[redacted]

NATIONAL UNIVERSITY
LIBRARY SAN DIEGO

NON CIRCULATING

CALIFORNIA REPORTER

Covering Cases Reported in

PACIFIC REPORTER

272 P.—274 P.

Cite by Volume and Page

of the

PACIFIC REPORTER

Thus:

272 P. 288

ST. PAUL, MINN.
WEST PUBLISHING CO.
1956

COPYRIGHT, 1929, BY WEST PUBLISHING CO.
Pacific Reporter, Vol. 272, Nos. 1-4; Vol. 273, Nos. 1-4; Vol. 274, Nos. 1-5.

COPYRIGHT, 1956, BY WEST PUBLISHING CO.

Cal.Rep. 272-274 P
2-1967

CASES REPORTED

Vols. 272–274 P.

	P.	
	Vol.	Page
Abbe v. Berry, App.	273	598
Adams; Tobias v., Sup.	273	579
Akopoff v. Mesropian, App.	273	604
Albori, In re, two cases, App.	272	321
Allen; People v., App.	272	349
Allerton v. King, App.	274	90
Allison; Holquin v., App.	274	1037
Allred v. Orth, Sup.	274	955
Amalgamated Copper Mines Co.; Hemmeon v., App.	273	74
American La France Fire Engine Co.; Grassie v., App.	272	1073
American Photoplayer Co.; Nathan v., App.	272	775
Anderson; People v., App.	272	755
Andrews v. Glick, Sup.	272	587
Andrews v. Waldo, Sup.	272	1052
Anglo California Trust Co. v. Kelly, App.	272	1080
Anthony v. Crocker First Nat. Bank, App.	272	767
Anthony; Pray v., App.	274	1024
Anthony v. Van, App.	274	563
Arizona Cent. Bank; Graves v., Sup.	272	1063
Atkinson; Stewart v., App.	273	606
Atwell v. Mercantile Trust Co. of California, App.	272	799
Bailey v. James, App.	272	339
Baker v. Hale, App.	273	612
Balboa Motor Corporation; Jones v., Sup.	272	1042
Baldwin v. Pacific Electric Ry. Co., App.	273	155
Baldwin v. Pacific Electric Ry. Co., App.	274	72
Balkins; Filson v., Sup.	273	578
Ballard v. Kingsbury, Sup.	274	63
Balthes v. Bogigian, App.	273	69
Bank of California Nat. Ass'n; McColgan v., Sup.	274	342
Bank of Italy v. E. N. Cadenasso, Sup.	274	534
Bank of Italy v. E. N. Cadenasso, Sup.	274	536
Bank of Italy; Evans v., App.	274	74
Bank of Italy; Noyes v., Sup.	274	68
Barrington; De Caccia v., Sup.	273	552
Bastian; People v., App.	272	756
Bate v. Jolin, Sup.	274	971
Baucus v. Riveroll, App.	272	760
Baum; Silverberg v., App.	273	47
Baxter v. King, App.	274	610
Bayer v. Hoagland, App.	273	58
Baymiller; Bryan v., App.	272	1106
Beach; People v., App.	272	754
Beck; Montgomery v., Sup.	272	1058
Beck; People v., App.	272	797
Becker; Wickham v., App.	274	397
Bell; Fleishell v., App.	273	1088

	Vol.	Page
Bell; People v., App.	274	393
Bennett v. Brown, Sup.	274	532
B. E. Porter Estate; Wells v., Sup.	272	1039
Berg; People v., App.	274	433
Bernstein v. Minney, App.	274	614
Berry; Abbe v., App.	273	598
Berry; Economy Home Builders v., App.	272	307
Berry; Vincent v., Sup.	272	1055
Bertschman v. Covell, Sup.	272	571
Biescar; People v., App.	272	328
Blalock v. Dunger, Sup.	272	1048
Bleil's Estate, In re, App.	273	1088
Board of Public Works of City and County of San Francisco; Rodgers v., App.	274	1034
Board of Trustees of Menlo Park; Martin v., App.	274	1015
Board of Water and Power Com'rs of City of Los Angeles; Krohn v., App.	272	757
Bogigian; Balthes v., App.	273	69
Boone v. Kingsbury, Sup.	273	797
Boone v. Kingsbury, Sup.	274	61
Borgfeldt; Moore v., App.	273	1114
Boucher v. Peasley, App.	272	1087
Bouey v. Porterfield, App.	274	766
Boyer v. United States Fidelity & Guaranty Co., two cases, Sup.	274	57
Brandenburger v. Hanner, App.	274	390
Bray; Panzer-Hamilton Co. v., App.	274	769
Bremser; George H. Tay Co. v., Sup.	272	1051
Brengle v. Southern California Gas Co., Sup.	274	548
Bridges v. Price, App.	273	72
Brockton; Financial Ins. Corporation v., App.	273	829
Brooks v. Nelson, App.	272	610
Brooks; Strei v., App.	273	145
Brown; Bennett v., Sup.	274	532
Brown v. Brown, Sup.	272	1052
Brown v. De Carlo, App.	274	374
Brown v. Happy Valley Fruit Growers, Sup.	274	977
Brown v. Sweet, App.	272	614
Brown; Wilson v., App.	273	847
Browning v. Reclamation Dist. No. 108, App.	274	993
Bruns; Harkins v., App.	274	82
Bryan v. Baymiller, App.	272	1106
Bryan; Cutting v., Sup.	274	326
Bryant; People v., Sup.	273	795
Bryson v. National Travelers' Casualty Co. of Des Moines, Iowa, Sup.	274	957
Buffums, Inc.; Purdy v., App.	272	770
Burchill; Young v., App.	274	379
Burdg; People v., App.	272	816
Burdick v. Burdick, App.	272	752
Burke; Mayhew v., Sup.	274	517
Butte; Lindsey v., App.	274	428
Cain; Schmidt v., App.	272	803
California Filter Co. v. Superior Court in and for City and County of San Francisco, App.	274	1012
California-Michigan Land & Water Co. v. Fletcher, Sup.	274	527
California Packing Corporation v. Lopez, App.	273	587
California Packing Corporation v. Lopez, App.	274	358
California State Life Ins. Co.; Harloe v., Sup.	273	560

	Vol.	Page
Calkins v. Mayer, App.	273	849
Calpetro Producers' Syndicate v. Charles M. Woods Co., Sup.	274	65
Cammack v. Cammack, Sup.	272	288
Campbell v. Smith, App.	274	758
Carroll v. Central Counties Gas Co., two cases, App.	273	875
Carroll v. Central Counties Gas Co., two cases, App.	274	594
Cassidy; Leriger v., App.	273	69
Cassidy's Guardianship, In re, App.	273	69
Catania; Cincotta v., App.	272	330
Cate, In re, App.	273	617
Cavalieri v. Hess, Sup.	272	295
Cavassa v. Off, Sup.	274	523
Central Counties Gas Co.; Carroll v., App.	273	875
Central Counties Gas Co.; Carroll v., App.	274	594
Central Counties Gas Co.; Cobbs v., App.	273	878
Central Counties Gas Co.; Cobbs v., App.	274	594
Central Counties Gas Co.; Ingram v., App.	273	878
Central Counties Gas Co.; Ingram v., App.	274	594
Chadwick v. Chadwick, App.	273	86
Chamberlin v. Kingsbury, Sup.	274	62
Champagne v. Passons, App.	272	353
Chandler v. Hollingsworth, App.	274	581
Charles M. Woods Co.; Calpetro Producers' Syndicate v., Sup.	274	65
Chico Well Drilling Co. v. Givens, Sup.	274	966
Christophel v. Riley, Sup.	273	1064
C. H. Smith Lumber Co.; Jacobs v., Sup.	273	571
Chun Kam v. Myers, App.	274	377
Cincotta v. Catania, App.	272	330
City and County of San Francisco; Dorrian v., App.	273	1067
City and County of San Francisco v. Tillman Estate Co., Sup.	272	585
City of Fresno v. Dillon, App.	273	1106
City of Long Beach v. Sten, App.	272	1088
City of Long Beach v. Sten, Sup.	274	968
City of Los Angeles; Lindsay v., App.	272	314
City of Los Angeles; Powell v., App.	272	336
City of North Sacramento v. Irwin, App.	272	767
City of Oakland v. De Guarda, App.	272	779
City of Oakland v. De Guarda, App.	273	819
City of Oakland v. Lyckberg, App.	272	606
City of Oakland; People v., App.	274	438
City of Oakland v. Williams, Sup.	274	328
City of Pasadena; Godber v., Sup.	273	30
City of San Rafael; People v., App.	273	138
Civil Service Commission of City and County of San Francisco; McCarthy v., App.	273	98
Clark v. Clark, App.	274	76
Clark; Pontecorvo v., App.	272	591
Clark's Estate, In re, App.	274	76
Clecak v. Dunn, App.	272	1104
Clensey; People v., App.	274	1018
Cline v. Smith, App.	274	761
Cline v. Smith, App.	274	763
Coachella Valley County Water Dist. v. Stevens, Sup.	274	538
Coast Counties Real Estate & Investment Co. v. Monterey County Water Works, App.	274	415
Cobbs v. Central Counties Gas Co., App.	273	878
Cobbs v. Central Counties Gas Co., App.	274	594

	P.	
	Vol.	Page
Cocking v. Fulwider, App.	273	142
Coley v. Hecker, Sup.	272	1045
Collins v. Industrial Accident Commission, Sup.	273	33
Comer v. Los Angeles Ry. Corporation, App.	272	1100
Commercial Mortg. Co.; Haines v., Sup.	273	35
Connolly v. Lake County Canning Co., App.	273	611
Consolidated Inv. Corporation; Peasley v., App.	272	1087
Continental Casualty Co.; Nittler v., App.	272	309
Cooley; McIndoe v., App.	273	1104
Coover v. Cox, App.	272	343
Cope v. Sutter County, Sup.	274	750
Cory v. Smith, Sup.	274	969
Cosmosart Realty & Building Corporation; Formaseri v., App.	274	597
Costaloupes; San Joaquin Light & Power Corporaton v., App.	274	84
Coult; Nissen v., App.	274	603
Council of City of Oakland; Garver v., App.	274	375
Covell; Bertschman v., Sup.	272	571
Cox; Coover v., App.	272	343
Craig; Wheeler v., Sup.	273	558
Craig v. Wheeler, Sup.	274	746
Crescent Bed Co. v. Jonas, Sup.	273	28
Crocker First Nat. Bank; Anthony v., App.	272	767
Crowley, Ex parte, App.	272	787
Curran v. Pecho Ranch & Stock Co., App.	273	126
Curtis v. Wasem, App.	274	607
Cutting v. Bryan, Sup.	274	326
Cyr v. Cyr, Sup.	272	751
Dalbkermeyer v. Rader, App.	273	600
Daly; Sexton v., App.	273	109
Danziger; Stern & Goodman Inv. Co. v., Sup.	274	748
Darrow v. Houlihan, Sup.	272	1049
Davies' Estate, In re, App.	273	612
Dawson; Pugh v., App.	273	39
Dean v. Midland Farms Co., App.	274	71
De Botiller; Norman v., App.	272	613
De Caccia v. Barrington, Sup.	273	552
De Caccia's Estate, In re, Sup.	273	552
De Carlo; Brown v., App.	274	374
De Geer v. Moreland Motor Truck Co., App.	273	1079
De Guarda; City of Oakland v., App.	272	779
De Guarda; City of Oakland v., App.	273	819
De Long v. Mission Marble Works, App.	273	107
D. E. McDaneld, Inc.; Wehrle v., App.	274	421
Dempster; People v., App.	274	592
De Mund; Hughes v., App.	274	405
Department of Industrial Relations of California, Division of Industrial Accidents and Safety; Fogarty v., Sup.	273	791
Dillon; City of Fresno v., App.	273	1106
Dimmick; Laack v., App.	273	50
Dobbie v. Pacific Gas & Electric Co., App.	273	630
Dodge v. Mitchell, App.	272	352
Dona; Spingola v., App.	273	1097
Donahue; Hodgins v., App.	273	600
Donahue; Wolf v., Sup.	273	547
Dorrian v. City and County of San Francisco, App.	273	1067
Dowling v. Superior Court in and for Marin County, Sup.	272	572
Downs, Ex parte, App.	273	143

	P.	
	Vol.	Page
Duke v. Levy, three cases, App.	274	1031
Dunger; Blalock v., Sup.	272	1048
Dunn; Clecak v., App.	272	1104
Dyer v. McCorkle, App.	274	587
Eastman; Spiegelman v., App.	272	761
Economy Home Builders v. Berry, App.	272	307
Edson v. Industrial Accident Commission, Sup.	273	572
Edwards; O'Neil v., App.	272	1099
Eggers v. National Radio Co., App.	274	997
Ehlen v. Williston & Meyfarth, Sup.	272	579
Eldridge; Wattson v., App.	272	1095
Electric Loop Land Co.; Henderson v., App.	274	445
Ellis; People v., Sup.	274	353
E. N. Cadenasso; Bank of Italy v., Sup.	274	534
E. N. Cadenasso; Bank of Italy v., Sup.	274	536
Engelberg v. Sebastiani, App.	273	161
Erreca v. Los Banos Cotton Gins, App.	274	1041
Estorga; People v., Sup.	273	575
Evans v. Bank of Italy, App.	274	74
Fairfax Incline R. Co.; Kniese v., App.	274	382
Fairfax Incline R. Co.; Kniese v., App.	274	383
Faraone; Ginsberg Tile Co. v., App.	274	549
Feather River Power Co. v. State Board of Equalization, Sup.	274	962
Fenech; Ohaver v., Sup.	273	555
Ferugia; People v., App.	273	99
Fidelity Trust & Savings Bank; Lencioni v., App.	273	103
Fidelity Trust & Savings Bank; Lencioni v., App.	274	75
Filson v. Balkins, Sup.	273	578
Financial Ins. Corporation v. Brockton, App.	273	829
Fink; Simon Newman Co. v., Sup.	273	565
Firestone v. O'Brien, App.	274	1006
Firpo v. Slyter, App.	272	1111
First Nat. Bank in Oakland, In re, App.	273	1085
First Nat. Bank in Oakland v. Foss, App.	273	1085
First Trust & Savings Bank v. Los Angeles County, Sup.	273	1066
Flannery, Ex parte, App.	274	396
Fleishell v. Bell, App.	273	1088
Fletcher; California-Michigan Land & Water Co. v., Sup.	274	527
Fletcher; Johnson v., App.	274	1001
Fogarty v. Department of Industrial Relations of California, Division of Industrial Accidents and Safety, Sup.	273	791
Force v. Hart, Sup.	272	583
Fornaseri v. Cosmosart Realty & Building Corporation, App.	274	597
Foss; First Nat. Bank in Oakland v., App.	273	1085
Frankel v. Rosenfield, App.	273	122
Fred J. Maurer & Son; Selvage v., App.	272	1092
Freligh v. McGrew, App.	272	791
Fulwider; Cocking v., App.	273	142
Fuqua v. Thomas, App.	273	1091
Gagnon; Lynch v., App.	274	584
Gally v. Wynne, App.	273	825
Galwey v. Pacific Auto Stages, App.	273	866
Garrett; People v., App.	272	339
Garver v. Council of City of Oakland, App.	274	375
Garver v. Williams, App.	273	604
Gauger v. Westberg, App.	272	1108
George H. Tay Co. v. Bremser, Sup.	272	1051

Vol. Page
Gibbons; People v., Sup. 273 32
Gibson v. Mailhebuau, App. 274 566
Gilbert v. United States Fidelity & Guaranty Co., App. 274 1023
Ginsberg Tile Co. v. Faraone, App. 274 549
Givens; Chico Well Drilling Co. v., Sup. 274 966
Gladium Co. v. Thatcher, App. 272 340
Glick; Andrews v., Sup. 272 587
Godber v. City of Pasadena, Sup. 273 30
Goldberg v. Rempp, App. 273 63
Gold Medal Creamery Co. v. Streff, App. 273 831
Goodwin; McCarron v., Sup. 274 65
Gordon; People v., Sup. 273 568
Gordon v. Pfeiffer, App. 274 578
Goularte v. Goularte, Sup. 272 747
Grant; People v., App. 274 1005
Grassie v. American La France Fire Engine Co., App. 272 1073
Grass Valley Gold Mines Co.; King v., Sup. 272 290
Graves v. Arizona Cent. Bank, Sup. 272 1063
Gray, Ex parte, Sup. 274 974
Gregoriev v. Northwestern Pac. R. Co., App. 273 76
Gregoriev v. Northwestern Pac. R. Co., App. 273 84
Gregson's Estate, In re, App. 274 991
Griffin v. Kent, Sup. 274 56
Grimes v. Merced County, App. 273 839
Groff v. Reclamation Dist. No. 108, App. 274 993
Grosjean; Musto v., App. 273 1070
Gross v. Hazeltine, Sup. 273 550
Haines v. Commercial Mortg. Co., Sup. 273 35
Hale; Baker v., App. 273 612
Hammond Lumber Co. v. Haw, App. 274 386
Hampton; People v., App. 273 854
Handy; Higginson v., App. 272 319
Hanner; Brandenburger v., App. 274 390
Hansen v. Kane, App. 274 380
Happy Valley Fruit Growers; Brown v., Sup. 274 977
Harkins v. Bruns, App. 274 82
Harloe v. California State Life Ins. Co., Sup. 273 560
Hart; Force v., Sup. 272 583
Harthorn v. Kingsbury, Sup. 274 62
Hartman; Hughes v., Sup. 273 560
Harvey Inv. Co.; Royal Realty Co. v., App. 272 805
Hastings' Estate, In re, Sup. 274 973
Havenscourt Co.; Henderson v., App. 274 445
Haw; Hammond Lumber Co. v., App. 274 386
Hawley; People v., App. 272 1076
Hazeltine; Gross v., Sup. 273 550
Hecker; Coley v., Sup. 272 1045
Hector; People v., App. 273 843
Heffner v. Jackson, App. 273 37
Heimburge; Streicher v., Sup. 272 290
Hemmeon v. Amalgamated Copper Mines Co., App. 273 74
Henderson v. Electric Loop Land Co., App. 274 445
Henderson v. Havenscourt Co., App. 274 445
Henderson v. Miglietta, Sup. 273 581
Henderson v. Richmond Annex Land Co., App. 274 445
Hendrickson v. Hendrickson, App. 272 1079
Hennessy, Ex parte, App. 273 826

	Vol.	Page
Henry; Title Guarantee & Trust Co. v., App.	274	572
Hess; Cavalieri v., Sup.	272	295
Hess v. Sausser, Sup.	272	1059
Hesse; Lacalusa Inv. Co. v., Sup.	273	766
Hester v. O'Dara, Sup.	272	1057
Heuer; Riley v., Sup.	274	351
Heuler v. Heuler, App.	272	301
Heuler v. Heuler, App.	272	304
Heuler's Estate, In re, App.	272	301
Heuler's Estate, In re, App.	272	304
Heuss; People v., App.	273	583
Hickey Bros. Co. v. Kingsbury, Sup.	274	62
Higginson v. Handy, App.	272	319
Hills v. Shaffer, App.	274	388
Hiltscher v. Wagner, App.	273	590
Hiss v. Mulholland, App.	273	859
Hoagland; Bayer v., App.	273	58
Hodges v. Kauffman, App.	273	125
Hodgins v. Donahue, App.	273	600
Hogberg v. Landfield, App.	274	995
Holland, In re, App.	274	559
Hollingsworth; Chandler v., App.	274	581
Holquin v. Allison, App.	274	1037
Houlihan; Darrow v., Sup.	272	1049
Howe v. Howe, Sup.	272	751
Howe v. Superior Court of California in and for Sacramento County, App.	274	992
Hughes v. De Mund, App.	274	405
Hughes v. Hartman, Sup.	273	560
Hutchings v. Southwestern Automobile Ins. Co. of Los Angeles, App.	274	79
Imperial Live Stock & Mortgage Co. v. Tracy, App.	272	600
Imperial Water Co. No. 3; Sacre v., Sup.	272	1044
Industrial Accident Commission; Collins v., Sup.	273	33
Industrial Accident Commission; Edson v., Sup.	273	572
Industrial Accident Commission; United States Fidelity & Guaranty Co. v., App.	272	589
Industrial Accident Commission of California; Southern California Edison Co. v., App.	274	81
Ingram v. Central Counties Gas Co., App.	273	878
Ingram v. Central Counties Gas Co., App.	274	594
Irwin; City of North Sacramento v., App.	272	767
Isaacson v. Union Trust Co. of San Diego, App.	273	119
Issenhuth v. Robert Marsh & Co., App.	273	628
Jackson; Heffner v., App.	273	37
Jacobs v. C. H. Smith Lumber Co., Sup.	273	571
James; Bailey v., App.	272	339
Jarvis; Tischhauser v., App.	273	66
J. C. Forkner Fig Gardens; Rawson v., Sup.	272	1057
Johnson, In re, App.	273	1091
Johnson v. Fletcher, App.	274	1001
Johnson; Teater v., App.	272	313
Johnston v. Wolf, App.	274	1028
Jolin; Bate v., Sup.	274	971
Jonas; Crescent Bed Co. v., Sup.	273	28
Jones v. Balboa Motor Corporation, Sup.	272	1042
Jones v. Kelly, App.	274	368
Jones; Lavers v., App.	274	78
Jones; Pacific Acceptance Corporation v., App.	272	1084

	Vol.	Page
Jones; Sun-Maid Raisin Growers of California v., App.	274	557
Jones; Thornley v., App.	274	93
Jordan; Shipley v., Sup.	274	745
Julien v. West, App.	274	421
Kane; Hansen v., App.	274	380
Kane; Los Angeles Land & Water Co. v., App.	274	380
Kauffman; Hodges v., App.	273	125
Kaufman v. Tomich, App.	272	1082
Kelleher's Estate, In re, Sup.	272	1060
Kelly; Anglo California Trust Co. v., App.	272	1080
Kelly; Jones v., App.	274	368
Kent; Griffin v., Sup.	274	56
King; Allerton v., App.	274	90
King; Baxter v., App.	274	610
King v. Grass Valley Gold Mines Co., Sup.	272	290
Kingsbury; Ballard v., Sup.	274	63
Kingsbury; Boone v., Sup.	273	797
Kingsbury; Boone v., Sup.	274	61
Kingsbury; Chamberlin v., Sup.	274	62
Kingsbury; Harthorn v., Sup.	274	62
Kingsbury; Hickey Bros. Co. v., Sup.	274	62
Kingsbury; Shudde v., Sup.	274	61
Kingsbury; Workman v., Sup.	274	62
Kirby v. San Francisco Savings & Loan Soc., App.	273	609
Klein v. Loeffler, App.	274	373
Klimm; Witt v., App.	274	1039
Kniese v. Fairfax Incline R. Co., App.	274	382
Kniese v. Fairfax Incline R. Co., App.	274	383
Knight; Knoke v., Sup.	273	786
Knoke v. Knight, Sup.	273	786
Koehn; People v., App.	274	595
Kost; Security Realty Co. v., App.	274	608
Krehmke; Ramsdell v., App.	272	333
Krohn v. Board of Water and Power Com'rs of City of Los Angeles, App.	272	757
Kroll v. Rasin, App.	273	820
Krueger; Warfield v., App.	274	764
Kurokawa v. Saroyan, App.	273	613
Laack v. Dimmick, App.	273	50
Lacalusa Inv. Co. v. Hesse, Sup.	273	766
Lagorio v. Yerxa, App.	273	856
Lake County Canning Co.; Connolly v., App.	273	611
Lalor; People v., App.	272	794
Lamb; State Compensation Insurance Fund v., App.	273	1080
Lambert; People v., App.	274	401
Lampe; O'Connell v., Sup.	274	336
Landfield; Hogberg v., App.	274	995
Lane v. San Diego Electric Ry. Co., App.	273	833
Langford; Robertson v., App.	273	150
Lannagan; People v., App.	274	607
Lauman; Pacific Finance Corporation v., App.	273	48
La Verne; People v., App.	273	48
Lavers v. Jones, App.	274	78
Law; Pacific Ready-Cut Homes v., Sup.	272	577
Lawson; Perelli-Minetti v., Sup.	272	573
Lawson; Scatena v., App.	273	592
Leal v. Leal, Sup.	274	965
Leddy; People v., App.	273	110

	Vol.	Page
Lefurgey; People v., App.	274	1038
Lencioni v. Fidelity Trust & Savings Bank, App.	273	103
Lencioni v. Fidelity Trust & Savings Bank, App.	274	75
Leong Fook; People v., Sup.	273	779
Leriger v. Cassidy, App.	273	69
Levy; Duke v., App.	274	1031
Lewis v. Pacific Electric Ry. Co., App.	272	346
Lewis v. Young Men's Christian Ass'n, Sup.	273	580
Liberty Bank v. Nonnenmann, App.	274	568
Lind; People v., App.	272	754
Lindberg v. Pantoleon, App.	274	1009
Lindsay v. City of Los Angeles, App.	272	314
Lindsey v. Butte, App.	274	428
Linnard v. Sonnenschein, App.	272	315
Lisle v. Shipp, App.	273	1103
Litchner v. Staples, App.	273	585
Loeffler; Klein v., App.	274	373
Lonardo, In re, App.	272	1066
Lopez; California Packing Corporation v., App.	273	587
Lopez; California Packing Corporation v., App.	274	358
Lo Presti; Young v., App.	272	310
Los Angeles; Los Angeles Rock & Gravel Co. v., App.	272	1076
Los Angeles County; First Trust & Savings Bank v., Sup.	273	1066
Los Angeles County v. Marblehead Land Co., App.	273	131
Los Angeles County v. Marblehead Land Co., App.	273	138
Los Angeles County Flood Control Dist. v. Superior Court in and for Los Angeles County, App.	272	359
Los Angeles Land & Water Co. v. Kane, App.	274	380
Los Angeles Life Ins. Co.; McKenzie v., App.	274	384
Los Angeles Ry. Corporation; Comer v., App.	272	1100
Los Angeles Ry. Corporation; Scott v., App.	273	95
Los Angeles Rock & Gravel Co. v. Los Angeles, two cases, App.	272	1076
Los Banos Cotton Gins; Erreca v., App.	274	1041
Luce; Rosenbaum v., App.	273	862
Lundblade v. Pierce, App.	272	329
Lundblade; Reliance Acceptance Corporation v., App.	274	360
Lyckberg; City of Oakland v., App.	272	606
Lynch v. Gagnon, App.	274	584
Mabrey v. McCormick, Sup.	272	289
McAuliffe; Pomeroy v., Sup.	272	1060
McCann; People v., App.	274	621
McCarron v. Goodwin, Sup.	274	65
McCarthy v. Civil Service Commission of City and County of San Francisco, App.	273	98
Macchiaroli; Warwick v., App.	273	1109
McColgan v. Bank of California Nat. Ass'n, Sup.	274	342
McCorkle; Dyer, v., App.	274	587
McCorkle; Sibley v., App.	274	592
McCormick; Mabrey v., Sup.	272	289
McGrew; Freligh v., App.	272	791
McGuffin v. Pacific Electric Ry. Co., App.	273	155
McGuffin v. Pacific Electric Ry. Co., App.	274	72
McHugh v. Voyce, App.	274	371
McIndoe v. Cooley, App.	273	1104
McKelley v. Turner, App.	273	1101
McKenzie v. Los Angeles Life Ins. Co., App.	274	384
McReavy v. Shaw, App.	274	612

	P.	
	Vol.	Page
Maggio; People v., App.	274	611
Mailhebuau; Gibson v., App.	274	566
Malvasi's Estate, In re, App.	273	1097
Mand v. Rose, App.	274	392
Marblehead Land Co.; Los Angeles County v., App.	273	131
Marblehead Land Co.; Los Angeles County v., App.	273	138
Marderosian v. National Casualty Co., App.	273	1093
Martin v. Board of Trustees of Menlo Park, App.	274	1015
Martin v. Sterling Grocery Co., App.	274	605
Mathewson v. Oswald, App.	274	423
Matthews; United States Fidelity & Guaranty Co. v., App.	273	822
Matthews; United States Fidelity & Guaranty Co. v., App.	274	769
Mayer; Calkins v., App.	273	849
Mayer v. West, App.	273	849
Mayhew v. Burke, Sup.	274	517
Mays v. Wann, App.	274	1020
Mazuran v. Stefanich, App.	272	772
Meile; People v., App.	274	1003
Mercantile Arcade Realty Co.; Shady v., Sup.	274	340
Mercantile Trust Co. v. Reay, App.	274	401
Mercantile Trust Co. of California; Atwell v., App.	272	799
Merced County; Grimes v., App.	273	839
Merrill, In re, App.	273	863
Merrill; Schutz v., App.	273	863
Mesropian; Akopoff v., App.	273	604
Midland Farms Co.; Dean v., App.	274	71
Miglietta; Henderson v., Sup.	273	581
Mihaly; People v., App.	272	1103
Mills College; Wells Fargo Bank & Union Trust Co. v., App.	273	130
Milton; Von Schrader v., App.	273	1074
Minney; Bernstein v., App.	274	614
Mission Marble Works; De Long v., App.	273	107
Mission Motor Service; Sparter v., App.	272	1114
Mitchell; Dodge v., App.	272	352
Mitchell v. Whittier College, Sup.	272	748
Monterey County Water Works; Coast Counties Real Estate & Investment Co. v., App.	274	415
Montgomery v. Beck, Sup.	272	1058
Moore v. Borgfeldt, App.	273	1114
Moore v. Neighbours, App.	273	36
Moreland Motor Truck Co.; De Geer v., App.	273	1079
Morgan; Wolfe v., App.	273	64
Morse's Estate, In re, App.	273	130
Moynier v. Moynier, Sup.	272	740
Moynier; Petroleum Midway Co. v., Sup.	272	740
Mulholland; Hiss v., App.	273	859
Musto v. Grosjean, App.	273	1070
Myers; Chun Kam v., App.	274	377
Myers v. Reclamation Dist. No. 108, App.	274	993
Nathan v. American Photoplayer Co., App.	272	775
National Automobile Ins. Co. v. Superior Court in and for Los Angeles County, App.	274	604
National Casualty Co.; Marderosian v., App.	273	1093
National Radio Co.; Eggers v., App.	274	997
National Radio Co.; San Francisco Bank v., App.	272	331
National Travelers' Casualty Co. of Des Moines, Iowa; Bryson v., Sup.	274	957
Neighbours; Moore v., App.	273	36

	Vol.	Page
Nelson; Brooks v., App.	272	610
Newman Co. v. Fink, Sup.	273	565
Niemeyer; Oatman v., Sup.	273	567
Nissen v. Coult, App.	274	603
Nittler v. Continental Casualty Co., App.	272	309
Nonnenmann; Liberty Bank v., App.	274	568
Norman v. De Botiller, App.	272	613
Northwestern Pac. R. Co.; Gregoriev v., App.	273	76
Northwestern Pac. R. Co.; Gregoriev v., App.	273	84
Novotny's Estate, In re, App.	273	58
Nowell v. Oswald, App.	274	423
Noyes v. Bank of Italy, Sup.	274	68
Nye; People v., App.	273	837
Oatman v. Niemeyer, Sup.	273	567
O'Brien; Firestone v., App.	274	1006
O'Connell v. Lampe, Sup.	274	336
O'Dara; Hester v., Sup.	272	1057
Off; Cavassa v., Sup.	274	523
Offill's Estate, In re, App.	274	623
Ohaver v. Fenech, Sup.	273	555
Okamoto; Platt v., App.	272	613
Oliver v. Sperry, App.	274	1030
Olson v. Olson, App.	272	1113
O'Neil v. Edwards, App.	272	1099
Orth; Allred v., Sup.	274	955
Oswald; Mathewson v., App.	274	423
Oswald; Nowell v., App.	274	423
Pacific Acceptance Corporation v. Jones, App.	272	1084
Pacific Auto Stages; Galwey v., App.	273	866
Pacific Diesel Engine Co.; Powers v., Sup.	274	512
Pacific Electric Ry. Co.; Baldwin v., App.	273	155
Pacific Electric Ry. Co.; Baldwin v., App.	274	72
Pacific Electric Ry. Co.; Lewis v., App.	272	346
Pacific Electric Ry. Co.; McGuffin v., App.	273	155
Pacific Electric Ry. Co.; McGuffin v., App.	274	72
Pacific Electric Ry. Co.; Smithwick v., Sup.	274	980
Pacific Finance Corporation v. Lauman, App.	273	48
Pacific Gas & Electric Co.; Dobbie v., App.	273	630
Pacific Ready-Cut Homes v. Law, Sup.	272	577
Pacific Ready-Cut Homes v. Seeber, Sup.	272	579
Pantoleon; Lindberg v., App.	274	1009
Panzer-Hamilton Co. v. Bray, App.	274	769
Parr Terminal Co.; Richmond Terminal Corporation v., App.	273	845
Parsons v. Robinson, Sup.	274	528
Pasadena Nat. Bank v. Shorten, App.	274	358
Passons; Champagne v., App.	272	353
Peasley; Boucher v., App.	272	1087
Peasley v. Consolidated Inv. Corporation, App.	272	1087
Pecho Ranch & Stock Co.; Curran v., App.	273	126
Peerless Stages; Tumelty v., App.	274	430
Pellissier v. Title Guarantee & Trust Co., App.	274	552
Peloian; People v., App.	272	304
Pendell v. Thomas, App.	272	306
People v. Allen, App.	272	349
People v. Anderson, App.	272	755
People v. Bastian, App.	272	756
People v. Beach, App.	272	754

P.

	Vol.	Page
People v. Beck, App.	272	797
People v. Bell, App.	274	393
People v. Berg, App.	274	433
People v. Biescar, App.	272	328
People v. Bryant, Sup.	273	795
People v. Burdg, App.	272	816
People v. City of Oakland, App.	274	438
People v. City of San Rafael, App.	273	138
People v. Clensey, App.	274	1018
People v. Dempster, App.	274	592
People v. Ellis, Sup.	274	353
People v. Estorga, Sup.	273	575
People v. Ferugia, App.	273	99
People v. Garrett, App.	272	339
People v. Gibbons, Sup.	273	32
People v. Gordon, Sup.	273	568
People v. Grant, App.	274	1005
People v. Hampton, App.	273	854
People v. Hawley, App.	272	1076
People v. Hector, App.	273	843
People v. Heuss, App.	273	583
People v. Koehn, App.	274	595
People v. Lalor, App.	272	794
People v. Lambert, App.	274	401
People v. Lannagan, App.	274	607
People v. La Verne, App.	273	48
People v. Leddy, App.	273	110
People v. Lefurgey, App.	274	1038
People v. Leong Fook, Sup.	273	779
People v. Lind, App.	272	754
People v. McCann, App.	274	621
People v. Maggio, App.	274	611
People v. Meile, App.	274	1003
People v. Mihaly, App.	272	1103
People v. Nye, App.	273	837
People v. Peloian, App.	272	304
People v. Perea, App.	273	836
People v. Pokrajac, Sup.	274	63
People v. Post, App.	274	988
People v. Ramirez, App.	272	608
People v. Rosencrantz, App.	272	786
People v. Smith, Sup.	273	789
People v. Smith, App.	274	451
People v. Snell, App.	274	560
People v. Strider, App.	274	601
People v. Troche, Sup.	273	767
People v. Weaver, App.	274	361
People v. Williams, App.	273	1087
Perea; People v., App.	273	836
Perelli-Minetti v. Lawson, Sup.	272	573
Petroleum Midway Co. v. Moynier, Sup.	272	740
Pfeiffer; Gordon v., App.	274	578
Phelps' Estate, In re, Sup.	272	296
Pickwick Stages, Northern Division; Seney v., Sup.	274	536
Pickwick Stages, Northern Division; Toon v., App.	272	797
Pierce; Lundblade v., App.	272	329
Pittler; Smith v., App.	272	789

P.

	Vol.	Page
Platt v. Okamoto, App.	272	613
Pokrajac; People v., Sup.	274	63
Pomeroy v. McAuliffe, Sup.	272	1060
Pontecorvo v. Clark, App.	272	591
Porterfield; Bouey v., App.	274	766
Post; People v., App.	274	988
Powell v. City of Los Angeles, App.	272	336
Powers v. Pacific Diesel Engine Co., Sup.	274	512
Pray v. Anthony, App.	274	1024
Price; Bridges v., App.	273	72
Pugh v. Dawson, App.	273	39
Purdy v. Buffums, Inc., App.	272	770
Rader; Dalbkermeyer v., App.	273	600
Ramirez; People v., App.	272	608
Ramsdell v. Krehmke, App.	272	333
Rasin; Kroll v., App.	273	820
Ratto v. Younie, Sup.	274	522
Rauch v. Southern California Gas Co., two cases, App.	273	1111
Rawson v. J. C. Forkner Fig Gardens, Sup.	272	1057
Ray v. Superior Court within and for San Diego County, App.	273	1084
Reay; Mercantile Trust Co. v., App.	274	401
Reclamation Dist. No. 108; Browning v., App.	274	993
Reclamation Dist. No. 108; Groff v., App.	274	993
Reclamation Dist. No. 108; Myers v., App.	274	993
Reliance Acceptance Corporation v. Lundblade, App.	274	360
Rempp; Goldberg v., App.	273	63
Richmond Annex Land Co.; Henderson v., App.	274	445
Richmond Terminal Corporation v. Parr Terminal Co., App.	273	845
Riley; Christophel v., Sup.	273	1064
Riley v. Heuer, Sup.	274	351
Riley's Estate, In re, Sup.	274	351
Riveroll; Baucus v., App.	272	760
Robert Marsh & Co.; Issenhuth v., App.	273	628
Robertson v. Langford, App.	273	150
Robertson; Storelli v., App.	274	357
Robinson; Parsons v., Sup.	274	528
Rodgers v. Board of Public Works of City and County of San Francisco, App.	274	1034
Romano v. Seibt, App.	272	1065
Rose; Mand v., App.	274	392
Rosenbaum v. Luce, App.	273	862
Rosencrantz; People v., App.	272	786
Rosenfield; Frankel v., App.	273	122
Rose's Estate, In re, App.	273	92
Royal Realty Co. v. Harvey Inv. Co., App.	272	805
Sacramento Suburban Fruit Lands Co.; Wellnitz v., App.	274	1016
Sacre v. Imperial Water Co. No. 3, Sup.	272	1044
San Diego Electric Ry. Co.; Lane v., App.	273	833
San Francisco Bank v. National Radio Co., App.	272	331
San Francisco Savings & Loan Soc.; Kirby v., App.	273	609
San Joaquin Light & Power Corporation v. Costaloupes, App.	274	84
Santa Cruz Portland Cement Co. v. Snow Mountain Water & Power Co., App.	274	617
Saroyan; Kurokawa v., App.	273	613
Sausser; Hess v., Sup.	272	1059
Sawyer v. Southern California Gas Co., Sup.	274	544
Scatena v. Lawson, App.	273	592

	P. Vol.	Page
Schade v. Stewart, Sup.	272	567
Schelling v. Thomas, App.	274	755
Schmidt v. Cain, App.	272	803
Schutz v. Merrill, App.	273	863
Scott v. Los Angeles Ry. Corporation, App.	273	95
Sebastiani; Engelberg v., App.	273	161
Security Realty Co. v. Kost, App.	274	608
Seeber; Pacific Ready-Cut Homes v., Sup.	272	579
Seibt; Romano v., App.	272	1065
Selvage v. Fred J. Maurer & Son, App.	272	1092
Seney v. Pickwick Stages, Northern Division, Sup.	274	536
Sexton v. Daly, App.	273	109
Shady v. Mercantile Arcade Realty Co., Sup.	274	340
Shaffer; Hills v., App.	274	388
Shattuck; Turney v., App.	274	442
Shaw; McReavy v., App.	274	612
Shaw's Estate, In re, App.	274	612
Shipley v. Jordan, Sup.	274	745
Shipp; Lisle v., App.	273	1103
Shorten; Pasadena Nat. Bank v., App.	274	358
Shudde v. Kingsbury, Sup.	274	61
Sibley v. McCorkle, App.	274	592
Silverberg v. Baum, App.	273	47
Simon Newman Co. v. Fink, Sup.	273	565
Sklar; Wiseman v., App.	274	764
Slyter; Firpo v., App.	272	1111
Smith; Campbell v., App.	274	758
Smith; Cline v., App.	274	761
Smith; Cline v., App.	274	763
Smith; Cory v., Sup.	274	969
Smith; People v., Sup.	273	789
Smith; People v., App.	274	451
Smith v. Pittler, App.	272	789
Smith; Sunset Lumber Co. v., App.	272	1068
Smithwick v. Pacific Electric Ry. Co., Sup.	274	980
Snell; People v., App.	274	560
Snow Mountain Water & Power Co.; Santa Cruz Portland Cement Co. v., App.	274	617
Snyder v. Superior Court in and for San Diego County, Sup.	274	337
Solomon; Syfert v., App.	272	810
Sonnenschein; Linnard v., App.	272	315
Southern California Edison Co. v. Industrial Accident Commission of California, App.	274	81
Southern California Gas Co.; Brengle v., Sup.	274	548
Southern California Gas Co.; Rauch v., App.	273	1111
Southern California Gas Co.; Sawyer v., Sup.	274	544
Southern Pac. Co.; Tracy-Waldron Fruit Co. v., App.	274	411
Southwestern Automobile Ins. Co. of Los Angeles; Hutchings v., App.	274	79
Sparter v. Mission Motor Service, App.	272	1114
Speer; Washburn v., Sup.	274	519
Sperry; Oliver v., App.	274	1030
Spiegelman v. Eastman, App.	272	761
Spingola v. Dona, App.	273	1097
Spore v. Washington, App.	274	407
Standard Dredging Co. v. Title Insurance & Trust Co., App.	273	871
Staples; Litchner v., App.	273	585
State Board of Equalization; Feather River Power Co. v., Sup.	274	962

	P. Vol.	Page
State Compensation Insurance Fund v. Lamb, App.	273	1080
Stefanich; Mazuran v., App.	272	772
Steinberg v. Waldo, Sup.	272	1052
Sten; City of Long Beach v., App.	272	1088
Sten; City of Long Beach v., Sup.	274	968
Sterling Grocery Co.; Martin v., App.	274	605
Stern & Goodman Inv. Co. v. Danziger, Sup.	274	748
Stevens; Coachella Valley County Water Dist. v., Sup.	274	538
Stewart v. Atkinson, App.	273	606
Stewart; Schade v., Sup.	272	567
Stockton's Estate, In re, App.	274	1022
Stone; United Fruit Distributing Co. v., App.	272	299
Storelli v. Robertson, App.	274	357
Streff v. Gold Medal Creamery Co., App.	273	831
Strei v. Brooks, two cases, App.	273	145
Streicher v. Heimburge, Sup.	272	290
Strider; People v., App.	274	601
Sucher; Weck v., App.	274	579
Sun-Maid Raisin Growers of California v. Jones, App.	274	557
Sunset Lumber Co. v. Smith, App.	272	1068
Superior Court in and for City and County of San Francisco; California Filter Co. v., App.	274	1012
Superior Court in and for Imperial County; Weare v., App.	273	870
Superior Court in and for Los Angeles County; Los Angeles County Flood Control Dist. v., App.	272	359
Superior Court in and for Los Angeles County; National Automobile Ins. Co. v., App.	274	604
Superior Court in and for Marin County; Dowling v., Sup.	272	572
Superior Court in and for San Diego County; Snyder v., Sup.	274	337
Superior Court of California in and for Sacramento County; Howe v., App.	274	992
Superior Court within and for San Diego County; Ray v., App.	273	1084
Sutter County; Cope v., Sup.	274	750
Sweet; Brown v., App.	272	614
Syfert v. Solomon, App.	272	810
Symons v. Wooden, App.	274	987
Tay Co. v. Bremser, Sup.	272	1051
Teater v. Johnson, App.	272	313
Temple Hospital Ass'n; Todd v., App.	273	595
Thatcher; Gladium Co. v., App.	272	340
Thomas; Fuqua v., App.	273	1091
Thomas; Pendell v., App.	272	306
Thomas; Schelling v., App.	274	755
Thomas v. Toppins, Sup.	272	1042
Thornley v. Jones, App.	274	93
Tillman Estate Co.; City and County of San Francisco v., Sup.	272	585
Tischhauser v. Jarvis, App.	273	66
Title Guarantee & Trust Co. v. Henry, App.	274	572
Title Guarantee & Trust Co.; Pellissier v., App.	274	552
Title Insurance & Trust Co.; Standard Dredging Co. v., App.	273	871
Tobias v. Adams, Sup.	273	579
Todd v. Temple Hospital Ass'n, App.	273	595
Tomich; Kaufman v., App.	272	1082
Toon v. Pickwick Stages, Northern Division, App.	272	797
Toppins; Thomas v., Sup.	272	1042
Tracy; Imperial Live Stock & Mortgage Co. v., App.	272	600
Tracy-Waldron Fruit Co. v. Southern Pac. Co., App.	274	411

P.

	Vol.	Page
Troche; People v., Sup.	273	767
Truitt; Wyser v., App.	273	147
Tumelty v. Peerless Stages, App.	274	430
Turner; McKelley v., App.	273	1101
Turney v. Shattuck, App.	274	442
Union Trust Co. of San Diego; Isaacson v., App.	273	119
United Fruit Distributing Co. v. Stone, App.	272	299
United States Fidelity & Guaranty Co.; Boyer v., Sup.	274	57
United States Fidelity & Guaranty Co.; Gilbert v., App.	274	1023
United States Fidelity & Guaranty Co. v. Industrial Accident Commission, App.	272	589
United States Fidelity & Guaranty Co. v. Matthews, App.	273	822
United States Fidelity & Guaranty Co. v. Matthews, App.	274	769
Universal Milk Co. v. Wood, Sup.	272	745
Van; Anthony v., App.	274	563
Vincent v. Berry, Sup.	272	1055
Visaxis v. Visaxis, App.	273	165
Visaxis' Estate, In re, App.	273	165
Von Schrader v. Milton, App.	273	1074
Voyce; McHugh v., App.	274	371
Wagner; Hiltscher v., App.	273	590
Waldo; Andrews v., Sup.	272	1052
Waldo; Steinberg v., Sup.	272	1052
Wann; Mays v., App.	274	1020
Warfield v. Krueger, App.	274	764
Warwick v. Macchiaroli, App.	273	1109
Wasem; Curtis v., App.	274	607
Washburn v. Speer, Sup.	274	519
Washington; Spore v., App.	274	407
Wattson v. Eldridge, App.	272	1095
Weare v. Superior Court in and for Imperial County, App.	273	870
Weaver; People v., App.	274	361
Weck v. Sucher, App.	274	579
Wehrle v. D. E. McDaneld, Inc., App.	274	421
Wellnitz v. Sacramento Suburban Fruit Lands Co., App.	274	1016
Wells v. B. E. Porter Estate, Sup.	272	1039
Wells Fargo Bank & Union Trust Co. v. Mills College, App.	273	130
West; Julien v., App.	274	421
West; Mayer v., App.	273	849
Westberg; Gauger v., App.	272	1108
Wheeler v. Craig, Sup.	273	558
Wheeler; Craig v., Sup.	274	746
White v. White, App.	274	990
Whittier College; Mitchell v., Sup.	272	748
Wickham v. Becker, App.	274	397
Wikstrom v. Yolo Fliers Club, Sup.	274	959
Williams; City of Oakland v., Sup.	274	328
Williams; Garver v., App.	273	604
Williams; People v., App.	273	1087
Williston & Meyfarth; Ehlen v., Sup.	272	579
Wilson v. Brown, App.	273	847
Wiseman v. Sklar, App.	274	764
Witt v. Klimm, App.	274	1039
Wolf v. Donahue, Sup.	273	547
Wolf; Johnston v., App.	274	1028
Wolfe v. Morgan, App.	273	64
Wood; Universal Milk Co. v., Sup.	272	745

	P.	
	Vol.	Page
Wooden; Symons v., App.	274	987
Workman v. Kingsbury, Sup.	274	62
Wynne; Gally v., App.	273	825
Wyser v. Truitt, App.	273	147
Yates v. Yates, App.	273	1079
Yerxa; Lagorio v., App.	273	856
Yolo Fliers Club; Wikstrom v., Sup.	274	959
Young v. Burchill, App.	274	379
Young v. Lo Presti, App.	272	310
Young Men's Christian Ass'n; Lewis v., Sup.	273	580
Younie; Ratto v., Sup.	274	522

CALIFORNIA REPORTER

272 PACIFIC REPORTER

205 Cal. 674

CAMMACK v. CAMMACK. (L. A. 9514.)

Supreme Court of California. Nov. 27, 1928.

Parent and child ⚷2(3)—Order awarding custody of minor children to mother is discretionary, and cannot be set aside except for abuse of discretion (Civ. Code, § 246).

Order awarding custody of minor children to mother, under Civ. Code, § 246, is discretionary with trial judge, and may not be set aside except for abuse of discretion.

Department 2.

Appeal from Superior Court, Los Angeles County; Walton J. Wood, Judge.

Proceeding by Kate S. Cammack against Fred R. Cammack. From an order denying defendant's motion for custody of the minor children, defendant appeals. Affirmed.

E. H. Woodard and Otto A. Gerth, both of Los Angeles, for appellant.

John E. Manders and Miller & Thornton, all of San Francisco, and Joseph Scott and Benno M. Brink, both of Los Angeles (Rolla Bishop Watt, of San Francisco, of counsel), for respondent.

SHENK, J. This is an appeal by the defendant from an order denying his application to have the care, custody, and control of Frank Strawn, aged 10, and Mary Jane, aged 8, the minor children of the parties, transferred from the plaintiff, their mother, to the defendant. The appeal is based upon the contention of the defendant that the evidence is insufficient to support the conclusion of the trial court that the mother is a fit and proper person to have the custody of her children.

The order was discretionary, and may not be set aside except for an abuse of discretion. A review of the record discloses that the evidence was sufficient to support the order and that the trial court was properly guided by the considerations prescribed by section 246 of the Civil Code. No abuse of discretion is shown.

The judgment is affirmed.

We concur: RICHARDS, J.; LANGDON, J.

205 Cal. 667

MABREY et al. v. McCORMICK et al.★
(Sac. 4119.)

Supreme Court of California. Nov. 27, 1928.

Hearing Denied in Bank Dec. 27, 1928.

1. Mechanics' liens 🔑281(3)—In action to enforce contractor's lien, defendants held not estopped to deny cost plus contract because items charging commission appeared on bills.

In action to enforce contractor's lien, defendants are not estopped to deny that work was done under cost plus contract by reason of fact that items charging 10 per cent. commission appeared on bills rendered them, since, if contract was for agreed sum, defendants might well be unconcerned as to items on statements.

2. Mechanics' liens 🔑161(4)—Contractors suing to enforce lien held not entitled to interest prior to judgment, where defendants were willing to settle under true contract (Civ. Code, § 3287).

In action to enforce contractor's lien, interest prior to judgment as damages *held* not allowable, under Civ. Code, § 3287, where defendants were always ready and willing to settle under true contract but plaintiffs abandoned work and insisted on recovery on different basis.

Department 1.

Appeal from Superior Court, Solano County; W. T. O'Donnell, Judge.

Action by Charles S. Mabrey and another against Archie McCormick and another. Judgment for defendants, and plaintiffs appeal. Affirmed.

Thomas B. Leeper, of Sacramento, for appellants.

Joseph M. Raines, of Fairfield, and Arthur C. Huston, of Woodland, for respondents.

PRESTON, J. We are called upon to determine whether the findings and judgment in this case have support in the evidence. Having thoroughly examined the record, we find that testimony upon the disputed questions of fact is about as acutely conflicting as it could be. This conflict the trial court resolved in favor of defendants, and its action will be upheld.

Plaintiffs sued to enforce their contractors' lien and to recover the sum of $5,376.78 under an alleged contract on the basis of cost plus 10 per cent. for the rebuilding and remodeling of defendants' farmhouse. Defendants, answering, alleged that, by the contract between the parties, plaintiffs undertook to furnish all necessary materials and perform all work needed on said building at a cost not to exceed $5,700. The court found the latter agreement to be the true contract made by said parties. It was further found that plaintiffs failed to complete the work; that they abandoned the contract, and as a result defendants were compelled to and did expend $1,016.60 for labor and materials to finish the building; that, in addition, defendants had paid plaintiffs on account the sum of $2,222.90; that there was therefore due plaintiffs upon said contract price of $5,700, the balance of $2,459.50, plus $1 for recording their lien, and $25, cost of extra work installing a buffet in said house—that is, a total of $2,486.50. Judgment in said sum was entered for plaintiffs, from which they have appealed.

[1] There is competent evidence that the contract was not upon a cost plus basis, but was for said agreed sum, nor are defendants estopped to deny said cost plus contract, by reason of the fact that items charging 10 per cent. commission appeared upon the bills rendered them. There is testimony that said bills were considered as rendered under the agreed sum contract, and that the itemization was disregarded in so far as it might have been thought to indicate a change in the arrangement under which the work was proceeding In other words, if, as the court found, the contract was in fact for an agreed sum, defendants might well have been unconcerned as to the items on the statements. This was the view of the trial court, and there is no evidence legally sufficient to compel an opposite conclusion. There is therefore no room for operation of the law of estoppel, and authority need not be cited upon this point. Our conclusion that the findings and judgment have support in the evidence is determinative of this appeal.

[2] Plaintiffs claim interest from the date of the third bill rendered by them, at which time they state the amount due became certain (section 3287, Civ. Code). Had the court found for them, this contention would be sound. Here, however, the record shows no refusal of defendants to settle with plaintiffs under the true contract. Defendants, being ready and willing to settle thereunder, were not at fault, because plaintiffs not only abandoned the work, but insisted on recovery upon a different basis. In other words, by reason of the action of plaintiffs, the amount due was unliquidated until determined by judgment of the court; hence interest prior to judgment, as damages, was not allowable. Macomber v. Bigelow, 126 Cal. 9, 15, 58 P. 312; Curtin v. State, 61 Cal. App. 377, 393, 214 P. 1030; Easterbrook v. Farquharson, 110 Cal. 311, 42 P. 811; Stimson v. Dunham, 146 Cal. 281, 79 P. 968.

Judgment affirmed.

We concur: CURTIS, J.; SEAWELL, J.

★Hearing denied in bank.

205 Cal. 698

KING v. GRASS VALLEY GOLD MINES CO.

(Sac. 4127.)

Supreme Court of California. Dec. 5, 1928.

Corporations 🔑308(2)—Agreement implied to pay reasonable worth of services of corporate officers performing onerous services, though no compensation is previously fixed.

Presumption that certain corporate officers render services gratuitously, in absence of previous express contract, does not apply to onerous services which could not reasonably be expected to be performed for nothing, although no compensation therefor is previously fixed; and in such cases there is implied agreement to pay what services are reasonably worth.

Department 1.

Appeal from Superior Court, Nevada County; Raglan Tuttle, Judge.

Action by Roy J. King against the Grass Valley Gold Mines Company. Judgment for plaintiff, and defendant appeals. Affirmed.

E. H. Armstrong and Frank R. Wehe, Jr., both of Grass Valley, for appellant.

W. E. Wright, of Nevada City, for respondent.

PRESTON, J. Plaintiff, claiming to have performed services for defendant as a mining engineer, mine manager, and superintendent, filed his complaint setting forth three causes of action. By the first and third counts he sought to recover under a contract in writing the sum of $6,000 for his said services. Said contract was found to be void by reason of a mutual mistake of law, and relief on those two counts was denied. The second, or quantum meruit count, alleged that plaintiff performed work, labor, and services for defendant which were reasonably worth the sum of $2,000. The court found that said services were of the value of $1,500 only, and rendered judgment on said count in that sum for plaintiff. Defendant now prosecutes this appeal therefrom, praying for reversal upon the sole ground of failure of proof.

Plaintiff was the only witness produced by either party at the trial. His testimony, uncontroverted by any witness for defendant, supports his claim for reasonable compensation, and the court was justified in finding that he did in fact perform such work, labor, and services as would entitle him to recover upon said quantum meruit count. In short, we see no reason here for withholding application of the rule announced in the case of Bassett v. Fairchild, 132 Cal. 637, 64 P. 1082, 52 L. R. A. 611, to the effect that the presumption that certain corporate officers render their services gratuitously, in the absence of previous express contract, does not apply to onerous services, which could not reasonably be expected to be performed for nothing, although no compensation therefor is previously fixed; and in such cases there is an implied agreement to pay what the services are reasonably worth.

Judgment affirmed.

We concur: CURTIS, J.; SEAWELL, J.

---

205 Cal. 675

STREICHER v. HEIMBURGE et al.

(L. A. 9502.)

Supreme Court of California. Nov. 28, 1928.

1. Landlord and tenant 🔑83(4)—Failure of arbitration under lease does not destroy lessee's rights, where new estate has vested, but equity will fix rent and maintain integrity of lessee's tenure.

Where new estate has vested under lease providing for arbitration, failure of arbitration provisions does not destroy or forfeit lessee's rights, but, if need be, court of equity will intervene to fix reasonable rental and decree specific performance and thus maintain integrity of tenure of lessee.

2. Landlord and tenant 🔑83(2)—Fixation of rental prior to expiration of original term held not condition precedent to vesting of new leasehold interest under renewal clause of lease (Civ. Code, §§ 707, 708, 1436).

Under lease granting to lessee option to renew lease for additional term on same covenants and conditions except as modified, which only provided for modification of provision respecting rental in original lease, which was made covenant and not condition, and providing for no conditions precedent to vesting of original term and imposing on lessee burden of making improvements, fixation of rental prior to expiration of original term of lease was not condition precedent to vesting of new leasehold interest under renewal clause, in view of Civ. Code, §§ 707, 708, 1436.

3. Landlord and tenant 🔑83(1)—Rule that grant is interpreted favorably to grantee applies in construing renewal clause in lease (Civ. Code, § 1069).

In construing clause in lease granting option to renew, grant is to be interpreted in favor of grantee, under Civ. Code, § 1069.

4. Landlord and tenant 🔑83(1)—Rule construing contract most strongly against party causing uncertainty applies to renewal clause in lease (Civ. Code, § 1654).

Rule specified in Civ. Code, § 1654, providing that, in case of uncertainty, language of contract should be interpreted most strongly against party causing uncertainty, is applicable in construing renewal clause in lease.

5. Landlord and tenant 🔑83(1)—Interpretation of renewal clause in lease depends on entire instrument in determining whether provision for rental is condition precedent or subsequent.

In construing renewal clause in lease to determine whether provision for fixing rent was condition precedent or subsequent, true interpretation depends on consideration of entire instrument, notwithstanding use of words which ordinarily introduce conditions.

6. **Landlord and tenant** ⚷83(2)—**Rule requiring appropriate words to create condition and construction in accordance with parties' intention held applicable to renewal clause of lease.**

Rule providing that condition to be created in grant must have appropriate words appended thereto importing that continuance of estate is to depend on condition and that construction should follow probable intention of parties *held* applicable, where condition precedent is claimed to renewal of lease.

In Bank.

Appeal from Superior Court, San Diego County; S. M. Marsh, Judge.

Action by Celia Streicher against Max Heimburge and another. Judgment for plaintiff, and defendants appeal. Reversed.

Superseding opinion of District Court of Appeal, 262 P. 774.

Arthur F. H. Wright, Adam Thompson, and Gordon Thompson, all of San Diego, for appellants.

A. Haines, Wright & McKee, and C. M. Monroe, all of San Diego, Arthur Joel, of San Francisco, and Haines & Haines, of San Diego, for respondent.

PRESTON, J. This appeal is controlled by the proper interpretation to be given a renewal provision in a lease of real property. The action is in unlawful detainer. The prayer is for restitution of the premises and for triple rental. The court directed a verdict for restitution of the premises to plaintiff, and submitted to the jury the sole issue of damages for the alleged unlawful withholding thereof. Judgment for plaintiff followed. Defendants have appealed.

On the 14th day of October, 1920, one Howard leased to defendants and appellants the ground floor and basement of a certain building situated in the city of San Diego, known as the Dalton building, for a term of five years commencing December 1, 1920, and ending November 30, 1925, the lease containing, however, a provision that the lessees should have the right or option to renew the lease for an additional term of five years, which provision was couched in the following language:

"Provided, and upon condition that the lessees and their successors in interest have at all times faithfully and punctually performed each and all of the covenants and conditions of this lease on the part of the lessees, the lessor grants to the lessees, and their successors in interest, the right or option to renew this lease for an additional term of five (5) years, upon the same covenants and conditions as are herein contained, except as modified by this paragraph, and except further that there shall be no right or option to further renew or extend this lease, provided that this option is accepted by a writing delivered to the lessor by the lessees, or their successors in interest, at least six (6) months prior to the expiration of the term of this lease, and provided further that the rent to be paid is agreed upon as follows. The parties are to agree in writing upon the rent to be paid during such renewed term, if they are able to do so. If within thirty (30) days after the acceptance of this option on the part of the lessees, by the delivery of the written acceptance aforesaid, the parties are still unable to agree upon the rent to be paid, then the lessor or his successor within ten (10) days shall in writing appoint an appraiser, and the lessees or their successors within ten (10) days shall in writing appoint an appraiser, and the two appraisers so appointed shall determine the rent to be paid for said time. Or, if the two appraisers so appointed are within ten (10) days unable to agree upon said rent, then they shall in writing immediately appoint a third appraiser, and the majority of the three so appointed shall determine said rent. If either of the parties fail or refuse to appoint an appraiser within the time aforesaid or within ten (10) days after new appraisers should be appointed by the parties as next provided, then the other party shall appoint both appraisers, who shall determine the amount of said rent; or, if the appraisers so appointed are unable to agree within the time aforesaid, and then fail or refuse to appoint a third appraiser as aforesaid, or if they appoint a third within that time, but a majority of the three refuse or are unable to agree within ten (10) days, then the parties within ten (10) days thereafter shall each in writing appoint a new appraiser, and the two so selected shall determine said rent, or if they are unable to do so, they shall appoint a third appraiser as aforesaid, and the majority of the three so appointed shall determine said rent; and this process of appointing and reappointing appraisers shall be continued, within the time and in the manner aforesaid, until either the parties themselves or appraisers for them determine the amount of said rent. The appraisers so appointed shall in all instances be business men of said City of San Diego, and shall reduce to writing and deliver to each party, a statement of the amount of rent determined upon."

On the 23d day of January, 1925, respondent, Celia Streicher, acquired the reversionary estate in the premises from Howard. There is no contention that the lessees did not at all times faithfully and punctually perform all the covenants of this lease on their part to be kept and performed. It is further conceded that on the 6th day of May, 1925, and more than six months prior to the expiration of the first term of said lease, appellants in writing gave notice to respondent of their exercise of the option to renew said lease. The parties failed to agreed within 30 days after May 6, 1925, upon rent for the renewal term of said lease; thereafter plaintiff and defendants each appointed one of ten successive sets or pairs of appraisers or arbitrators to determine the amount of rent to be paid during such renewal term. These appointments extended over a period beginning June 8, 1925, and ending November 30, 1925. Neither of said boards of appraisers were able to agree upon a rental or even upon the appointment of a third member of any board of appraisers. On December 2, 1925, respondent refused to appoint any other appraiser to determine the rental for said new period. At that time she took the position that the fixing of the rent during the life of the original lease was a condition precedent to the creation of the new term, and, that condition having failed, appellants became tenants from month to month under provision 13 of the lease. On December 1, respondent served 30 days' notice upon appellants to vacate the premises. It also appears that after November 30, 1925, appellants of their own motion selected a board of appraisers, claiming to act under said paragraph 20, and these two appraisers did agree upon an amount as rent to be paid during said alleged new term. Mutual arrangements were made between the parties so that appellants continue in possession of the premises pending this appeal.

The court below held that the right to renew said lease never accrued to appellants, and that they became tenants from month to month only of the premises. The position of appellants upon this appeal is that, on the expiration of the first term provided for in said lease, a new term vested in them by virtue of their faithful performance of the covenants of the original lease and by reason of their exercise in time of the right or option to have the same renewed; that the provision respecting the rent to be paid was a covenant or at most a condition subsequent.

Respondent's position, however, is that said provision respecting rental, together with two other co-ordinate and correlative provisions are severally conditions precedent to the vesting of said new term, and that, one of said conditions precedent not having been met during the life of the original lease, the attempted renewal did not ripen into an estate, and appellants lost the right to continue in possession of said premises except as tenants from month to month under paragraph 13 of the original lease. Respondent, in contending that said provision respecting rent is a condition precedent to the vesting of the new term, assembles her arguments under the following heads:

> "(1) It is couched in apt and appropriate language for such a condition; (2) It is a substantive provision initiated distinctly from all others and is complete in itself and expressly made a 'further' proviso; (3) The proviso covers the whole consideration for a renewal term; (4) The proviso is not only conjunctively and copulatively associated with two other unquestioned conditions precedent, but it is expressly made a 'further' condition and completes the trio of such conditions."

Appellants rely upon the now well-understood principle announced in a long line of cases. For example, Kaufmann v. Liggett, 209 Pa. 87, 58 A. 129, 67 L. R. A. 353, 103 Am. St. Rep. 988, a leading case often cited with approval and squarely in point here, if appellants' construction of the renewal provision is correct, the lease provided that the lessees should have the privilege of a renewal; that the rental, in event the lessees elected to renew, should be fixed by arbitrators selected in a specified way; also that, if the arbitrators and umpire failed to agree within a fixed time, then others should be chosen in the same manner. However, there was no provision in the lease covering the contingency of the failure of the second set of arbitrators to agree. The lessees exercised their privilege of renewal and gave the stipulated notice; both sets of arbitrators failed to agree. The landlords then gave notice to the lessees to surrender possession of the premises. Thereupon the lessees filed a bill in equity, praying that the court determine the amount of rental to be paid under the renewal. Holding that it had complete jurisdiction in equity to fix the amount of the rental to be paid by the lessees during the extension of 5 years and to enforce specific performance of the agreement providing for such extension, the court said:

> "After careful consideration of this question in the light of the elaborate argument of counsel for the appellant, we agree with the conclusion of the court below that the fixing of the rental value of the premises for the period in dispute in this case is not of the essence of the contract, but that the right of renewal constituted the substantial element in this portion of the agreement. It was that feature which, in great measure, justified the lessees in erecting upon the premises a large and costly building, adapted to the needs of their business."

In the case of Nakdimen v. Atkinson Improvement Co., 149 Ark. 448, 459, 233 S. W. 694, 697, the court said:

> "In the present case, the essence of the contract was the renewal of the lease for another term of 10 years, and the fixing of the rental for that period was merely ancillary to the main contract. Where the provision for an appraisal is incidental and subsidiary to the substantive part of the agreement, the party refusing to name an appraiser or arbitrator cannot be heard to complain where the court performs or provides for the performance of such service. The court, in fixing the reasonable rental value, treats the method as a matter of form, rather than substance. So it may be said in the present case that the clause of the contract providing for a board of arbitrators to fix the rental value of the premises does not render the contract void as being too indefinite to be enforceable."

See, to the same effect, North Coast R. Co. v. A. A. Kraft Co., 63 Wash. 250, 115 P. 97; note to the case of Young v. Nelson, 121 Wash. 285, 209 P. 515, 30 A. L. R. 568, at page

580; Houston v. Barnett, 90 Or. 94, 175 P. 619.

[1] Respondent immediately attempts to distinguish the above line of authorities because of the absence of appropriate language making the renewal depend upon a condition precedent. Admittedly, in those cases the fixing of the rent by arbitration was not made a condition precedent to the vesting of the leasehold estate and consequently we need not pay any further attention to the principle of law well understood that where the new estate has vested under a lease providing for arbitration, a failure of the arbitration provisions does not destroy or forfeit the lessees' rights, but, if need be, a court of equity will intervene to fix the reasonable rental and in effect decree specific performance and thus maintain the integrity of the tenure of the lessee. See numerous cases cited in Glenn v. Bacon (Cal. App.) 260 P. 558, 564.

We must therefore give our special consideration to the meaning of the lease before us, having in mind sections 707, 708, and 1436 of the Civil Code. Speaking of it as a whole and not of paragraph 20 alone, it will be noted that said lease contains repeatedly the words "covenants and conditions" used together. It will also be noted that in one or two instances the word "condition" appears without association with the word "covenant." A noticeable thing, however, is that there were no conditions precedent to the vesting of the original term. Every provision therein is a covenant, or at most a condition subsequent, and whether a given provision is the one or the other is immaterial, because under paragraph 18 a forfeiture is provided for the failure to observe either. It should also be noted that the lease provides that the lessees shall at their own expense make such improvements upon the property as may be assented to by the lessor. In other words, the lessees assume all burden of keeping the premises in repair and also of alterations and changes that may be necessary for the business which they are to conduct upon the premises. It is no stretch of the imagination to see that under this lease the lessees would be warranted in making and perhaps did make permanent improvements with the thought in mind of the renewal period as well as the old term of the lease.

Coming now to paragraph 20, it may be conceded that the provision respecting observance of the covenants and conditions of the lease before right of renewal accrued is a condition precedent, although situations are easily supposable where a court of equity could decree contrary to the contention of the lessor that the new term had vested. We may concede also that the right of renewal depended upon the giving of notice to the respondent within the time and in the manner stated in said paragraph, but here again a situation might be easily supposed where a court of equity would be warranted in decreeing the vesting of the new term, notwithstanding the failure of the lessees to literally live up to said requirements. See Fountain Co. v. Stein, 97 Conn. 619, 118 A. 47, 27 A. L. R. p. 976, and note.

[2] But the most noticeable of the provisions of paragraph 20, when paraphrased is:

> "* * * The lessor grants to the lessees * * * the right or option to renew this lease for an additional term of five (5) years, upon the same covenants and conditions as are herein contained, except as modified by this paragraph. * * *"

It is thus seen that the renewal term will have the same covenants and conditions as in the original lease, except as modified by the paragraph under consideration. It is "covenants and conditions" found in the original lease that are to be modified by the present paragraph. But the only "condition" or "covenant" modified, or attempted to be modified, by this paragraph 20, is the provision respecting the amount of rental and the amount of rental in the original lease is a covenant and not a condition. Moreover, when we approach the words "and provided further," we see in them a qualification of the words "covenants and conditions" found above and in turn a qualification of covenants and conditions found also in the original lease. It follows that this clause respecting rental introduced by these words may logically be either a covenant or a condition but hardly in any event a condition precedent. At least we are not by reason of its relation to other clauses bound to declare it such a condition.

Again, time is not made the essence of the provision which of itself argues strongly that it is a covenant or agreement, and not a condition. This construction is further emphasized by the words:

> "* * * And this process of appointing and reappointing appraisers shall be continued, within the time and in the manner aforesaid, until either the parties themselves or appraisers for them determine the amount of said rent."

The words "within the time" refer, not to the expiration date of the original lease, but refer to the ten-day periods which precede them respecting the appointment of arbitrators. The language just quoted shows that it was in the contemplation of the parties that although they themselves might not agree during the first 30-day period, they might agree during the period of the arbitrators' activities. If it had been the intention of the parties that the new estate should not vest prior to the fixation of the rental, it should have been so declared by the lessor. But nothing is declared to be the result of a failure of all efforts to effect a rental figure. "If the right to renewal had been intended to depend upon the rent being fixed in advance, it would not only have been the easiest, but most natural, thing to have said so." Kaufmann v. Liggett, supra, at page 356 of 67 L. R. A. (209 Pa. 95, 58 A. 132). Perhaps the strongest reason that may be urged that it was never intended that this be a condition precedent is the fact that this provision in and of itself would give to the lessor the power to absolutely nullify the whole right of renewal under this lease, for, by failing to agree, or by failing to appoint proper appraisers who would agree, the lessor under that construction of the provision always had within her the power to prevent a renewal of the lease.

[3, 4] In the construction of a clause of this character, too, we are fortified by the rule that a grant is to be interpreted in favor of the grantee. Civ. Code, § 1069; Hasman v. Union High School, 76 Cal. App. 629, 632, 245 P. 464. The rule announced in section 1654 of the Civil Code is also applicable; it is:

> "In cases of uncertainty not removed by the preceding rules, the language of a contract should be interpreted most strongly against the party who caused the uncertainty to exist. The promisor is presumed to be such party. * * *"

This doctrine has been specially applied to leases in the case of Glenn v. Bacon, supra. It is stated in Kaufmann v. Liggett, supra, as follows:

> "As a general rule, in construing provisions of a lease relating to renewals, where there is any uncertainty, the tenant is favored, and not the landlord, because the latter, having the power of stipulating in his own favor, has neglected to do so, and also upon the principle that every man's grant is to be taken most strongly against himself. Taylor, Land & T. (9th Ed.) § 81."

See, to the same effect, Commonwealth v. Arcuroso, 283 Pa. 84, 128 A. 668; McClintock & Irvine Co. v. Ætna, etc., Co., 260 Pa. 191, 103 A. 622, Ann. Cas. 1918E, 1078; 16 R. C. L. 884; Hacquard v. Sweetwine, 92 W. Va. 681, 115 S. E. 797, 799; 24 Cyc. 991.

[5] We are also confirmed in the construction placed upon these provisions by the rule as to conditions subsequent announced in such cases as Hawley v. Kafitz, 148 Cal. 393, 395, 83 P. 248, 249, 3 L. R. A. (N. S.) 741, 113 Am. St. Rep. 282, where it is said:

> "There must be language used which is so clear as to leave no doubt that the grantor intended that an estate upon condition subsequent should be created—language which ex proprio vigore imports such a condition."

Many cases may be found where the words "provided" or even "on condition that" have been used and nevertheless held to be covenants and not conditions. The true interpretation depends upon a consideration of the whole instrument, and from the whole instrument a deduction must often be made that the provision under consideration is a covenant and not a condition, and this too notwithstanding use of the words which ordinarily introduce such a condition. See Fitzgerald v. Co. of Modoc, 164 Cal. 493, 129 P. 794, 44 L. R. A. (N. S.) 1229; Victoria Hospital Ass'n v. All Persons, 169 Cal. 455, 460, 147 P. 124; Quatman v. McCray, 128 Cal. 285, 60 P. 855; Los Angeles University v. Swarth (C. C. A.) 107 F. 798, 54 L. R. A. 262. A quotation from Post v. Weil, 115 N. Y. 361, 366, 22 N. E. 145 (5 L. R. A. 422, 12 Am. St. Rep. 809); is appropriate here.

> "Mere words should not be and have not usually been deemed sufficient to constitute a condition, and to entail the consequences of forfeiture of an estate; unless from the proof such appears to have been the distinct intention of the grantor and a necessary understanding of the parties to the instrument. Nor should the formal arrangement of the words influence us wholly in determining what the clause was inserted to accomplish; but in this, as in every other case, our judgment should be guided by what was the probable intention; viewing the matter in the light of reason."

[6] The rule has again been stated as follows:

> "To create a condition in a grant, apt and appropriate words must be appended thereto, which, ex vi termini, import that the vesting or continuance of the estate is to depend upon the condition, but mere words should not be, and have not usually been, determinative of whether a clause was intended to operate as a condition or a covenant. In every case the construction should follow the probable intention of the parties, viewing the matter in the light of reason. Thus, the words in a deed 'upon the express condition,' introducing restrictions upon the use of the property conveyed, tho apt and appropriate to create a condition, are to be taken to import a covenant where it is evident that the parties so intend, even tho there is a provision for forfeiture in case of breach of the condition or covenant." 7 Cal. Jur. 712.

There is equal reason for applying this doctrine to a case where a condition precedent is claimed.

We are therefore satisfied to pronounce the conclusion that, taking this instrument as a whole and viewing it from all standpoints, it was never intended that the fixation of rental prior to the expiration of the original term of the lease was a condition precedent to the vesting of the new leasehold interest. It also, of course, follows that, were the lessees trying to avoid the obligation of the renewed lease, they could not rely upon the failure of the arbitrators to agree as a defense. We regard such cases as Stout v. North, 211 Mo. App. 245, 252, 242 S. W. 119, and Burge v. Purser, 141 Miss. 163, 106 So. 770, as strengthening rather than weakening this conclusion, for in these cases affirmative conditions existed in the original lease, such as security for the rental. These cases are but to the effect that, in addition to the notice of election to exercise the option, the affirmative conditions of the old term must be met before the new term vests. The appellants therefore have the right of possession, but cum onere. Whether the rental, however, shall be the amount provided for in the original lease, the amount fixed by the appraisers appointed ex parte, or whether in the absence of an agreement of the parties a court of equity shall fix it, are questions not germane to this appeal.

This conclusion renders it unnecessary to consider the second point made by appellants, that, in an action of this character, the 3 days' notice provided for by section 791 of the Civil Code must be given.

The judgment is reversed.

We concur: WASTE, C. J.; CURTIS, J.; RICHARDS, J.; SEAWELL, J.; SHENK, J.

205 Cal. 703

CAVALIERI v. HESS. (Sac. 4121.)

Supreme Court of California. Dec. 11, 1928.

1. Specific performance 🔑52—Findings showing mutual mistake in legal description of lands sought to be included in contract of sale, specific performance will not be enforced (Civ. Code, § 3391, subd. 4).

Findings in action for specific performance and damages showing mutual mistake in legal description of lands sought to be included in contract of sale, specific performance will not be enforced, under Civ. Code, § 3391, subd. 4.

2. Specific performance 🔑7—Buyer, accepting deed with knowledge that it did not conform to description in contract of sale, waived right to specific performance.

Buyer of land, accepting deed to property purchased without objection and with full knowledge that it did not conform to the description in contract for sale, *held* to have waived right to insist on strict compliance with terms of contract.

Department 2.

Appeal from Superior Court, Tuolumne County; J. T. B. Warne, Judge.

Action by Joseph Cavalieri against Louise Hess. Judgment for defendant, and plaintiff appeals. Affirmed.

J. O. Stemmler, of Stockton, and J. C. Webster, of Sonora, for appellant.

Rowan Hardin, of Louisville, for respondent.

LANGDON, J. This is an appeal from a judgment of the superior court in and for the county of Tuolumne in favor of defendant in an action for specific performance and for damages resulting from the failure of defendant to perform under a certain agreement set forth in the complaint. The description of the property in the agreement between the parties was:

> "All that portion of the east one-half of northwest one-quarter and west one-half of northeast one-quarter of section five, township one north, range fifteen east, M. D. M., which lies northerly of Sullivan's creek, in the county of Tuolumne, state of California, and being the same property distributed to the party of the first part by decree of distribution given, made and entered on the 18th day of May, 1904, in the matter of the estate of George Mayer, deceased, in the superior court of the county of Tuolumne, state of California, together with the improvements thereon."

The findings disclose:

> "That passing through said property in an easterly and westerly direction is a road commonly known as and called the Sonora and Mono road. That in the year 1885, one George Mayer sold and conveyed to Bridget Wolfling and Michael Wolfling all that portion of the E½ of the NW¼ and W½ of NE¼ of Sec. 5, T. 11 N., R. 15 E., M. D. M., which lies northwesterly of said Sonora and Mono road, except two corrals opposite what was formerly known as the Northup or Bergel place. That at the time said agreement was entered into between plaintiff and defendant, the only land owned by defendant north of said Sonora and Mono road was the lands embraced within the two corrals mentioned in the deed from George Mayer to Bridget Wolfling et al.
>
> "That at and prior to the time said agreement was executed both plaintiff and defendant were ignorant of the true and correct legal description of the property which said defendant owned at said time and which plaintiff desired to purchase, and before said agreement was entered into, defendant caused the boundaries of her land to be shown to plaintiff, all of which said lands were enclosed by fence. That plaintiff knew before the execution of said agreement from the boundaries so shown to him, that the land which defendant was selling and which land he desired to purchase did not include or embrace the portion of land theretofore sold by Geo. Mayer to Bridget Wolfling, * * * and said plaintiff knew before the said agreement was executed that defendant did not own or claim to own and did not have possession of or claim the right to the possession of the said land described in the said deed from Geo. Mayer to Bridget Wolfling aforesaid, and said plaintiff knew before the execution of said agreement, that said lands described in said deed from Geo. Mayer to Bridget Wolfling were in the possession of Mr. Sanguinetti, and said plaintiff was not in possession of said lands, and knew at the time that he was making the payments under the said agreement that his purchase did not include said land described in said Mayer to Wolfling deed. That through a mistake in the legal description of the land in the decree of distribution in the matter of the estate of Geo. Mayer, deceased, the said tract formerly sold by said Geo. Mayer was included in said decree of distribution and in preparing the said agreement the description as appearing in said decree of distribution in the estate of Geo. Mayer, deceased, was used in describing

the said lands of defendant. That under the terms and provisions of said agreement said plaintiff was placed in possession of the lands then owned by defendant in the month of April, 1923, and was told at that time by defendant, and plaintiff knew, that defendant did not own any lands north of the county road except the two corrals opposite the Hess residence, formerly the Bergel place, and defendant knew that a property division fence separated the said two corrals from the property formerly owned by Wolfling, and at the time said agreement was entered into, was in the possession of a Mr. Sanguinetti, and plaintiff knew that he did not have any right to the possession of the said land theretofore sold by Geo. Mayer to Bridget Wolfling, and said plaintiff knew at all times that the lands which he was purchasing from defendant consisted of approximately 35 acres. That if the tract formerly sold by Geo. Mayer to Bridget Wolfling had been included, that the tract would have contained approximately 58.42 acres.

"That the mistake in the description of lands so contained in said agreement was not discovered until observed by Mr. Eric J. Segerstrom in preparing the final papers for transfer of the title of the lands of defendant. That when said mistake was observed, the said plaintiff was informed of the same, prior to the execution and delivery of the deed under the terms of said agreement, and knew before the deed was executed and delivered to him that such mistake had been made in describing the lands in the said agreement and made no objection to such correction of the land description and was agreeable to the correction of the description in the said deed so as to properly and correctly describe the said lands which said plaintiff had agreed to purchase from defendant; that the said deed so delivered to plaintiff on or about the 25th day of January, 1926, did correctly and fully describe the lands which plaintiff had in fact agreed to purchase, and which lands defendant had in fact agreed to sell, and defendant has fully complied with the terms and conditions of the said contract of purchase and sale between plaintiff and defendant.

"That defendant did not agree to convey and plaintiff did not in truth and fact agree to purchase the amount of 18.44 acres or any other amount of land in addition to the said land described in the said deed delivered by defendant to plaintiff, that plaintiff has received by said deed all of the land which he in truth and fact agreed to purchase and all of the land he paid for; that the said portion of lands sold and conveyed by Geo. Mayer to Bridget Wolfling and which said lands were included by mistake in the description of lands set forth in the said agreement formed no part or portion of the consideration paid or agreed to be paid for defendant's said lands by plaintiff. That the principal thing and matter of value in said transaction of sale from defendant to plaintiff, was the residence building and out buildings on said property known as the Hess residence property and the location of said buildings as a business property to operate a service station and soft drink establishment, that the said 18.44 acres more or less included by mistake in the said agreement is not more valuable than other portions of said land described in said agreement of sale by reason of the timber thereof or for any other reason or at all."

[1, 2] The foregoing findings show a mutual mistake as to the legal description of the lands sought to be included in the contract of sale. It is clear that a court of equity will not order specific performance of such a contract. Civ. Code, § 3391, subd. 4. There is also present in the case the element of estoppel. The plaintiff, by accepting the deed to the property owned by defendant, without objection, and with full knowledge that it did not conform to the description contained in the contract, waived his right to insist upon a strict compliance with the terms of the contract. The case of Smiley v. Read, 163 Cal. 644, 126 P. 486, presents substantially the same legal situation as we are considering here. In that case it was said:

"It makes no difference how soon after the consummation of the sale plaintiff made his objection. His duty was to assert his unwillingness to accept the land offered at the time of the tender. Failing to do this he was estopped from demanding the fraction of an acre representing the difference between the amount of land mentioned in the contract and that specified in the certificate of title."

The judgment is affirmed.

We concur: RICHARDS, J.; SHENK, J.

---

205 Cal. 619

In re PHELPS' ESTATE. (S. F. 12593.)

Supreme Court of California. Nov. 26, 1928.

1. Trusts ⚷274(3)—Testamentary trustee's and attorney's fees held properly charged against corpus of estate, leaving balance of unexpended income in trustee's hands to apply on accumulated annuities (Code Civ. Proc. § 1563).

Where bequests to annuitants was specific, testatrix intended that net income should be devoted to them as preferred class, and there was sufficient estate to care for expenses of administration without jeopardizing other specific legatees, order charging testamentary trustee's and attorney's fees against corpus of the estate, leaving balance of unexpended income in trustee's hands to apply on accumulated annuities in accordance with testatrix's intention, was both just and legally proper, though estate is liable for administration expenses in proportion to value or amount of several devises or legacies, under Code Civ. Proc. § 1563.

2. Trusts ⚷274(3)—Net income should be devoted exclusively to satisfaction of specific bequests, where testatrix so intended, though testamentary trustees are entitled to reimbursement for expenses incurred in good faith and administration expenses are usually payable from income.

While testamentary trustees generally are entitled to reimbursement for expenses incurred in good faith in execution of trust, and expenses of administration are usually payable from income, net income should be devoted exclusively to satisfaction of specific bequests, where testatrix plainly so intended.

3. Executors and administrators ⟹513(9)—Provision on approval of testamentary trustee's account for payment of his and attorney's fees from income held not to preclude court from charging such fees against corpus of estate on settlement of subsequent account.

That probate court on approval of testamentary trustee's account provided for payment of his and attorney's fees from income bequeathed to annuitants did not bind court to charge such fees to income instead of corpus of estate on settlement on subsequent account; such approval not being of such finality as to foreclose court from making order appropriate to facts presented on hearing of later account, especially in view of final decree directing distribution of property specifically devised and bequeathed to life tenants with residue to trustees.

In Bank.

Appeal from Superior Court, San Mateo County; George H. Buck, Judge.

In the matter of the estate of Josephine A. Phelps, deceased. From an order settling the account of W. F. Chipman, testamentary trustee, and particularly from portions thereof charging trustee's fees against principal instead of income payable to Alfred A. McLean and others, Florence Lansing and another appeal. Affirmed.

Lasher B. Gallagher, of San Francisco, for appellants.

W. C. Sharpsteen, of San Francisco, for respondent Chipman.

Alden Ames and S. E. Sheffey, both of San Francisco, for respondent McLean.

R. P. Henshall, A. McCulloch, Tobin & Tobin, and Simeon E. Sheffey, all of San Francisco, for respondent Schroeder.

Edward T. McLean in pro. per.

SHENK, J. This is an appeal from an order settling the sixth account of W. F. Chipman, trustee, in the matter of the estate of Josephine A. Phelps, deceased, and particularly from those portions of the order directing the transfer of trustee's fees and attorney's fees from charges against income to charges against principal and directing the trustee to make the payment of $12,950.27, as income, to Eugenie H. Schroeder, an annuitant under the will.

Josephine A. Phelps died testate on December 5, 1916, in the county of San Mateo. The will, admitted to probate, created a trust for the benefit of certain named beneficiaries, including the appellants, Florence Lansing and Clara Ethel Cooley. By the terms of the will, life estates in certain properties were vested in Virginia A. Lord and Eugenie H. Schroeder, sisters of the decedent. W. F. Chipman and Union Trust Company were appointed executors of the will and also trustees to carry out the provisions of the trust. Prior to distribution the court made an order directing the executors to sell property of the estate and to pay to Virginia A. Lord certain sums claimed by her to be due under the terms of the will. Upon an appeal by the executors, the order was reversed. Estate of Phelps, 179 Cal. 703, 178 P. 846. The executors filed their final account and report and petition for distribution. The account was approved and distribution ordered. On appeal from the decree of distribution attacking the validity of the trust, the same was declared valid and operative except in certain particulars not involved herein. The decree of distribution was reversed, with directions to enter an order distributing to the several specific devisees and legatees the property devised and bequeathed to them under the valid portions of the will, and to distribute the remainder to the trustees, to be held by them upon the trusts declared in the will. Estate of Phelps, 182 Cal. 752, 190 P. 17. Thereafter, and on July 22, 1920, the executors submitted to the probate court their second and supplemental final account and report and petition for distribution. On September 20, 1920, the account was approved and distribution ordered to the life tenants and the residue to the trustees.

By the terms of the fifth article of the will the beneficiaries were established as class A and class B. The class A beneficiaries were five brothers and sisters of the decedent. As to them the trustees were directed to pay monthly out of the net income of the estate annuities aggregating $900 per month. The will further provided that, should the income in any month be insufficient to pay all of said annuities in full, the trustees were directed to pay the annuities to Virginia A. Lord and Eugenie H. Schroeder in full and prorate the balance among the remaining annuitants, and that, whenever there should be more than sufficient to pay all of said annuities in full, the trustees should pay such annuitants as had not received their annuities in full a sufficient sum to make up such deficit, but without interest. The trustees were then directed to sell from time to time, when sales might in the judgment of the trustees be profitably made, sufficient of the estate to yield a fund of $240,000. Upon the accumulation of such fund the trustees were directed to invest the same and from the income thereof pay to the annuitants certain specified percentages thereof, respectively, in lieu of the annuities theretofore provided for. Provision was then made that, in the event that any of said annuitants should not be living at the time of the accumulation of said fund of $240,000, or if then living should afterward die, the fund

---

⟹For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

of $240,000 was to be paid to certain named heirs of the annuitants.

As to the class B beneficiaries, the trustees were directed, as sales of the estate should be made, to pay legacies in specified amounts to twenty-nine different persons, corporations and associations, and in the order named. The first five legacies aggregate $115,000. The sixth and seventh are in favor of the appellants herein, and are in the the sum of $15,000 each. The remainder of the estate, as to the disposition thereof provided for in the fifth article, was directed to be paid in equal shares to two of the sisters, Virginia A. Lord and Eugenie H. Schroeder, and to a nephew, W. F. Chipman, if living, and, if dead, to their heirs.

The second order of distribution decreed that the right to the annuities provided for in the class A schedule of beneficiaries should vest in the respective annuitants at the dates the same became or should become payable, and that said annuities "are hereby decreed to be a preferred charge on the whole of the net income of said estate, other than the fund of $240,000, after the same has been accumulated, whenever realized." From the second decree of distribution no appeal was taken.

Some time after the entry of the second decree of distribution and prior to February 21, 1927, the Union Trust Company resigned as trustee, and W. F. Chipman became and has continued to act as sole trustee. On February 21, 1927, W. F. Chipman filed his sixth account and report as trustee, showing that at that date he had in his possession assets of the estate valued at $389,818.63. This account also shows that all of the expenses of the estate accruing prior to the sixth account have been paid; that the income from the estate covered by the report was the sum of $19,383.15; that $10,000 on account of trustee's fees and $17,000 on account of attorney's fees, theretofore allowed by the court, had been charged to income, and that other expenses of the estate in the sum of $8,432.88 had accrued. If this charge of $27,000 for trustee's and attorney's fees and the additional charges for other expenses were made against income alone, the result would be not only an overdraft of $14,049.73 on the income account, but no funds whatever would be available for the annuitants. The terms of the will indicate very clearly that it was the intention of the testatrix to provide a monthly income for the annuitants who were first in her thought and affections. The testatrix expressly stated in her will that she believed her estate sufficient to provide for the monthly payment of the annuities and the specific bequests. She certainly contemplated that the estate would be so administered that the annuitants should obtain some benefit from her bounty during their lifetime. Instead of accomplishing that purpose, and due to the delays in administering the estate, the annuitants have been deprived of their income, and, if no greater progress is made, the trust estate will not be closed during the lifetime of any of them, nor at all until the accumulating annuities are liquidated. The outlook is not encouraging, for the reason that the expenses of administering the trust are continually exceeding the income, and more than ten years have elapsed since the executors were appointed. Two of the five annuitants have died, and the other three have passed the allotted time of three-score and ten.

[1] This was the situation confronting the probate court when it was called upon to approve the sixth account. The court determined that the general expense accruing during the period covered by the account be charged against the income account, but that the trustee's fees and the attorney's fees should be charged against the corpus of the estate, leaving a balance of $12,950.27 of unexpended income in the hands of the trustee to apply on the accumulated annuities, amounting to $39,333.34. The decision of the court in this respect was eminently just and in accordance with the obvious intention of the testatrix, and should be allowed to stand unless there is some insuperable legal obstacle to prevent it.

We think the order may be legally justified. In the first place, the decree distributing the estate to the trustees provided that the annuities should be a preferred charge on the whole of the net income of the estate. The plain intention of the testatrix was that this should be so. Section 1563 of the Code of Civil Procedure provides, among other things, that the estate is liable for the expenses of administration in proportion to the value or amount of the several devises or legacies, but specific devises or legacies are exempt from such liability if it appears to the court necessary to carry into effect the intention of the testator and there is other sufficient estate. There is ample in the residuary estate to provide for the sums allocated by the court to payment from the corpus and the residuary legatees are not appealing from the order. Therefore, since the bequests to the annuitants were specific, and since it was the intention of the testatrix that the net income should be devoted to the annuitants as a preferred class, and since there is sufficient estate to care for the expenses of administration without jeopardizing the other specific legatees, including these appellants, the order appealed from is not open to successful attack.

[2] The appellants cite and rely upon Estate of Gartenlaub, 185 Cal. 648, 198 P. 209, 16 A. L. R. 520, which holds that as a general rule testamentary trustees are entitled to reimbursement for expenses incurred in good faith in the execution of the trust, and that the expenses of administering the estate are usually payable from income. Such, no doubt, is the general rule. In its application, how-

ever, cognizance must necessarily be taken of the intention of the testator, and if, as here, it be clear that it was intended that the net income should be devoted exclusively to the satisfaction of specific bequests, the case is within the rule. There is nothing here decided inconsistent with the general rule.

[3] It is further insisted that, since the probate court, on the approval of a prior account, provided that the trustee's fees and the attorney's fees be paid from income, there was no alternative for the court in the consideration of the present account but to charge such fees to income. We do not think that there was such finality in the approval of the prior account as would foreclose the court from making an order with reference to the account in hand appropriate to the facts and circumstances presented on the hearing of the later account, especially in view of the terms of the final decree of distribution.

The order is affirmed.

We concur: WASTE, C. J.; RICHARDS, J.; LANGDON, J.; SEAWELL, J.; PRESTON, J.; CURTIS, J.

---

95 Cal. App. 131

UNITED FRUIT DISTRIBUTING CO. v. STONE et al. (Civ. 6408.)★

District Court of Appeal, First District, Division 2, California. Nov. 23, 1928.

Rehearing Denied Dec. 20, 1928. Hearing Denied by Supreme Court Jan. 21, 1929.

1. Sales ⊂⇒363—Whether demand was properly made on plaintiff for delivery of fruit sold held for jury.

Under contract treated by parties as a sale of fruit, whereby defendants agreed to purchase certain lots of fruits under contract to plaintiff from growers, whether demand was properly made on plaintiff for delivery of fruit, rather than demand made on each grower, *held* question of fact for jury.

2. Trial ⊂⇒191(3)—Requested instructions assuming that title passed under contract, which was question of fact and not of law, held properly refused.

Requested instructions assuming that contract in question passed title were properly refused, where contract was silent on subject; since whether title was passed was question of fact, and not question of law.

Appeal from Superior Court, Lake County; M. S. Sayre, Judge.

Action by the United Fruit Distributing Company against S. C. Stone and others. Judgment for defendants, and plaintiff appeals. Affirmed.

Crawford & Crawford, of Lakeport, and Robt. H. Schwab, of Sacramento, for appellant.

Benjamin C. Jones, of Lakeport, for respondents.

STURTEVANT, J. The plaintiff commenced an action to recover a judgment for money. The defendants answered, and a trial was had before the trial court sitting with a jury. The jury returned a verdict in favor of the defendants, and from a judgment entered thereon the plaintiff has appealed.

In its complaint the plaintiff pleaded its case in two counts: (1) For goods sold and delivered, and (2) for a balance due on an open book account. The answer denied all of the material averments in the complaint. In an amended answer the defendants set up a written contract, alleged to have been executed by the parties, and thereupon they alleged that the plaintiff had wholly failed to perform the same. In asking permission to make the amendment the defendants stated in open court that their purpose was to clearly present the issue that there had been no delivery. The plaintiff asserts that there was no evidence to sustain the verdict, and it addresses its contention to each count separately. In the view we take of the case we will consider both points together.

As throwing much light on the controversy, certain surrounding circumstances are of importance. Big Valley in Lake county is given up very largely to the production of pears. The pears are, to a large extent, harvested, packed, and shipped east. There are many individuals, partnerships, and corporations engaged in handling the shipments after the fruit is packed. However, there are not many concerns who are actually engaged in packing. It is therefore not uncommon to find several shippers who are having their packing done in one and the same packing house. Among other packing houses one is conducted by E. S. Griffitts. He packed for many persons, including United Fruit Distributing Company, the plaintiff, and one of the companies engaged in shipping. The shippers sometimes act as consignees, and sometimes they purchase outright either for themselves or for others. One of the defendants, S. C. Stone, was a grower and had a crop of his own, and furthermore conducted a drying yard. Prior to the 18th day of August, 1925, M. H. Stitt, as the agent of the plaintiff, had purchased from various growers the whole or a part of the crop of such growers. Those purchases were evidenced by written instruments which were made by using certain blanks, which blanks were filled out and certain passages were scratched, thus evidencing the contract. S. C. Stone had been in the company of Mr. Stitt when some of the con-

---

★Rehearing denied. Hearing denied by Supreme Court.

tracts were being negotiated. Later a written instrument was executed, which is the principal document involved in this case. A copy of it is as follows:

"Finley, Calif., Aug. 18th, 1925.

"S. C. Stone of Finley, Calif., hereby agrees to buy and the United Fruit Distributing Company of Sacramento hereby sells to S. C. Stone the following lots of fruit (Bartlett pears) now under contract to the United Fruit Distributing Company. The H. E. Cookson, J. A. Sylar, G. L. Daily, C. W. Carpenter, D. P. Sylar, W. J. Slattery and the Levensaler & Slattery lots at Seventy dollars per ton orchard run. The B. J. Pardee, E. A. Lamb, Paul Shirley, Fannie Hudson and G. W. Johnson lots at Seventy-five dollars per ton orchard run. The Wm. Gordon and M. A. Spencer lots at Seventy-three dollars per ton orchard run. Any advances or moneys paid out by the United Fruit Distributing Company to any of above growers to be charged to the account of S. C. Stone.

"In consideration of the United Fruit Distributing Company furnishing the funds to handle the above contracts S. C. Stone agrees to ship what Bartlett pears not contracted to the Stewart Fruit Company with the United Fruit Distributing Company.

"S. C. Stone.
"United Fruit Distributing Co.
"By M. H. Stitt."

The second paragraph of the contract is not at all involved in this litigation. It is an admitted fact that the fruit grown on the Stone place was turned over to the United Fruit Distributing Company, and was by it shipped to the east, and thereafter it was fully accounted for. Although the instrument is not clear, it will be seen at once that the plaintiff might contend that after the execution of the instrument dated August 18, 1925, it would be entitled to claim that not only the fruit grown by Mr. Stone should be turned over to it for eastern shipment, but that the fruit grown by the other growers, Cookson et al., should also be turned over to the plaintiff for eastern shipment. On the other hand, it is true that the defendants might reasonably contend that, having purchased from the plaintiff the several lots of fruit grown by Cookson et al., that they were entitled to have the same delivered to them, and that they could thereafter ship the fruit so purchased through the plaintiff's organization, or otherwise as they might determine. These questions were all presented to the trial court sitting with the jury, and have all been determined in favor of the defendants.

[1] The instrument dated August 18, 1925, was a sale or it was not. If it was not a sale, then the plaintiff may not complain. If it was a sale, it was a sale of the fruit mentioned in the contracts theretofore executed by each grower and the plaintiff, or it was a sale of several written contracts. On the trial of the case both parties treated the instrument dated August 18, 1925, as a sale of fruit. The defendants introduced evidence to the effect that when the fruit was ready for delivery they made a demand on the plaintiff that the fruit be delivered to them. The demand was not complied with. The plaintiff now makes the point that the demand should have been made on each grower. The record shows that the growers had sold to the plaintiff, and that by the terms of the contracts some agreed to deliver at the plaintiffs' packing shed, that is, the Griffitts' packing shed, and not knowing that the fruit had been resold, they did in fact deliver at that shed. Other lots were brought to the Griffitts' house, but by whom does not appear, and they were in process of being so delivered on or before August 18, 1925. Notwithstanding it had resold the fruit to the defendants, the plaintiff received the fruit, packed it, and shipped it east to be resold. Under these circumstances it was a question of fact for the jury to determine whether the demand was properly made on the plaintiff. In this behalf it is pertinent that when Mr. Stone made a demand on Mr. Stitt to deliver the fruit to him, Mr. Stitt made certain replies, but did not contend that Mr. Stone should address his demand to the individual growers and not to the plaintiff. Neither did Mr. Stitt at that time turn to Mr. Stone and make the claim that pursuant to the provisions of the contract dated August 18, 1925, the plaintiff was entitled to receive the fruit, pack it, and ship it for Mr. Stone's account. On the contrary, he asked Mr. Stone if he had resold it, and for what price. On hearing the price he merely replied, "The fruit is worth more money." There was evidence in the case which, if the jury believed it, fully warranted the jury in bringing in the verdict which it brought in.

Certain contentions are made by counsel in this court which do not require extended notice. The defendants assert that the instrument dated August 18, 1925, was not a sale. That contention presents a theory that was not presented to the trial court. The plaintiff contends that the instrument dated August 18, 1925, was a sale of contracts and not a sale of fruit. As to that point we make the same comment and add thereto that from the time that the attorney for the plaintiff made his opening statement, and thereafter throughout the trial in the lower court, the plaintiff was contending that it was entitled to a balance due as on an express contract for the sale of pears.

[2] The plaintiff requested and the trial court refused to give two different instructions. Each of the proposed instructions assumed that the contract dated August 18, 1925, passed the title. The contract is silent on the subject. As to whether title passed was a question of fact and not a question of law. Turner, Kuhn & Fraser, Inc., v. Jones, 61 Cal. App. 732, 734, 215 P. 1033. The question of fact should have been submitted under

appropriate instructions together with all other questions of fact.

The judgment is affirmed.

We concur: KOFORD, P. J.; NOURSE, J.

In re HEULER'S ESTATE. ★

HEULER v. HEULER.

(Civ. 6194.)

District Court of Appeal, Second District, Division 1, California. Nov. 20, 1928.

Hearing Granted by Supreme Court Jan. 17, 1929.

1. Wills ⚷69—"Will" is instrument legally and intentionally disposing of property, to become effective only after death.

A will is an instrument in or by virtue of which a qualified person legally and intentionally directs the disposition of his property, to become effective only following the death of such person.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Will (Testament).]

2. Wills ⚷94—Will need not use any particular form of words, but must of itself or with surrounding circumstances unmistakably express animus testandi.

Though no particular form of words need be used in a will, it must be readily discernible therefrom that primary purpose of testator is to make a will, and that either in or of itself, or in connection with circumstances surrounding its execution, the very paper or document be clearly, unmistakably, and with legal certainty expressive of the animus testandi.

3. Wills ⚷88(1)—Instrument entitled "Marriage Contract," signed by decedent and intended wife, reciting agreement as to disposition of property in case of death, held not probatable as will.

Instrument entitled "Marriage Contract," signed by decedent and his intended wife, reciting that parties were to be married on the day following, and that it was agreed that, if decedent predeceased wife, she should be entitled to a life estate in one-third of his estate, with remainder to certain of his children by a former marriage, and that remaining two-thirds of his estate should be divided equally among such children, followed by provisions relating to disposition of intended wife's property, if she predeceased him, *held* not entitled to probate as decedent's will, animus testandi being lacking.

Appeal from Superior Court, Los Angeles County; Walter J. Desmond, Judge.

Proceeding by George E. Heuler for the probate of the will of George T. Heuler, deceased, opposed by Christina Heuler, contestant. From an order admitting the will to probate, contestant appeals. Reversed.

Merriam, Rinehart & Merriam, of Pasadena, for appellant.

Horace S. Wilson and Constan Jensen, both of Los Angeles, for respondent.

HOUSER, J. This is an appeal from an order admitting to probate, as the last will of George T. Heuler, deceased, a certain document denominated a "marriage contract."

[1, 2] Before considering the contents of the writing in question, it may be well to freshen the recollection with reference to the prevailing legal principle which may be applicable to the situation herein presented: A will is an instrument in or by virtue of which a qualified person legally and intentionally directs the disposition of his property, to become effective only following the death of such person. Although in its preparation it is unnecessary that any particular form of words be used, it is indispensable that it may be readily discernible therefrom that the primary purpose of the testator be that he make a will, and that either in and of itself, or in connection with circumstances surrounding its execution, the very paper or document be clearly, unmistakably, and with legal certainty, expressive of the animus testandi, or intention of the maker thereof to give direction for the disposition of his property after his death. Estate of Henning, 186 Cal. 307, 199 P. 39; Estate of Lowe, 178 Cal. 111, 172 P. 583; In re Keith, 173 Cal. 276, 159 P. 705; Estate of Meade, 118 Cal. 428, 50 P. 541, 62 Am. St. Rep. 244; In re Richardson, 94 Cal. 63, 29 P. 484, 15 L. R. A. 635; In re Major's Estate (Cal. App.) 264 P. 542; Estate of Beffa, 54 Cal. App. 186, 201 P. 616.

With so much in mind, and for the purpose of determining its legal effect so far as its testamentary qualities are concerned, the instrument which was presented for probate herein may be considered. It was in German script, dated and written by Heuler, signed by him and his intended wife, and later "witnessed" by two persons. The English translation of the document follows:

"Marriage Contract.

"The following agreement between George T. Heuler, on the one part, and Christina Wagner on the other part, was effected on Monday, the 4th of January, 1909. George T. Heuler is entering the state of matrimony on Tuesday, the 5th of January, 1909, after this mutual, and legally witnessed agreement. If George T. Heuler departs from this life first, so shall Christina Wagner receive her legal third share only under the following conditions. After an honest, conservative estimate shall the third part of my estate be converted into cash and given over to a trust company where Christina Wagner may draw the interest thereof every six months until the end of her life.

"The other two-thirds shall be divided equally among my three children out of my first mar-

---

★Hearing granted. 278 P. 1031.

riage, or their heirs, on their survivors. Also, shall my three children, George, Leo, Erna, after the death of the above mentioned Christina Wagner, receive the above mentioned capital.

"If, on the other hand, Christina Wagner departs from this life before George T. Heuler, so shall George T. Heuler, her husband, inherit all moveable property which she now owns or shall own, without reservation, without interference from her relatives.

"[Signed] George T. Heuler.
"(——) Christina Wagner."

At the time the document herein was executed George T. Heuler was an unmarried man of the age of 59 years. Prior to the execution of the instrument, Heuler had been twice married—first, to a woman by whom later he had three children, including the appellant herein; and, secondly, to another woman by whom he had one child. From each of such women he had been divorced. It was his expectation that on the day following the date of the "marriage contract" he would marry the woman with whom he was making what may be termed the antenuptial agreement. After this agreement was executed, Heuler sent a copy thereof to each of his three children by his first wife. The record does not affirmatively disclose that Heuler ever spoke of the document as constituting a will. To the contrary, his widow testified that she never heard him refer to the instrument as his will. She further testified in part:

> "He came in the kitchen and told me to sign that, and he didn't give me a chance to read it."

At the time when the "marriage contract" was executed, Heuler said nothing to Mrs. Heuler about making a will, nor did he at the time of its execution or at any time thereafter ask her to make a will. Some 15 years after the instrument in question was executed, Heuler personally dictated another instrument purporting to be a will, but which, because of defects in the manner of its attestation by witnesses, was refused probate. The opening statements of that will were:

> "This is my last will and testament. I hereby name my son George E. Heuler as executor of my will and property, personal and real estate, stocks, bonds, etc. The property is to remain intact and the income thereof of my entire property and belongings is to defray the living expenses of my wife, Mrs. Christina Heuler, born Christina Wagner, until her death."

Prior to the time when the last-mentioned instrument was signed by Heuler, on several different occasions, he spoke of the advisability, if not of the necessity, of his making a will, in order not only that his wife might be adequately protected, but as well for other purposes.

Considering the instrument itself, together with the evidence relating to its execution as hereinbefore outlined, it would appear that, with the possible exception hereinafter noted, in no case in the state of California has the court, in announcing appropriate legal principles or conclusions, gone so far as to indicate that the document in question should be regarded and probated as a will. To the contrary, both the Supreme Court and the Appellate Courts of this state have been most consistent in declaring that documents much stronger in language, executed in circumstances far more favorable to a conclusion of "animus testandi" on the part of the maker thereof, failed to comply with the requirements necessary to the establishment of a legal will. A reference to some of the authorities may be helpful.

In the case entitled In re Richardson, 94 Cal. 63, 29 P. 484, 15 L. R. A. 635, it appears that a man wrote a letter to his sister, a copy of which is as follows:

> "Los Angeles, Cal., October 1, 1890.
>
> "Nina—I wrote you yesterday, hastily; answer my letter at once; I want to know everything about mother, and all about you—your children. I have reached the point of perfect independence, pecuniarily. My health is probably ruined, and I want to anticipate possibilities. You and your children get everything. Your boy I want given the best of educations. I would like him to go to Harvard. I would like to have him a lawyer; don't bring him up a prejudiced Southerner; but teach *honor; make it dearer than life*, and he must, with the blood in his veins, be a man. Write me. As soon as I possibly can, I will be in Savannah. Brother."

Regarding the sufficiency of the document as a legal will, the following excerpts are taken from the opinion of the Supreme Court:

> "The language of the letter which is propounded as the last will and testament of the deceased is not, to our minds, testamentary in its character.
>
> "There is nothing in the circumstances and surroundings of the writer which unmistakably evince that it was his intention that the letter in question should be a testamentary disposition of his estate. * * *
>
> "He was not in extremis, nor is there anything to show that he contemplated immediate or very proximate dissolution, which might necessitate a final disposition of his estate. * * *
>
> "It is not for courts to declare that to be a testamentary disposition of his estate when it does not clearly appear that such was the intention of the individual executing it."

In each of several other California cases the language appearing in the document itself, as well as attendant circumstances, were at least as expressive of "animus testandi," as were the words and the conduct of George T. Heuler in the instant case. Nevertheless each of such documents was refused probate as a will. In this connection, attention is specially directed to Estate of Meade, 118 Cal. 428, 50 P. 541, 62 Am. St. Rep. 244; Estate of Anthony, 21 Cal. App. 157, 131 P.

96; In re Major's Estate (Cal. App.) 264 P. 452; Estate of Seiler, 176 Cal. 771, 170 P. 1138, 179 P. 389; Estate of Henning, 186 Cal. 307, 199 P. 39. See, also, Estate of Branick, 172 Cal. 482, 157 P. 238; Estate of Wheatley, 184 Cal. 399, 193 P. 934; Estate of Scott, 128 Cal. 57, 60 P. 527.

Although not set forth in the opinion, from the record in Estate of Lowe, 178 Cal. 111, 172 P. 583, it appears that the facts were somewhat analogous to those in the instant case. Therein a husband and a wife each signed an instrument purporting to be an "agreement and lease," by which the property rights of each of the parties one toward the other were "settled," and a 50-year lease of certain property was demised by the husband to the wife, with the apparently attempted proviso that, if the wife should die before the end of the term, the lease should terminate. The instrument also contained a paragraph which was strikingly similar to that which in the instant case is relied upon as showing testamentary intent. It is as follows:

> "It is understood that by reason of this settlement all the separate property of the husband will at his decease, subject to said lease, go to his children, unless otherwise disposed of by him, and all the separate property of the wife, will at her decease go to her heirs at law (cutting off the husband) unless otherwise disposed of by her."

In addition thereto, at a date several years subsequent to that of the original instrument the husband signed and appended thereto a paper of which the following is a copy:

> "It is further provided and mutually agreed by and between the said parties above named in the annexed agreement and lease, that, in addition to the same, for the better support during the lifetime of the said Louesa Lowe, his wife, that in case she shall survive the said Amos Lowe, her husband, she, the said wife, shall be allowed out of the income of the property of Amos Lowe, her husband, Twenty Dollars monthly each and every month during her lifetime, also the household goods."

In ruling upon the sufficiency of the instrument there propounded as a will, the Supreme Court said:

> "* * * The writing on its face purported to be a mere agreement between husband and wife for the support of the latter, and was annexed to an earlier writing of like character signed by the two. * * * *Manifestly the paper was not drawn and signed animo testandi*" —citing cases.

Although in Estate of Spitzer, 196 Cal. 301, 237 P. 739, the language used by the testator in a letter written by him perhaps was no stronger in its indication of testamentary intent than was that used by either of the persons in either of the authorities to which reference herein has been had, nevertheless, from evidence and declarations made by the testator in connection therewith, as well as from other surrounding circumstances, the court was of the opinion that such letter was sufficient to constitute a holographic will. See, also, Estate of Skerrett, 67 Cal. 585, 8 P. 181.

[3] Considering the language of the instrument in question in the instant case, it will be noted, first, that its author called it a "marriage contract." Thereafter, in two different places therein, the instrument was referred to as an "*agreement.*" He said "the *following agreement* * * * was effected on Monday, the 4th of January, 1909," and that he was "entering the state of matrimony on Tuesday, the 5th of January, 1909, after this mutual and legally witnessed *agreement.*" Although a later document dictated by Heuler was described by him as his "last will and testament," and by which he appointed an "executor," in no place in the instrument in question may any such words as "will," "testament," or "executor" be found. As to declarations of the author concerning the nature of the instrument here propounded as a will, we find that he was absolutely silent; whereas, in a similar connection with reference to the other instrument, the evidence shows that on several occasions preceding its attempted execution he expressed his ideas very clearly and definitely. The purport of the instrument in question is that Heuler and his intended wife, having theretofore agreed upon certain matters ("effected on Monday"), they will be married on the day following, "after this mutual and legally witnessed agreement" has been properly executed. He then attempted to reduce to writing that which theretofore had been agreed upon by him and the woman whom he expected to marry. In substance, he first said that it was agreed that, if he "departs from this life first," his intended wife should be entitled to a life estate in one-third of his estate, with the remainder to certain of his children, and that as to two-thirds of his estate it "shall be divided equally" among his three children. Then follows that part in which it was agreed that, if "Christina Wagner departs from this life before George T. Heuler, so shall George T. Heuler, her husband, inherit all movable property which she owns," etc. So far as may be readily seen, other than the word "inherit," used once only, together with the words "departs from this life," the instrument is devoid of any language which would indicate testamentary intent either on the part of its author or on the part of Christina Wagner. Assuming (even as against the evidence) that that part of the instrument in which the word "inherit" appears was the voluntary act and deed of Christina Wagner, at most it was but declaratory as to *her* intention with reference to the final disposition of *her* separate property. But it will be noted that even such language purports to deal with the property of Christina Wagner only. Manifestly, it would not be competent by *his* will for George T. Heuler to direct the disposition of the property of

Christina Wagner after her death; and there is no evidence that Christina Wagner ever considered the instrument in the light of a testamentary or other disposition of her property. It may be that by some other instrument the parties to the "marriage contract" contemplated a joint, positive direction for the disposition of the several properties of each of them after the death of either or both of them; but, in the language of some of the cases to which reference has been had, there is nothing in the *very paper itself* which clearly manifests such an intention. As indicated in Estate of Henning, 186 Cal. 307, 199 P. 39, to which attention has been directed, it is apparent that the parties were "contemplating matrimony," and that the "main question" in the mind of each of them, or at least in the mind of Heuler, was to reduce to writing that which theretofore orally "was effected on Monday" between them. With reference thereto, the statement made by the court in the somewhat similar case of Estate of Meade, 118 Cal. 428, 50 P. 541, 62 Am. St. Rep. 244, is that "such being *the principal purpose* of the writing, it should certainly *be made plain by apt words*" that incidentally he also intended the paper as his last will. Furthermore, as is also suggested in that case, it is "hardly conceivable" that a man of the apparent intelligence and education of Heuler, possessed of his evident familiarity with legal terminology ordinarily employed in the drafting of a will, would have so indistinctly and inappropriately expressed his wishes respecting the disposition of his property after his death. The language employed in the "marriage contract" is more or less appropriate to an antenuptial agreement. It is lacking in the legal requirement that, in order to constitute a will, primarily it must be clearly and unmistakably evincive of a present desire there expressed to direct the final disposition of his estate after the death of its author. It should therefore be denied probate as a last will and testament.

The order is reversed.

We concur: CONREY, P. J.; YORK, J.

In the Matter of the Estate of George T. HEULER, Deceased. ★

George E. HEULER, Petitioner and Respondent, v. Christina HEULER and Jay D. Rinehart, Administrator of the Estate of George T. Heuler, Deceased, Appellants.

(Civ. 6193.)

District Court of Appeal, Second District, Division 1, California. Nov. 20, 1928.

Hearing Granted by Supreme Court Jan. 17, 1929.

Appeal from Superior Court, Los Angeles County; Walter J. Desmond, Judge.

Merriam, Rinehart & Merriam, of Pasadena, for appellants.

Horace S. Wilson and Constan Jensen, both of Los Angeles, for respondent.

HOUSER, J. The facts herein are that after the death of George T. Heuler, on petition to the probate court by the widow of the deceased, and by her nomination, one Jay D. Rinehart was duly appointed administrator of the estate, and letters of administration were accordingly issued to him. Later, an instrument denominated a "marriage contract" was propounded as the last will and testament of the deceased, and, after a hearing thereon, said instrument was admitted to probate. Thereafter, on the stated grounds that George T. Heuler did not die intestate, and that his widow had "failed and refused" to present his will for probate, a surviving son of the deceased petitioned the probate court for an order of revocation of the letters of administration and of the said appointment of Jay D. Rinehart as the administrator of said estate. The petition was granted and an order made in accordance with the prayer thereof. It is from said last-mentioned order that this appeal is taken.

At about the same time that the appeal herein was taken, an appeal was also taken from the order admitting to probate as the last will and testament of the deceased the so-called "marriage contract" to which reference has been had. As to the last-mentioned appeal, by an opinion and judgment this day filed therein (272 P. 301), this court has determined that the "marriage contract" was lacking in essential legal requirements to constitute it a valid will; that the order admitting such instrument to probate as the last will and testament of the deceased was erroneous; and that such order should be reversed.

In view of the fact that the order from which the appeal herein was taken necessarily depended upon the legal sufficiency of the "marriage contract" as a will, and as this court has concluded that such instrument failed to comply with the legal requirements of a valid will, it follows that the foundation for the order of which complaint is here made was insufficient, and consequently that such order should be, and it is, reversed.

We concur: CONREY, P. J.; YORK, J.

---

95 Cal. App. 96

PEOPLE v. PELOIAN. (Cr. 1501.)

District Court of Appeal, First District, Division 2, California. Nov. 21, 1928.

1. Criminal law ⚷314—Mere truth of fact does not support inference of knowledge thereof; "inference" being deduction from facts proved, not conclusion on suspicion alone.

That a fact is true does not alone support an inference that a party has knowledge thereof; an "inference" being a deduction to be drawn from facts proved, not a conclusion based on suspicion alone.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Inference.]

★Hearing granted. 278 P. 1032.

2. Arson 🔑37(3) — That accused lived with wife, who owned and managed property burned, held not to support finding that he knew it was insured.

That one charged with burning insured property was living with his wife, who owned and attended to all matters relating to property, *held* insufficient to support finding that he knew it was insured, as against direct evidence to contrary.

Appeal from Superior Court, Fresno County; Denver S. Church, Judge.

Peter S. Peloian was convicted of burning insured property, and he appeals. Reversed, and new trial ordered.

N. Lindsay South, of Fresno, for appellant.

U. S. Webb, Atty. Gen., and Waldemar Augustine, Deputy Atty. Gen., for the People.

NOURSE, J. The defendant was tried upon an information in two counts, the first charging arson and the second charging "burning insured property." The jury returned a verdict of guilty on both counts, but the trial court granted defendant's motion for a new trial on count 1. From the order denying his motion for a new trial on count 2, and from the judgment of conviction, the defendant has appealed on a typewritten record.

On the night of January 31, 1928, a house situated in the city of Fresno was partially damaged by fire. The property was jointly owned by defendant's wife, in her separate right, and by her two minor children by a former marriage. For some time prior to the fire it had been managed solely by the wife of defendant, who had covered it with two policies of fire insurance in the sum of $2,000 each. The property was unoccupied at the time of the fire, but when the firemen arrived at the scene they discovered that coal oil had been sprinkled upon the walls and floors of the house and that candles had been placed in various rooms, all of which tended to convince them that the fire was of incendiary origin. Upon investigation a five-gallon can containing some coal oil was found. This can bore a yellow label, partially torn, the remaining portions of which were found inside the rear door of defendant's store. It was also shown that defendant carried coal oil for sale at his store and that he had a Ford truck for delivery purposes which had four new Fisk tires corresponding to fresh automobile tracks found in the alley behind the burned property. The state also showed that certain paper wrappers found at the fire had been delivered to the defendant's store on January 19 preceding the fire.

This is all the evidence upon which the state relies as connecting defendant with the commission of the crime. It is the contention of appellant on this appeal that it is insufficient to support the verdict, that it merely creates a suspicion that the appellant, or one of his clerks, could have, or might have, committed the crime, and that this suspicion rests entirely upon the fact that they had access to the coal oil and cartons in the store and to the key to a Ford automobile which could have made the tracks observed near the burned building. But we should add, not for the purpose of showing a conflict in the testimony, but merely to give the entire story, that the uncontradicted testimony showed that the appellant was home ill all during the night of the fire, and that on the morning of the day preceding the fire, which was a Sunday, the appellant's store was found open and that a number of customers called for service, but could find no one in attendance. We would have to strain the rule covering the weight to be given circumstantial evidence if we were to hold that the facts and circumstances in this case were "such as to exclude any other reasonable theory than that of the guilt of the accused." People v. Nagy, 199 Cal. 235, 236, 248 P. 906, 907. But, assuming for the purposes of the case that they are sufficient to show appellant's participation in the burning, we are confronted with the asserted failure of the state to prove the essential element of appellant's knowledge that the building was insured.

[1] The appellant contends that the only competent evidence in the record shows that appellant had no knowledge that the property was insured, and that the judgment must therefore be reversed. The state of the evidence is conceded by respondent, but the respondent argues that the jury could disregard all this positive evidence and draw the inference that appellant had such knowledge from the facts that the property was in truth insured, that appellant's wife owned the property, and that he was living with his wife. That a fact is true does not alone support an inference that a party has knowledge of that fact. If we might infer from the fact that a man lives with his wife he must know all the details of her private business affairs, then the jury might have drawn that inference and might have set it up against the positive testimony to the contrary. But an inference is a deduction to be drawn from the facts proved and not a conclusion based upon suspicion alone.

[2] It is conceded that knowledge of the insurance was an essential element of the crime charged in the second count, and one which the state was required to prove. The only evidence on the subject is the direct and positive testimony that appellant did not have such knowledge. To reach the verdict it was necessary for the jury to disregard this direct evidence and conclude that appellant had the knowledge from the fact that he lived with his wife, who alone attended to all the matters relating to her own property. Manifestly this is nothing more

---

🔑For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

than a suspicion that appellant might have had knowledge of this essential fact. If mere suspicion were sufficient to support a finding of an essential element of a crime, then the statutory presumption of innocence of crime would become a declaration without a consequence.

The judgment and order are reversed, and a new trial ordered.

We concur: KOFORD, P. J.; STURTEVANT, J.

---

95 Cal. App. 33

PENDELL v. THOMAS. (Civ. 5299.)

District Court of Appeal, Second District, Division 1, California. Nov. 19, 1928.

1. Trover and conversion ⚷16—Legal title is not necessary to recover for conversion of personal property.

To enable one to recover for the conversion of personal property, it is not necessary to have legal title.

2. Trover and conversion ⚷16—Owner rightfully in exclusive possession of truck could maintain action in conversion, though transfer was not in compliance with law requiring registration (Motor Vehicle Act, § 45).

Owner of truck rightfully in exclusive possession thereof had sufficient title to maintain action in conversion, though there was a failure on transfer to him to comply with Motor Vehicle Act (St. 1923, p. 525), § 45, relative to registration on sale of automobile.

Appeal from Superior Court, Los Angeles County; Ira F. Thompson, Judge.

Action by H. G. Pendell against Charles R. Thomas. Judgment for plaintiff, and defendant appeals. Affirmed.

Henry O. Wackerbarth, of Los Angeles, for appellant.

William Ellis Lady, of Los Angeles, for respondent.

CRAIL, Justice pro tem. This is an action in conversion for the value of a Ford truck. The plaintiff alleged that he was the owner and entitled to the possession of the truck, and it developed at the trial that the plaintiff had fully paid for it and had it rightfully in his exclusive possession at the time it was taken on attachment by the defendant. The plaintiff had received a bill of sale for the property and had also received the legal owner's certificate from the former owner, duly indorsed. Everything was done in order to transfer the title which should have been done, except a compliance with section 45 of the "California Vehicle Act" of 1923, and subdivision (e) thereof provides that:

> "Until said division shall have issued said new certificate of registration and certificate of ownership as hereinbefore in subdivision (d) provided, delivery of such vehicle shall be deemed not to have been made and title thereto shall be deemed not to have passed and said intended transfer shall be deemed to be incomplete and not to be valid or effective for any purpose." St. 1923, p. 525.

It is the contention of appellant that plaintiff's title was not such as would enable him to bring an action in conversion.

[1, 2] It will be observed that the plaintiff not only had possession of the property, but that he had a right to its possession; also that he was the equitable owner of it. To enable one to recover for the conversion of personal property it is not necessary to have legal title. A person in the actual and rightful possession is entitled to maintain such an action, even though upon a transfer to him there was a failure to comply with section 45 of the Motor Vehicle Act. Moody v. Goodwin, 53 Cal. App. 693, 200 P. 733.

By way of analogy, we refer to the following cases: Goodman v. Anglo-California Trust Co., 62 Cal. App. 702, 217 P. 1078; Davis v. Cline, 184 Cal. 548, 195 P. 42; Sidney v. Wilson, 67 Cal. App. 282, 227 P. 672; Boles v. Stiles, 188 Cal. 304, 204 P. 848—all of which had to do with the failure to have the automobile registered upon a sale in accordance with said act. The fact that the plaintiff was the equitable owner of the car, coupled with his physical possession thereof at the time it was taken from his custody by defendant, is a sufficient compliance with the rule requiring not merely possession, but a right to possession, in order to maintain the action. Sidney v. Wilson, 67 Cal. App. 282, 227 P. 672.

Judgment affirmed.

We concur: HOUSER, Acting P. J.; YORK, J.

⚷For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

95 Cal. App. 106

ECONOMY HOME BUILDERS, Inc., v. BERRY et ux. (Civ. 3631.)

District Court of Appeal, Third District, California. Nov. 21, 1928.

Hearing Denied by Supreme Court Jan. 17, 1929.

1. Appeal and error 🔑1071(5)—Inconsistency between court's finding and appellee's statement need not be considered, where other findings justified by evidence are sufficient to support judgment.

Court's finding attacked as inconsistent with statement of appellee need not be considered, where other findings fully justified by evidence are sufficient to support judgment.

2. Mortgages 🔑280(5)—Agreement to assume and pay mortgage is not inconsistent with deed of property subject to mortgage, and hence may be shown by parol evidence.

An agreement to assume and pay a mortgage is not inconsistent with a deed reciting that the property is granted subject to a mortgage, and hence may be shown by parol evidence.

3. Appeal and error 🔑882(17)—Plaintiff alleging that it assumed and agreed to pay unpaid balance of principal under trust deed could not complain on appeal that court's finding to such effect was contrary to evidence.

Where complaint in action for breach of contract to sell land alleged that plaintiff agreed to take land subject to unpaid balance under trust deed, which was then incumbrance on land which plaintiff assumed and agreed to pay to such extent, and answer alleged that plaintiff agreed to pay such balance, plaintiff could not complain that finding that he agreed to pay trust deed was not supported by evidence.

4. Trial 🔑396(1)—Finding contrary to fact alleged by both parties would be of no effect.

Mere finding contrary to a fact alleged by both parties would be of no effect.

5. Vendor and purchaser 🔑185—Purchaser having failed to pay, reimburse vendors, or deposit in escrow amount of installments due under trust deed assumed, vendors were not required to proceed further.

Where purchasers not only failed to pay installments due under trust deed assumed as required to protect vendors' title, but failed to reimburse latter for payment made by them or deposit amount in escrow, vendors were not required to proceed further.

6. Escrows 🔑9—Evidence held to warrant finding that escrow holder was unable to comply with terms of escrow because of purchaser's default.

Vendors' testimony that purchaser's agent said he could not give trust deed with clear title and believed he would have to let thing go, together with evidence of purchaser's repeated failures to comply with terms of contract, *held* to warrant finding that escrow holder was unable to comply with terms of escrow because of purchaser's default.

7. Appeal and error 🔑1011(1)—Judgment for vendors in purchaser's action for breach of contract will not be reversed on ground that vendor prevented purchaser from carrying out sales campaign by disparaging its good faith and financial standing in conversations with purchasers of lots, where court found against contention on conflicting evidence and complaint presented no such issue.

Judgment for defendants, in action for breach of contract to sell land, will not be reversed on ground that defendant prevented purchaser from carrying out sales campaign by disparaging its good faith and financial standing in conversations with purchasers of lots, where court found against such contention on conflicting evidence and complaint presented no such issue.

Appeal from Superior Court, Los Angeles County; W. C. Doran, Judge.

Action by the Economy Home Builders, Inc., against Thomas Berry and wife, who filed a cross-complaint. Judgment for defendants, and plaintiff appeals. Affirmed.

Leo D. Daze and I. Henry Harris, both of Los Angeles, for appellant.

Frank R. Carrell and Dana R. Weller, both of Los Angeles, for respondents.

FINCH, P. J. The plaintiff brought this action to recover damages for alleged breach of contract to sell it 10 acres of land, which, together with two adjoining tracts, it planned to subdivide and sell as city residence lots. In addition to answering the allegations of the complaint, the defendants filed a cross-complaint to quiet their title to the land. Judgment was entered in favor of the defendants, quieting their title and denying any relief to the plaintiff. The plaintiff has appealed. The appellant did not file a reply to the respondents' brief or appear at the time fixed for oral argument, and the appeal was ordered submitted on the plaintiff's opening brief and the respondents' reply thereto.

December 19, 1923, L. M. Moore, acting for and on behalf of the plaintiff, entered into an agreement with the defendants, evidenced by contemporaneous escrow instructions, by the terms of which the defendants agreed to sell and convey to the plaintiff, within 30 days from the date thereof, the land in question for $33,750, of which $5,000 was to be deposited in escrow, together with plaintiff's two promissory notes, one for $14,375 payable in 90 days, and the other for $8,375 payable in 180 days. The property was to be taken subject to a trust deed given to secure a note in favor of Carrie A. Culler, on which there was an unpaid balance of $6,000 which the plaintiff agreed to pay. Time was expressly made of the essence of the contract. The plaintiff deposited in escrow, in lieu of a cash deposit, a check for $5,000, drawn by M. McManus on a bank in Maine. The escrow hold-

★Hearing denied by Supreme Court.

er forwarded the check for collection, and it was returned marked, "No account." The plaintiff was given immediate possession of the land, and it proceeded to subdivide it, in connection with said two adjoining tracts, and to make improvements thereon. The trial court found:

> "That plaintiff, or the said L. M. Moore, neglected and failed to pay the said sum of $5,000, * * * and on or about January 29th, 1924, * * * the said agreement to purchase was amended and modified in these respects only: The time limit for performance of the terms of said agreement was extended from January 19th, 1924, to February 19th, 1924, and the said promissory notes and trust deed securing the same were dated January 19th, 1924, instead of December 19th, 1924.
>
> "That plaintiff, or the said L. M. Moore, failed and neglected to pay the sum of $5,000 upon the purchase price of said real property * * * on or before February 19th, 1924, and on said last-mentioned date the said agreement of purchase was again modified as follows: Defendants agreed to accept, and plaintiff agreed to pay as a down payment for said real property, the sum of $2,000 and the further sum of $500 on or before May 19th, 1924, and the balance by executing to defendants two promissory notes for $12,625 each, one payable on July 3rd, 1924, and the other payable on August 20th, 1924, with interest at 7 per cent per annum quarterly, from February 19th, 1924, and secured by second trust deed upon said premises, subject only to a prior trust deed in favor of Carrie A. Culler, having an unpaid balance of $6,000, which plaintiff agreed to assume and pay in accordance with its terms, with interest from February 19th, 1924, * * * and on said February 19th, 1924, escrow was made at the Title Insurance & Trust Company, Los Angeles, California, in accordance therewith; and defendants executed a good and sufficient grant deed conveying the title to said real property to plaintiff, and deposited the same in said escrow for delivery to the plaintiff upon the performance by plaintiff of the terms of the aforesaid agreement to purchase, and of the terms of said escrow.
>
> "That plaintiff, or the said L. M. Moore, failed and neglected to pay the said sum of $500 * * * on or before May 19th, 1924, * * * and on or about June 9th, 1924, defendants again consented and agreed to an extension of the time limit for performance of the terms of said contract and of said escrow from May 19th, 1924, to July 3rd, 1924, upon the payment to them by the plaintiff of the said sum of $500 upon said purchase price, and interest thereon to May 19th, 1924; to which plaintiff consented and agreed, and the escrow instructions were modified accordingly.
>
> "That on or about the 11th day of June, 1924, a payment upon said trust deed in favor of Carrie A. Culler in the sum of $2,500 became due and payable, and defendants notified plaintiff thereof; that the plaintiff, or the said L. M. Moore, failed and neglected to make said payment on said trust deed, * * * and defendants were obliged and compelled to make, and did make, said payment in order to protect their interest in said property, and to avoid foreclosure proceedings thereon.
>
> "That plaintiff, or the Title Insurance & Trust Company, for plaintiff, did not deliver or offer to deliver to defendants the promissory notes for $12,625 each, as aforesaid, secured by trust deed, together with certificate of title in accordance with said agreement, and the same were never delivered or tendered to defendants, or either of them, and the said Title Insurance & Trust Company, escrowee, as aforesaid, was unable to comply with, and did not comply with the terms of said escrow on or before July 3rd, 1924, by reason of plaintiff's said default; and in addition thereto, plaintiff allowed and suffered several mechanics' liens, attachments and other instruments affecting the title to said real property to be filed and recorded. That on July 5th, 1924, * * * defendants declared the said agreement to purchase terminated and at an end, and in accordance with the terms of their said escrow instructions, as approved by plaintiff, demanded in writing of the Title Insurance & Trust Company, the return to them of the deed theretofore executed and delivered into said escrow, and on said date the said deed was returned and delivered to defendants.
>
> "That at all times during the life of said agreement * * * defendants were ready, able and willing to perform, and did perform, all the terms, conditions and requirements of said agreement for sale by them to be performed, and performed and complied with all the terms and requirements of the said escrow, * * * and acted in good faith throughout the entire transaction."

[1] The court further found that—

> "Plaintiff entered into contracts with prospective purchasers for the sale of lots in said tract, and for the erection of houses and furnishing the same, and collected large sums of money from such purchasers, a portion of which sums so collected was used in the construction of houses and other improvements upon the property of these defendants; that no money of the plaintiff was used either in paying the purchase price of the property to the defendants or in placing the improvements upon said property, except such as was collected from the purchasers of lots in the proposed tract, with the exception of the sum of $1,500. * * * That the officers and promoters of the plaintiff corporation also withdrew from the moneys received by plaintiff from purchasers of lots sums aggregating in excess of $7,000, and used the same for their own purposes."

Appellant attacks this last finding on the ground that it is "directly opposed to the statement of the defendant Berry" to the effect that he had received certain moneys from the plaintiff. There appears to be no inconsistency between the statement and the finding, because the moneys paid to Berry may have been received by plaintiff from the sale of lots, but the finding need not be further considered, as the other findings, which are fully justified by the evidence, are sufficient to support the judgment.

[2-4] It is contended that the finding that the "plaintiff agreed to pay the Culler trust deed is contrary to the evidence, in that it appears from the escrow agreement * * * that the plaintiff herein was to take the land

subject thereto." The defendant Thomas Berry testified that the plaintiff promised to make the payment promptly which was to become due June 11, and there is no contention that plaintiff paid the same at any time or tendered the defendants the amount they were compelled to pay on account of the plaintiff's failure in this respect.

> "It is well settled by the authorities that an agreement to assume and pay a mortgage is not inconsistent with a deed reciting that the property is granted subject to a mortgage. Consequently such an agreement may be shown by parol evidence." White v. Schader, 185 Cal. 606, 607, 198 P. 19 (21 A. L. R. 499).

The plaintiff is in no position to complain that the finding in question is not supported by the evidence, because the complaint alleges that it agreed to take the land subject "to the unpaid balance of $6,000 principal of a trust deed for $8.500 * * * which was then an incumbrance on said land which plaintiff assumed and agreed to pay to the extent of the unpaid balance of $6,000." The answer of the defendants also alleges that the plaintiff agreed to pay this unpaid balance. Any finding contrary to a fact alleged by both parties would be of no effect. Welch v. Alcott, 185 Cal. 731, 754, 198 P. 626; Coulter Dry Goods Co. v. Wentworth, 171 Cal. 500, 507, 153 P. 939; Robison v. Mitchel, 159 Cal. 581, 591, 114 P. 984; De Leonis v. Walsh, 140 Cal. 175, 182, 73 P. 813; Gamache v. South School District, 133 Cal. 145, 147, 65 P. 301.

[5] Prompt payment of the installments as they fell due under the Culler trust deed was necessary for the protection of the defendants' title. Plaintiff not only failed to make payment thereof but failed to reimburse defendants for the payment made by them or to deposit the amount thereof in escrow. Under such circumstances, the defendants were not required to proceed further.

[6] The defendant Thomas Berry testified that on July 3d Moore said "he couldn't give the trust deed with a clear title on account of the liens and attachments," and that, later in the day, "he said he believed he would have to let the thing go." The foregoing evidence, read in the light of the plaintiff's repeated failures to comply with the terms of the contract, as they were modified from time to time, fully warrants the finding that the Title Insurance & Trust Company was unable to comply with the terms of the escrow by reason of the plaintiff's default.

[7] Appellant contends that Mr. Berry prevented it from successfully carrying out its sales campaign by disparaging its good faith and financial standing in his conversations with purchasers of lots; "that he then and there intended to prevent the plaintiff realizing on its option contracts, and made every possible effort to frustrate its sales campaign." Plaintiff introduced evidence tending to show the truth of this charge, but the defendant Berry contradicted such evidence in so far as it tended to prove him in fault, and the court found against the contention. It may be said further that the complaint presents no such issue.

Other points made by the appellant are not deemed of sufficient merit to require discussion. It clearly appears from the evidence that the plaintiff had embarked upon an undertaking which it was financially unable to carry out, and, by reason of its failure to comply with the terms of the contract between the parties, the defendants rightfully refused further extensions of time.

The judgment is affirmed.

We concur: PLUMMER, J.; HART, J.

---

94 Cal. App. 498

NITTLER et al. v. CONTINENTAL CASUALTY CO. et al. (Civ. 6375.)

District Court of Appeal, First District, Division 2, California. Nov. 21, 1928.

Hearing Denied by Supreme Court Dec. 24, 1928.

1. Appeal and error 🔑1170(3)—Error in rulings on pleadings must have resulted in miscarriage of justice to warrant reversal (Const. art. 6, § 4½).

To secure reversal on appeal for error of court in rulings in pleadings, party must, under Const. art. 6, § 4½, show that error resulted in miscarriage of justice.

2. Appeal and error 🔑1170(3)—Appellate court may rest its decision on findings, where defects in complaint have been cured and defendant proceeded to trial after overruling of demurrer (Const. art. 6, § 4½).

Where defendant, after overruling of demurrer to complaint, proceeded to trial, and findings disclose that alleged infirmities of complaint have been cured, appellate court may, under Const. art. 6, § 4½, rest its decision on the findings.

3. Appeal and error 🔑835(2)—Claim that recovery on real estate broker's bond should be limited to amount received for leasehold interest could not be considered on rehearing, where point previously presented was that there was no sale of real estate.

Claim that recovery on real estate broker's bond should be limited to amount received for exchanged leasehold interest, which was traded, together with gasoline station, could not be considered on rehearing, where there was no evidence of separate value of the lease, and the point raised on the original hearing on appeal was that the value of the leasehold interest was only nominal, so that there was not a sale of real estate.

★Hearing denied by Supreme Court.

4. Appeal and error 🔑835(2)—Point first raised in petition for rehearing need not be considered.

District Court of Appeal is not required to consider a point raised for the first time in the petition for rehearing.

Appeal from Superior Court, Alameda County; J. D. Murphey, Judge.

On petition for rehearing. Petition denied. For original opinion, see 271 P. 555.

Redman & Alexander, of San Francisco, for appellant.

Stanley Sterne, of Oakland, for respondents.

PER CURIAM. [1, 2] In appellant's petition for a rehearing, and in the brief of amicus curiæ in support thereof, criticism is made of the opinion heretofore filed herein on the matter of the demurrer to the complaint. It is argued that the complaint was demurrable, because it failed to allege that the broker was acting for a compensation, or that the money was received as a result of a real estate transaction. We are inclined to the same view, and, if we had been sitting in the trial court, we would probably have sustained the demurrer and required an amendment of the complaint. But when the point is raised on appeal, after answer and trial, this court is in a different position from what the trial court was in at the time of the ruling on the demurrer. Here it is necessary for the appellant to show that "the error complained of has resulted in a miscarriage of justice." Section 4½, art. 6, Constitution. And, before we can reverse a case because of such claimed error, we must be satisfied that it has resulted in a miscarriage of justice after we have examined the entire cause, including the evidence. When, therefore, the defendant has answered and gone to trial after his demurrer has been overruled, and the findings of fact disclose that the alleged infirmities of the complaint have been cured, we may rest our decision on the findings, particularly where, as here, the appellant has failed to show that the evidence was not received without objection.

[3, 4] It is also argued that, in any event, the recovery on the bond should be limited to the amount received for the exchange of the leasehold interest. But the appellant has not shown that the issue was raised in the trial court. It has been raised here for the first time in this petition for a rehearing. The point argued in the briefs was that the value of the leasehold interest was so small that the entire transaction should be deemed to have been a sale of the personalty, and not a real estate sale under the act. The respondent testified that he inventoried the personalty at $1,300. The total sale price was $1,700. We took the view, on the point raised, that the value of the lease was substantial, and brought the transaction under the act. But there was no evidence on the value of the lease because the matter was not put in issue. We are not required to consider a point raised for the first time in a petition for rehearing.

The petition is denied.

---

95 Cal. App. 79

YOUNG v. LO PRESTI. (Civ. 3471.)

District Court of Appeal, Third District, California. Nov. 20, 1928.

1. Account stated 🔑19(3)—Evidence of former transaction between parties held sufficient to establish basis for new obligation represented by account stated.

In action on account stated, evidence of former transactions between parties *held* sufficient to establish basis for new obligation represented by account sued on.

2. Account stated 🔑19(3)—Transactions between parties, from which relation of debtor and creditor has arisen, and mutual assent that specific amount which debtor expressly or impliedly agrees to pay is due, is sufficient proof of account stated.

All that is required in proof of an account stated is that transactions have occurred between parties from which relation of debtor and creditor has arisen, and that they have assented that specific amount is due which debtor by express or implied promise agrees to pay.

3. Account stated 🔑8—Items of original accounts are not proper subject of inquiry in action on account stated.

Items of original accounts are not proper subject of inquiry in action on account stated.

4. Account stated 🔑5—Promise to pay on future contingency, coupled with acknowledgment of definite and subsisting indebtedness, is sufficient to establish account stated.

Promise to pay need not be absolute or unconditional to give rise to account stated; promise to pay on some future contingency being sufficient if coupled with acknowledgment of definite and subsisting indebtedness.

5. Account stated 🔑19(3)—Evidence of admission of specific sum due, failure to deny indebtedness therefor, and statement of desire to pay it though without money at time, held to establish account stated.

Evidence of defendant's admission that he owed specific sum sued for, his receipt of letter claiming such amount to be due from him, his failure to deny that he owed such sum in discussing account and letter with plaintiff's agent, and statement that he would like to pay it though he did not have money at that time, *held* sufficient to establish account stated on which right of action accrued when conditions extending time of payment failed through no fault of plaintiff.

6. Account stated 🔑5—Fruit grower's reference to possible credit of freight rebates which marketing corporation undertook to collect for him held not to affect latter's right to recover on account stated for moneys advanced.

Fruit grower's statement to marketing corporation's agent that he would like to have payment of his debt for advances go over to next season's business, and that any amount due from the railroad on claim for freight rebates would lessen amount owed, since marketing corporation was attempting to collect it for him, left no uncertainty as to amount due barring recovery on account stated; such claim being mere chose in action in which corporation was not concerned.

7. Account stated 🔑6(1)—Failure to deny amount claimed to be due within reasonable time may constitute "affirmance" of claim establishing account stated.

Failure to deny amount claimed to be due within reasonable time may constitute "affirmance" of claim and thereby become account stated.

[Ed. Note.—For other definitions, see Words and Phrases, First, Second and Third Series, Affirmance.]

8. Account stated 🔑18(2)—Variance between allegation of complaint and evidence as to when account was stated held not fatal.

Variance between allegation of complaint that stated account occurred on or about November 19, and evidence that letter claiming amount was mailed December 9, and that amount was specifically acknowledged in following January, *held* not fatal, where there was no controversy over mere question as to date of agreement and no items of account were incurred after date alleged in complaint; mere date of agreed account being immaterial.

9. Appeal and error 🔑1039(13)—Variance between pleading and proof as to immaterial date of transaction is not prejudicial or reversible error.

When the mere date of a transaction is not material, variance in proof in that regard is neither prejudicial nor reversible error.

10. Account stated 🔑19(3)—Failure to show agreement on first of two dates found by court was immaterial, in action on account stated, where evidence supported finding as to later date.

Where court found that account was stated "on or about the 19th day of November, 1925, and in the month of January, 1926," and evidence showed that agreement occurred in early part of January, 1926, failure to show such agreement on November 19, 1925, was immaterial.

11. Appeal and error 🔑1039(13)—Cause will not be reversed for immaterial discrepancy between pleadings and findings as to mere date of transaction.

Cause will not be reversed for an immaterial discrepancy between pleadings and the findings as to the mere date of a transaction.

Appeal from Superior Court, Madera County; Stanley Murray, Judge.

Action by Alex J. Young, Jr., against G. Lo Presti. Judgment for plaintiff, and defendant appeals. Affirmed.

Barcroft & Barcroft, of Madera, for appellant.

Heller, Ehrman, White & McAuliffe, of San Francisco, for respondent.

R. L. THOMPSON, Justice pro tem. This is an action upon an account stated. The defendant appealed from a judgment of $660.67 in favor of the plaintiff.

Dennis, Kimball & Pope, Inc., of the state of New York, is a fruit-marketing corporation. In October, 1925, through its California agent, this corporation advanced $1,750 to the appellant to harvest and market his grape crop. Pursuant to agreement, six cars of grapes were shipped to this company on consignment, and sold in the New York market for the account of appellant. The complaint alleges that "on or about the 19th day of November, 1925, * * * an account was stated between Dennis, Kimball & Pope, Inc., and the defendant," in which statement it was agreed between the parties that a balance of $660.67 was due the corporation, no part of which had been paid. This account was assigned to the respondent. In proof of the stated account, Mr. Barr, the local agent of the marketing corporation, testified that on December 9, 1925, he wrote a letter to the appellant inclosing his account, together with bills of lading, which letter concluded with this language: "Also statement of your account showing a balance due us of $660.67. * * *" The witness said that in January, 1926, just after the first of the year, he visited the appellant, and he testified:

> "We discussed the deficiency that was owing to the company, * * * and he mentioned that he would like to pay although he did not have the money at that time, but he would like to carry it over until the following season, when he would make a contract with us to ship fruit to offset the balance. * * * He said that he would like to allow that to go over to next season's business, and if there was any amount of money *due from the railroad* on the claim, that that would also tend to lessen the amount that was owing us."

The court said:

> "Q. As I understand you, * * * Mr. Presti * * * asked that you allow the $660.67 to be carried over and applied on his account for the following year, and also the adjustment of the freight charges, and you agreed to that, did you? A. Yes sir."

No fruit was shipped from the appellant to the marketing corporation the following year. No freight rebates were ever paid on account of appellant's claim. There is no evidence that any such claims are due. From these facts the court found that "on or about the 19th day of November, 1925, and in the month of January, 1926, * * *" an account was stated between the parties, and an agreement reached that the sum of $660.67 was due from the appellant. Judgment was thereupon rendered for that sum.

The appellant contends that the findings and judgment are not supported by the evidence, for the reason that (1) there is no proof of prior indebtedness; that (2) there was no admission of indebtedness of a specific sum since certain rebates of freight charges were unsettled; and (3) there is a variance between the pleadings and the evidence respecting the date upon which the balance of account was alleged to have been admitted.

[1-4] The record contains evidence of former transactions between the parties sufficient to establish a basis for the new obligation represented by the account stated. Mr. Justice Shaw, in Bennett v. Potter, 180 Cal. 736, 183 P. 156, says that all that is required in proof of an account stated is "that transactions have occurred between the parties from which the relation of debtor and creditor has arisen," and that it is assented between the parties that a specific amount is due, which sum the debtor by either express or implied promise, agrees to pay. 1 C. J. 698, § 304; Auzerais v. Naglee, 74 Cal. 60, 15 P. 371. In the case of Partridge v. Butler, 113 Cal. 326, 45 P. 678, Mr. Justice Henshaw says:

> "In an action upon an account stated these averments" concerning the nature of the original contract "would have no proper place. An account stated is a mere acknowledgment of the amount of an existing liability between the parties. From it, the law implies a promise to pay the admitted amount. Thereby arises a new and independent cause of action so far that a recovery may be had without setting forth or proving the original contract or accounts, or the separate items of liability from which the balance results."

The items of the original accounts are not proper subject of inquiry upon an action for an account stated. 1 Cal. Jur. 203, § 58; 1 R. C. L. 219, § 19; Gardner v. Watson, 170 Cal. 570, 150 P. 994. "The promise to pay need not be absolute or unconditional; a promise to pay upon some future contingency is sufficient if coupled with an acknowledgment of a definite and subsisting indebtedness." 1 C. J. 698, § 302. In the present case the evidence of appellant's admission that he owed the specific sum of $660.67 is sufficiently definite. In December, 1925, he received a letter in which it was claimed that this amount was due from him. The following month the agent of the marketing corporation visited him, and, in discussing this account and the letter mentioning the specific balance, he did not deny that he owed the sum stated. Upon the contrary, he said: "He would like to pay (it) although he did not have the money at that time." This is a definite acknowledgment that he owed that specific sum, coupled with a request to extend the time for payment. The conditions extending the time of payment failed through no fault of respondent, and the right of action upon the account stated then accrued.

[5] The appellant, however, contends that there was no agreement to pay a specific sum, for the reason that there was a reservation on his part to the effect that he was to obtain credit for an unsettled claim for rebate of freight charges. But the marketing corporation did not owe this claim for rebate of freight charges. If any such valid claim existed, that was an obligation due the appellant from the railroad company, with which the respondent was not concerned, except that, after the balance of the indebtedness had been agreed upon between the parties, as a matter of accommodation, the agent suggested that this claim might be collected through their claim department. The collection of this claim in no way affected the amount which was due to respondent. It was a mere chose in action for the claim of appellant against the transportation company, in which the respondent was not concerned. There was not even a definite statement on the part of appellant that it was due. After tacitly agreeing to the amount which he admitted was due the respondent, and requesting a delay in the payment thereof, the appellant suggested that, if the marketing company succeeded in collecting anything on his claim for a rebate of freight charges, that sum might be credited on the amount which was due from him. Mr. Barr testified that the appellant said he would like to have the payment of his debt "go over to next season's business, and *if there was any amount due from the railroad on the claim*," that would tend to lessen the amount of money he owed, since respondent was attempting to collect it for him. So far as the evidence discloses, no such freight charges were ever allowed or paid up to the time of the trial of this cause in February, 1927. Mr. Barr had no knowledge of the validity of this claim, or of the prospect of collecting it. He was no longer employed with the marketing company. The freight claim had nothing to do with the account between appellant and respondent. In response to the statement that this claim was to be credited on the balance due from the appellant, Mr. Barr testified:

> "Q. What did you say in response to that, * * * A. I said we would receive all those papers and send them back east; that we had a claim department and would look after those things for him."

The only evidence with respect to the payment of the freight claim was the following testimony of the same witness:

"Q. Those freight charges are still pending undetermined, aren't they? A. I haven't heard from them regarding the claims. Q. So far as you know, they are still undetermined? A. Yes sir. * * * (but) I am no longer with Dennis, Kimball & Pope Company—in fact, I haven't been with them for over a year."

From the foregoing record it appears those freight claims were remote, uncertain, and in no way connected with the account which was due from appellant to respondent. Reference to this claim, and the effort to collect it through respondent's claim department, therefore, left no uncertainty regarding the amount which was due.

[6-8] Finally, the appellant contends there was a fatal variance between the allegations of the pleadings as to the exact date of the alleged stated account and the proof. The complaint did allege that the stated account occurred "on or about the 19th day of November, 1925." The letter containing the amount claimed by respondent to have been due was mailed to appellant December 9, 1925. Failure to deny the amount claimed to have been due, within a reasonable time, might constitute an affirmance of the claim and thereby become an account stated. 1 Cal. Jur. 195, § 54; 1 R. C. L. 213, § 12. The conference occurred between the parties in the early part of January, 1926, at which time the amount claimed by respondent was specifically acknowledged. At the trial there was no controversy over the mere question as to the date of the agreement. There were no items of the account incurred subsequent to the date of the stated account alleged in the complaint. Under the circumstances of this case, the mere date of the agreed account is not material. When the mere date of a transaction is not material, the variance in proof in that regard is neither prejudicial nor reversible error. Amador Gold Mine v. Amador Gold Mine, 114 Cal. 346, 46 P. 80; Bancroft Co. v. Haslett, 106 Cal. 151, 39 P. 602; Thomas v. Jameson, 77 Cal. 91, 19 P. 177; Biven v. Bostwick, 70 Cal. 639, 11 P. 790; Atwood v. So. Cal. Ice Co., 63 Cal. App. 343, 346, 218 P. 283.

[9-11] When the variance is not material, the trial court may direct findings in accordance with the proof as to the fact. Section 470, Code Civ. Proc. This the court did in the present case. The court found that, "on or about the 19th day of November, 1925, and *in the month of January 1926*," the account was stated between the parties. The evidence fails to show such an agreement on November 19, 1925, but this is immaterial, provided there was also another subsequent agreement as to the same amount due. The evidence does support the finding that this agreement occurred "in the early part of January, 1926." This is sufficiently accurate for the purposes of this cause, and supports the findings and judgment. A cause will not be reversed for an immaterial discrepancy between the pleadings and the findings as to the mere date of a transaction. Thomas v. Jameson, supra.

The judgment is therefore affirmed.

We concur: HART, Acting P. J.; PLUMMER, J.

---

95 Cal. App. 182

TEATER v. JOHNSON et al. (Civ. 3632.)

District Court of Appeal, Third District, California. Nov. 26, 1928.

1. Taxation ⚿810(3)—Evidence held sufficient to support finding that no notice of tax sale was sent to owner of portion of land (Pol. Code, § 3897).

Evidence *held* sufficient to support finding that no notice of tax sale, which under Pol. Code, § 3897, was jurisdictional prerequisite to valid sale, was sent to owner of part of land sold.

2. Taxation ⚿341—Inclusion in assessment of two lots not belonging to owner of land assessed rendered entire assessment void.

Inclusion in tax assessment against owner of remainder of quarter section of two lots, containing 24.05 acres of land, not belonging to him, rendered entire assessment void.

Appeal from Superior Court, Riverside County; G. R. Freeman, Judge.

Action by M. M. Teater against Hope Miller Johnson and others. Judgment for plaintiff, and defendant named appeals. Affirmed.

Andrew J. Copp, Jr., of Los Angeles, for appellant.

Wilson & Snow, of Los Angeles, for respondent.

FINCH, P. J. The defendant, Hope Miller Johnson, has appealed from the judgment herein, quieting plaintiff's title to the northwest quarter of section 15, township 5 south, range 4 west, San Bernardino base and meridian, excepting lots 37 and 38 in said quarter section, said lots containing 24.05 acres of land.

Appellant claims title under a tax deed executed pursuant to a sale of the land in the year 1919 for nonpayment of the second installment of taxes levied in 1912. In the year 1912 H. L. Carnahan was the owner of the land in controversy, but he was not the owner of lots 37 and 38. The land was last assessed next before the sale to William Collier. The court found:

"That for the year 1912, the whole of the said northwest quarter of section fifteen was assessed to the said H. L. Carnahan. That said assessment was for more land than was owned by the said H. L. Carnahan and placed upon him an additional burden of taxation and subsequently an additional burden of redemption as to the amount of land which he did not own, but with which he was assessed, viz. 24.05 acres. That no notice of the time and place of the said sale of July 26, 1919, was given to the said William Collier, the then assessed owner of said property and the person entitled to receive the same."

[1] The only conflict in the evidence bearing upon the facts so found relates to the finding that notice was not given to Collier. In that connection, the tax collector testified:

> "My name is C. R. Stibbens. I am the county tax collector of the county of Riverside. I was such county tax collector in the year 1912 as well as at all times subsequently thereto. I caused a copy of the published notice of sale for nonpayment of taxes for the year 1912 on the property involved in this action, postage thereon prepaid, and registered, to be mailed to Hook Bros. at Perris, California. I mailed only one notice with respect to this land. This was by registered mail and I demanded a return receipt therefor. (Whereupon witness produced from his files and records post office return receipt No. 120.) I identify the post office return receipt for the notice so mailed, No. 120, which is in my file pertaining to this sale."

Such return was introduced in evidence and marked Plaintiff's Exhibit B. It was signed "Hook Bros.," by "J. F. Hook." On cross-examination the witness testified:

> "I testified on direct examination that I mailed only one notice of sale and that was to Hook Bros. By referring to the public records in the county assessor's office of the county of Riverside I find that the northwest quarter of said section 15, the property sold, was last assessed next before said sale in the name of William Collier, and not to Hook Bros. I do not know why Plaintiff's Exhibit B is in my file pertaining to the sale of the northwest quarter of said section 15. I do not find the return registry receipt for the notice sent by registered mail to Mr. Collier, but I know the notice was sent by registered mail, postage prepaid, and it was sent to William Collier, Perris, California. * * * I must have done so in this case, * * * but do not know whether I received any return receipt or not. My custom has always been to file the return receipt with the file pertaining to the tax sale proceedings. * * * Either no such receipt came back from Mr. Collier or else it was placed in the wrong file."

On redirect examination the witness testified:

> "I have no positive recollection of mailing any notice to Mr. Collier and the only reason I testified that I must have done so is that I always mail these notices to the last assessed owner next before the sale. Any notice that I might have sent to Mr. Collier in connection with this property would be enclosed in the same kind of an envelope as the one in which the notice to Hook Bros. was enclosed and it would have the same printed directions, to-wit: 'Return in 5 days to C. R. Stibbens, Tax Collector.'"

It cannot be said as a matter of law that the foregoing evidence is insufficient to support the finding that no notice of sale was sent to Collier. Such notice was a jurisdictional prerequisite to a valid sale by the state. Pol. Code, § 3897; Healton v. Morrison, 162 Cal. 668, 670, 124 P. 240; Joslin v. Shaffer, 66 Cal. App. 69, 72, 225 P. 307.

[2] Since lots 37 and 38 were included in the assessment to Carnahan of the northwest quarter of section 15, the trial court was justified in drawing the inference that Carnahan's assessment was increased in amount by reason of the inclusion of the 24.05 acres of land which did not belong to him. The assessment of lots 37 and 38 was so blended with the assessment of the remainder of the quarter section as to render the entire assessment void. San Pedro, etc., R. Co. v. Los Angeles, 180 Cal. 18, 27, 179 P. 393.

The judgment is affirmed.

We concur: HART, J.; PLUMMER, J.

---

95 Cal. App. 159

LINDSAY v. CITY OF LOS ANGELES.
(Civ. 3568.)

District Court of Appeal, Third District, California. Nov. 26, 1928.

Appeal and error ⚷1011(1)—Trial court's finding on conflicting evidence on length of division line between lots in disputed boundary case was conclusive on appellate court.

Trial court's finding upon conflicting evidence regarding length of division line between lots, in action to establish boundaries, was conclusive on appellate court.

Appeal from Superior Court, Los Angeles County; Wm. D. Dehy, Judge.

Action to establish boundaries of certain property and for damages for a trespass, by Robert J. Lindsay against the City of Los Angeles. From a judgment for defendant, plaintiff appeals. Affirmed.

Wilson & Snow, of Los Angeles, for appellant.

Jess E. Stephens, Herman Mohr, Wm. H. Neal, and Milton Bryan, all of Los Angeles, for respondent.

PRESTON, Justice pro tem. Plaintiff, Robert J. Lindsay, brought this action against the city of Los Angeles, to establish the boundaries of certain property owned by him in the city of Los Angeles, and also for damages for an alleged trespass thereon.

The case was tried by the court sitting

without a jury, and judgment was entered in favor of the defendant, city of Los Angeles. From this judgment, the plaintiff prosecutes this appeal.

The plaintiff and appellant is the owner of certain real property in the city of Los Angeles particularly described as lots 10 and 11 of "Fellowship Heights Tract No. 2," according to the official map of said tract, recorded in the office of the county recorder of Los Angeles county. On September 24, 1906, the city counsel of the city of Los Angeles accepted and approved a map of said "Fellowship Heights Tract No. 2," which showed thereon certain streets, including one known as "Fellowship Park Way." This street is 10 feet wide and was dedicated for public use according to said official map and accepted by the city of Los Angeles on or about September 25, 1906.

The controversy in this action is over the northerly boundary line of "Fellowship Park Way," which is also the southerly boundary, or property line, of appellant's property.

About 20 years after the city accepted the dedication of said "Fellowship Park Way," the engineers for the city of Los Angeles made a survey of said street preliminary to letting a contract for the improvement of the same, and discovered that appellant had constructed a stone wall extending into said street a distance of more than 2 feet from the northerly boundary thereof, and a fence extending in both directions from the southerly end of said stone wall in said street the full length of appellant's property.

The exact location of the boundary line between said street and said lots 10 and 11 is the precise question involved in this appeal; appellant contending that the fence which he constructed south of his property correctly marks said boundary line, while the city maintains, and the court found, that said fence is entirely within said street.

The appellant contends that the court erred in finding that the respondent's survey correctly established the northerly boundary of said street (Fellowship Park Way). This contention rests solely upon the accuracy of the indicated length of the division line between said lots 10 and 11, as appears on the recorded map of said "Fellowship Heights Tract No. 2," a copy of which map was received in evidence. The recorded map discloses that the division line between said lots 10 and 11 is marked thereon as "40.00," indicating that it is 40 feet in length. It appears that appellant relied upon the accuracy of said indicated length of said line, as measured from the northerly exterior boundary of said subdivision, and constructed his fence 40 feet southerly from said point in said northerly exterior boundary line; said fence extending in both directions therefrom.

There is abundant evidence in the record to support the court's findings that the indicated length of said division line between lots 10 and 11 is erroneous and that said division line is approximately 37 feet in length, and not 40 feet as indicated on the map.

The only evidence that appellant introduced in support of his contention that said division line between lots 10 and 11 is 40 feet in length was the figures "40.00" marked beside said line on said recorded map.

That this line is only approximately 37 feet in length seems to be almost conclusively established by other established bearings and distances constituting a complete survey of "Fellowship Heights Tract No. 2," of which appellant's property is a part, and also by the testimony of surveyors who actually made the survey of the street in dispute. We think therefore that the court was amply justified in finding that the division line between said lots 10 and 11 is approximately 37 feet, and that appellant's wall and fence are both within the street.

This case, in its last analysis, presents only a conflict in the evidence, and the findings of the trial court upon conflicting evidence are conclusive upon this court.

The judgment is affirmed.

We concur: FINCH, P. J.; PLUMMER, J.

94 Cal. App. 729

LINNARD v. SONNENSCHEIN et al.★
(Civ. No. 6411.)

District Court of Appeal, First District, Division 1, California. Nov. 10, 1928.

Rehearing Denied Dec. 10, 1928. Hearing Denied by Supreme Court Jan. 7, 1929.

1. Appeal and error 🔑989—Trial court having found against defendants in action for unlawful detainer on certain issue, appellate court need only determine whether record contains substantial supporting evidence.

Where the trial court had found against defendants in action for unlawful detainer on issue of whether defendants had equitable lease, it is only necessary for appellate court to determine whether there is any substantial evidence in the record to support the finding.

2. Landlord and tenant 🔑22(2)—It being understood that lease was to be reduced to writing and signed by parties, where such was never done, parties were not obligated.

Where it was understood between lessor and lessee that a lease was to be reduced to writing and signed by parties, and such was never done, *held*, that none of the parties were obligated thereunder.

3. Landlord and tenant 🔑118(1)—Tenant entering possession pending negotiations for lease becomes tenant at will until lease is completed.

A tenant who enters upon real property, pending completion of negotiations for lease,

---

★Rehearing denied. Hearing denied by Supreme Court.

enters it at his peril, becoming a tenant at will until the lease is completed.

4. Landlord and tenant 🔑114(1), 115(1)—Tenant having no lease, and paying rent which is accepted, becomes tenant from month to month or year to year, according to when rent is paid.

Tenant occupying property without having a lease, and paying rent which is accepted by landlord, becomes tenant at will from month to month if rent is paid monthly, or from year to year if it is paid annually.

5. Landlord and tenant 🔑291(1, 16)—Waiver of notice to quit given tenant in action for unlawful detainer rests on intent, and is a question of fact.

Waiver of notice to quit given a tenant in action by landlord for unlawful detainer rests on the intent, and is ever a question of fact.

6. Landlord and tenant 🔑291(13)—Acceptance of money, as rent accrued, after time tenant should have surrendered possession, is strong evidence of waiver of notice to quit.

Acceptance of money by landlord, as rent which accrued after time tenant should have surrendered possession of premises, is strong evidence of the landlord's waiver of notice to quit.

7. Landlord and tenant 🔑291(10)—Tenant relying on waiver by landlord of notice to quit must plead and prove facts showing actual intention to relinquish.

Tenant relying on waiver by landlord of notice to quit must plead and prove facts from which the actual intention to relinquish the right may be derived.

8. Estoppel 🔑53—Intention to waive right may be manifested by express agreement or by conduct upon which bona fide reliance is shown.

Intention to waive a right may be manifested by an express agreement, or by conduct upon which a bona fide reliance is shown to have been made.

9. Estoppel 🔑53—Waiver is presumed contrary to intention, if, by conduct, opposing party has been prejudicially misled into belief that waiver was intended.

A waiver will be presumed or implied contrary to the intention of the party, if, by his conduct, the opposing party has been misled to his prejudice into the honest belief that such waiver was intended.

10. Landlord and tenant 🔑291(13)—Evidence in unlawful detainer held to support finding that landlord did not intend waiver of notice to quit by accepting rent money.

In action by landlord for unlawful detainer of premises by tenant after having been given notice to surrender possession, where defendant was tenant at will, evidence *held* to support finding that the landlord did not intend a waiver of notice to quit by acceptance of rent from tenant, which was less than rent as demanded by landlord, where the rent accepted had no condition attached to it providing that it was full payment.

Appeal from Superior Court, City and County of San Francisco; H. D. Gregory, Judge.

Action by D. M. Linnard against S. Sonnenschein and others. Judgment for plaintiff, and defendants appeal. Affirmed.

John Ralph Wilson, of San Francisco, and Huston, Huston & Huston, of Woodland, for appellants.

Sawyer & Cluff, of San Francisco, and William O'Brien, of Pasadena, for respondent.

CAMPBELL, Justice pro tem. This appeal is from a judgment entered in favor of plaintiff and against defendants in an action in unlawful detainer.

On September 1, 1923, the plaintiff was in possession of the whole of the Whitcomb Hotel building in San Francisco under a lease for a term of years from the owner thereof. On that date the defendants entered into possession of one of the stores on the ground floor of such hotel building as subtenants of plaintiff, and continued in possession until ousted by the sheriff under judgment rendered in this proceeding in August, 1927. From the time of their entry as subtenants until May 1, 1926, the defendants paid to plaintiff as rent for the premises $100 a month and varying additional sums, being 5 per cent. of their reported sales. On March 29, 1926, the defendants were served with a notice changing the terms of the tenancy on and after May 1, 1926, and fixing the rent at $300 per month. On November 1, 1926, according to plaintiff's contention, the defendants were in default under this increased rent in the sum of $900 or thereabouts. The usual notice to quit and surrender the premises was served and ignored by defendants, who remained in possession of the premises.

The defendants admit the service of two notices, but set up as an affirmative defense that defendants entered into and remained in possession of the premises under a lease from plaintiff commencing on September 1, 1923, for five years and four months at a rental of $100 per month, plus 5 per cent. of the gross sales made by defendants from their store. The lease was pleaded in accordance with its legal effect, and it was not alleged whether it was oral or in writing. At the trial, however, it developed that the lease had never been reduced to writing, defendants contending that there had been an oral lease for five years, arranged for in conversation between plaintiff and the defendant Samuel Sonnenschein prior to the entry in 1923, and that the subsequent entry and possession of the defendants under this oral agreement was sufficient to bring the case under the rule announced in Schubert v. Lowe, 193 Cal. 291, 223 P. 550, and that the oral lease might be shown in defense of an action in unlawful detainer despite the statute of frauds. The answer alleges a number of covenants as part of the lease, including the right of plaintiff to examine defendants' books; covenants regulating assignment and underletting; entry by landlord, and that it was agreed that defendants should have the right to bid on any work in their line of business during the term of the lease that plaintiff might have in connection with the Fairmont and Whitcomb Hotels and that they should be awarded the work, if their bid was at the same price as that of any other bona fide bidder.

Two questions are involved: One, whether defendants were tenants at will, as found by the court; and, the other, did plaintiff by the acceptance of rent under the terms existing prior to the service of the notice changing the terms of the tenancy, and also after the notice to quit, waive his rights under the notices?

[1] The case of Schubert v. Lowe, supra, is authority for the position of appellants that an action of unlawful detainer partakes of an equitable suit for a forfeiture, and therefore it is proper to consider the occupation of the premises by a defendant under an oral agreement to lease as an equitable defense. The trial court, however, having found against defendants on this issue of the equitable lease, it is only necessary for us to determine whether there is any substantial evidence in the record to support the court's finding.

The testimony of Samuel Sonnenschein is that he called upon plaintiff in December, 1922, and asked for space in the Whitcomb Hotel, which was then being renovated, and offered as rent 5 per cent. of his gross sales. This offer was rejected by plaintiff as not sufficient. Sonnenschein then offered $100 per month and 5 per cent. of the sales, which was satisfactory to plaintiff, and it was agreed that the lease should run for five years. Plaintiff then referred Sonnenschein to Mr. Vail, his manager, to examine the stock and arrange details. There was also to be a glass partition between the store and the hotel lobby. There followed another conversation between Sonnenschein and plaintiff, wherein it was agreed that the proposed lease should be for five years from the time the store was ready for occupancy, and there was a discussion as to giving defendants an opportunity to figure on work in their line for the two hotels operated by plaintiff, namely, the Whitcomb and the Fairmont. In respect to the proposed lease itself, plaintiff refused to discuss the details, referring Sonnenschein to his manager, Mr. Vail; his attorney, Mr. O'Brien, and his superintendent, Mr. Mason.

Appellants rely on the case of Levin v. Saroff, 54 Cal. App. 289, 201 P. 961, wherein the elements of a valid lease are enumerated as: (1) A sufficient description of the premises; (2) a definite and agreed term; (3) an agreed rental; and (4) the time and manner of payment. It is urged that these elements were agreed upon in the conversations between Sonnenschein and plaintiff, and that no dispute arose as to the agreed terms until after the entry on September 1, 1923. True, the terms were discussed and the rent fixed at $100 per month and 5 per cent. of the gross receipts, but the time and manner of the payment of this 5 per cent. had not been discussed or considered at all—it was not decided whether it was to be paid monthly, annually, or otherwise. Furthermore, the evidence shows that the parties did not intend that their agreement should be confined to the bare essentials of a lease. The proposed agreement was to cover more than merely premises, terms, and rent. At these conversations the parties had discussed some of the essentials and details of the proposed lease, but the final details were to be worked out with plaintiff's subordinates, and when the details were finally agreed to, the agreement or lease was to be reduced to writing and signed by the parties. On the question of the lease being reduced to writing, Mr. Sonnenschein testified:

> "Q. You know you told me you were very anxious about five or six things, a number of clauses; you have set forth a number of clauses here (referring to the answer), and in the clauses you have set forth, I find there is a clause in reference—that you agreed not to assign the lease or let or underlet it. When was that agreed to? A. That was agreed—one second the time I had—
>
> "Q. When? A. —the conversation with him in the Fairmont, after December, 1923.
>
> "Q. After December, 1923? A. Yes.
>
> "Q. In other words, after you moved into the store? A. Yes, sir.
>
> "Q. All right. Now, then, I find an agreement here to the effect that you would not use or keep on the premises any articles that the insurance companies might consider dangerous? A. Mr. O'Brien wrote that down.
>
> "Q. Then this was not agreed to when you moved in? A. It was a regular form of lease, to protect Mr. Linnard.
>
> "Q. Exactly—and you considered or contemplated at the time you made the agreement that you gentlemen would change—draw a full lease, containing the usual covenants and conditions, and have that lease signed; wasn't that a fact? A. No, I expected him to give me a fifty-fifty lease.
>
> "Q. You expected a lease, and you expected him to draw it? A. Yes."

Mr. O'Brien, attorney for Linnard, testified that he prepared a lease for Mr. Linnard in April, 1923, and that he presented it to Mr. Sonnenschein, but that it was never signed by either party; that he had several subsequent conversations with Mr. Sonnenschein with reference to the proposed lease. After Sonnenschein moved into the store he had conversations with Mr. Huston, the attorney representing Sonnenschein, negotiating with relation to the lease, which negotiations continued down to 1926, and that the lease was never executed.

[2] We find the situation presented then to be that the parties agreed in the main to the provisions of the lease, but not as to all of its details and conditions, which lease it was understood was to be reduced to writing and signed by the parties, and, never having been so reduced to writing and signed by the parties as contemplated, it never became a binding and subsisting obligation upon either. As was said in Spinney v. Downing, 108 Cal. 666, 41 P. 797:

> "It is a general rule to which this case presents no exception that, when it is a part of the understanding between the parties that the terms of their contract are to be reduced to writing and signed by the parties, the assent to its terms must be evidenced in the manner agreed upon, or it does not become a binding or completed contract. This is essentially true when, as here, the proposed contract contains reciprocal stipulations and covenants upon the part of each as a consideration for the acts of the other (Ambler v Whipple, 20 Wall. 546 [22 L. Ed. 403]; Fuller v. Reed, 38 Cal. 99; Morrill v. Tehama, etc., Co., 10 Nev. 125)."

Here we have the reciprocal agreement on the part of the tenant to award to the subtenants the work in their line, if their bid be the same as that of any other bona fide bidder.

Aside from the fact that the written lease was never executed, the evidence supports respondent's contention that the terms of the lease were not agreed upon prior to appellant's entry on September 1, 1923. The witness O'Brien, employed by respondent to draft the lease, testified that the lease form had been presented shortly after the conversation of April 27, 1923, and long before the entry. "Q. What was it; do you recall the subject of that discussion? A. Well, the principal subject of discussion was whether he (Sonnenschein) should pay $100.00 plus five per cent. of the sales of the Market Street store alone, which he claimed was his arrangement with Mr. Linnard, or whether he should pay five per cent. on the sales both in the Market Street store and in the factory"—showing that there was a dispute as to what gross sales of the 5 per cent. applied, which became apparent in April, 1923, and existed at the time of the entry.

After this conversation in April, O'Brien prepared and submitted a draft of the proposed lease. That he had acceded to Sonnenschein's request for a five year and four months term, but adhered to his proposition that the 5 per cent. should apply to both store and factory sales, is evident from the draft of the lease in evidence. When this draft of the lease was presented to Sonnenschein he said he would submit it to his attorney. In so far as the record shows, the entry was made without any further negotiations or conversations whatever.

[3, 4] When a tenant enters upon real property pending the completion of negotiations for a lease, he enters at his peril. True, the entry with the consent of the lessor creates the relation of landlord and tenant, but the tenancy is merely a tenancy at will. Thereafter, if the proposed lease is completed, the tenant holds under the lease, but if the lease is not accomplished, the holding is at will, which by the acceptance of rent may become a tenancy from month to month or from year to year. If the rent is paid monthly, the tenancy becomes one of month to month, or if it be agricultural land and the rent is paid annually, the tenancy is from year to year. Phelan v. Anderson, 118 Cal. 504, 50 P. 685; Carteri v. Roberts, 140 Cal. 164, 73 P. 818.

[5-8] The "waiver" defense urged is based upon the acceptance by plaintiff of various sums on account of the rent of the premises after the notice changing the terms of the tenancy and the notice to quit. Acceptance of rent after a notice changing a tenancy or after notice to quit does not necessarily operate to waive the notice. While the unconditional acceptance by a landlord of moneys as rent, which rent has accrued after the time the tenant should have surrendered possession, will constitute strong evidence of the landlord's waiver of the notice to quit, waiver always rests on intent, and is ever a question of fact. Alden v. Mayfield, 164 Cal. 6, 11, 127 P. 45. The rule as to the constituents of a valid waiver is quoted from Ruling Case Law (27 R. C. L. 908) in Craig v. White, 187 Cal. 489, 498, 202 P. 648, 652:

> "To constitute a waiver within the definitions given, it is essential that there be an existing right, benefit or advantage; a knowledge, actual or constructive, of its existence, and an intention to relinquish it. No man can be bound by a waiver of his rights, unless waiver is distinctly made, with full knowledge of the rights which he intends to waive; and the fact that he knows his rights, and intends to waive them."

So waiver cannot be predicated upon the fact of the acceptance of rent alone. The party relying on a waiver must plead and prove facts from which an actual intention to relinquish the right may be derived. This intention may be manifested by express agreement or by conduct. If conduct is relied upon, bona fide reliance upon such conduct must also appear.

On March 29, 1926, the notice changing the tenancy and increasing the rent was served. On May 21, 1926, defendants herein commenced an action in the superior court at San Francisco seeking the specific enforcement of the alleged oral lease contended for here and claiming damages. Subsequent to the filing of that suit appellants remitted checks and statements of sales in various amounts, purporting to cover rent for the months of June, July, August, and September, 1926. These checks were certified as they arrived by the Whitcomb Hotel auditor and were ultimately cashed. The notice to quit served on October 29, 1926, recited the notice changing the terms of the tenancy, gave credit for the various amounts received on account, and demanded payment of the balance due or the surrender of the premises.

[9, 10] It is true, as stated by appellants, that a waiver will be presumed or implied contrary to the intention of the party, if by his conduct the opposing party has been misled to his prejudice into the honest belief that such waiver was intended (Thompson v. Gorner, 4 Cal. Unrep. Cas. 609, 36 P. 434); but here, prior to the notice to quit, no condition was attached to the checks, the payments being made under appellants' claim of a verbal lease evidenced by their suit pending to enforce specific performance of such lease, which lease they were protecting from forfeiture by such payments, and such claim they had knowledge was disputed by respondent. On December 20, 1926, Sonnenschein Bros. wrote Linnard inclosing a check, stating that it was "in payment of rent for the month of December, 1926, under the original lease and agreement with you, and not under the terms or conditions stated in your letter of December 11th, 1926." The letter does not refer to the alleged waiver because of accepting prior checks, but states that the inclosed check was payment under the "original lease and agreement." Obviously, this referred to the claimed equitable lease then being asserted in the action for specific performance and which was being contested and disputed by Linnard. To this letter Linnard replied, stating that appellants were well aware that the terms and conditions under which they were in possession of the premises were then the subject of litigation. "You apparently admit that in any event you owe the amount for which your check was written, and I am quite willing to give you credit for that amount upon any sums which the court may find are due to me. If you are not contented that I shall accept the sum evidenced by this check without prejudice to the position previously taken by me in respect to your tenancy and the amount of rent due thereunder, kindly advise me." After having waited a week and receiving no reply, plaintiff cashed the check. On January 25, 1927, plaintiff received a check for $117, as rent for January, inclosed in a letter stating:

> "We do not wish to complicate this situation by any agreement that might be the subject of future controversy and for that reason we will continue to remit the rents as we have in the past in accordance with the terms of our lease and whether you accept them as such rests with you. We will not consent to any acceptance of these remittances upon any other terms."

The check inclosed in this letter, attaching a condition to its acceptance, was returned. Thereafter appellants deposited the monthly checks to Linnard's credit in the Humboldt Bank at San Francisco.

It is apparent that no waiver was intended by respondent, and it is equally apparent that appellants were not misled to their prejudice. Under the evidence the court manifestly could conclude that appellants were not misled, but that the payments were made to protect their rights under their asserted equitable lease. The finding, therefore, that respondent did not waive the notices, finds support in the evidence.

The judgment is affirmed.

We concur: TYLER, P. J.; KNIGHT, J.

---

95 Cal. App. 136

HIGGINSON v. HANDY. (Civ. 6557.) ★

District Court of Appeal, First District, Division 2, California. Nov. 26, 1928.

Rehearing Denied Dec. 26, 1928. Hearing Denied by Supreme Court Jan. 24, 1929.

Deeds ⚿208(1)—On question of delivery evidence held not to show that deed executed and recorded by grantor was purloined by grantee (Code Civ. Proc. § 1963).

Evidence *held* not to show that deed conveying realty to grantor's sister under his agreement to convey, and which deed was recorded by grantor, was not purloined by grantee, but was duly delivered, in view of presumption created by Code Civ. Proc. § 1963, that grantee's possession of deed was lawful.

Appeal from Superior Court, City and County of San Francisco; E. P. Shortall, Judge.

Action by S. P. Higginson against Ada M. Handy. Judgment for defendant, and plaintiff appeals. Affirmed.

Geo. D. Collins, Jr., of San Francisco, for appellant.

Myrick & Deering and Scott, of San Francisco, for respondent.

STURTEVANT, J. This is an action to quiet title. The plaintiff filed a complaint in the usual form, the defendant filed an answer denying the material allegations in the complaint and pleading certain affirmative matter, and a trial was had in the trial court before the court sitting without a jury. That court made findings in favor of the defendant, and the plaintiff has appealed under section 953a of the Code of Civil Procedure.

The plaintiff claims that the findings are not sustained by the evidence, and in particular he objects to the finding "that plaintiff is not the owner of and seized in fee and enti-

---

⚿For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

★Rehearing denied. Hearing denied by Supreme Court.

tled to the possession of those certain lots, * * *" in controversy; and he also makes the same contention regarding the finding "that defendant claims and has a right, title, and interest in and to said property. * * *" These contentions involve a consideration of the following facts:

The plaintiff and defendant are brother and sister. Their mother died intestate, leaving an estate including, among other things, two lots located in San Francisco. Her estate was not administered upon. On April 18, 1906, the plaintiff was residing in San Francisco, and the defendant was residing at Seattle. At the same time they had an aunt, Mrs. E. E. Curry, residing on her farm near Lodi. That farm included 400 acres planted to grapes and the farm was valued at $1,000 per acre. After the great fire in April, 1906, the plaintiff was desirous of putting up a building on one of the lots that belonged to the estate of his mother. He did not have the funds that would enable him to do the building, and he applied to the relief committee for assistance. That committee declined to advance the funds, excepting that the entire title stood in the plaintiff. The plaintiff had a deed prepared, sent it to his aunt, Mrs. Curry, and she applied to the defendant, asking the defendant to execute it. About the same time the plaintiff wrote a letter to defendant, explaining the transaction. The letter is quite long, but it contains clear statements to the effect that the plaintiff was desirous of obtaining the deed from his sister to enable him to build on one of the lots a place in which he could live, and that he intended to hold the title in trust for his sister, and thereafter convey to her on demand, at which time her interest would be reconveyed upon the payment by her of taxes and assessments. That letter was dated January 4. 1907.

The defendant's deed to her brother was dated January 14, 1907. On September 11, 1908, the plaintiff made an indorsement on the deed just referred to, by the terms of which he conveyed both lots to the defendant. That deed was acknowledged and was delivered to Mrs. E. E. Curry under an agreement by the terms of which the document was to be turned over to the defendant when Mrs. Curry should have conveyed a part of her lands to the plaintiff. Mrs. Curry made such a conveyance. The exact date is not stated in the record. However, it does appear that Mrs. Curry made her deed before the defendant executed the deed dated January 14, 1907. In this connection, however, the record is clear that Mrs. Curry, after having made her deed, did not deliver it to the plaintiff. There is some evidence to the effect that there was an outstanding judgment against the plaintiff, and Mrs. Curry was desirous of protecting the plaintiff from any execution based on such judgment. There is also evidence in the record that Mrs. Curry was farming the properties, and was not willing to do more than allow the plaintiff to have the net proceeds after the farming expenses had been deducted. There is no conflict in the evidence but what the plaintiff received such net proceeds.

We do not understand the plaintiff to contend that according to the arrangements made by the parties any question exists regarding the ultimate right of the defendant to receive from the plaintiff a fee-simple title to the lots. However, the plaintiff does contend that his deed to the defendant was never delivered, but that she purloined it. If the deed was not purloined, but was delivered, a contract, which all admit was made, was duly carried out, and no one may complain.

The question remains: Does the record show that the deed dated January 14, 1907, together with the indorsement of September 11, 1908, was purloined? It is clear that the defendant had possession of it and had it recorded April 17, 1915. The record is clear that delivery was due at that time. Mrs. Curry had made her deed as contemplated. True, she had not delivered; but she had delivered the fruits. Plaintiff was getting the net proceeds, and more, at that time. It is presumed that defendant's possession was lawful, and that she owned it. Code Civ. Proc. § 1963. The defendant was called as a witness by the plaintiff, but was not asked any questions regarding her possession. The deposition of Mrs. Curry was taken April 3, 1920. At that time she was over 90 years of age, of poor hearing, of poor eyesight, unable to walk and unable to go upstairs or downstairs. She stated that at one time she showed the deed to the defendant, and that at a later date, when she looked for the deed, she could not find it. She did not say the defendant took the document forcibly or by stealth. It might be inferred the defendant did one or the other. On that subject the evidence showed a conflict, and we may not say that the findings as made are not sustained by the evidence, nor may we say there has been a miscarriage of justice.

The plaintiff complains because he has not been repaid his expenditures under the trust agreement. The complaint is not well founded. The agreement of January 14, 1907, was superseded by the agreement of September 1, 1908. By the latter agreement no duty rested on the defendant to repay such amounts. Moreover, in his entire case the plaintiff did not introduce proof of the items, if any, expended by him, nor ask a finding thereon.

The judgment is affirmed.

We concur: KOFORD, P. J.; NOURSE, J.

95 Cal. App. 42

In re ALBORI (two cases). (Cr. 1732, 1746.)

District Court of Appeal, Second District, Division 2, California. Nov. 19, 1928.

1. Criminal law 🔑1026—Right of appeal from conviction is one secured by constitutional guaranty.

The right of appeal from a judgment of conviction is the offspring of constitutional guaranty.

2. Constitutional law 🔑56—Power of courts to issue writs necessary to complete exercise of appellate jurisdiction cannot be impaired by Legislature (Const. art. 6, § 4).

The power of appellate courts declared by Const. art. 6, § 4 to issue all writs necessary or proper to the complete exercise of their appellate jurisdiction cannot be impaired by the Legislature.

3. Criminal law 🔑1068½—Right to appeal from conviction includes right to have from appellate courts writs necessary or proper to complete exercise of its jurisdiction.

The right of appeal from judgment of conviction guaranteed by the Constitution, or resting, in part, in the inherent power of the appellate courts as tribunals of appeal, is not merely the right to take appeal, but also the right to have from the appellate tribunal all writs which are necessary or proper to the complete exercise of the jurisdiction set in motion by the perfecting of appeal.

4. Criminal law 🔑1073—"Writ of probable cause" is one that appellate court in criminal case can issue as necessary or appropriate to complete exercise of appellate jurisdiction (Const. art. 6, § 4).

A "writ of probable cause," in effect an order to stay execution, is one of the writs, issuable under an appropriate state of facts, which is necessary or appropriate to the complete exercise of appellate jurisdiction in a criminal case, and so is issuable by the appellate court, under Const. art. 6, § 4; the mere rendering of its judgment, without proper protection of appellant pending appeal, not being the complete exercise of appellate jurisdiction contemplated by the Constitution.

5. Criminal law 🔑1001—In proper case, appellant's right to confinement in jail, rather than in penitentiary, will be protected by stay of execution.

Right of one, pending appeal from a conviction, to be confined in the county jail, rather than in the penitentiary, to which he has been sentenced, is one that appellate court in a proper case should protect by stay of execution.

6. Criminal law 🔑1073—Power of appellate court in criminal case to issue writs of probable cause, not being dependent on statute, was not taken away thereby (Pen. Code, § 1243, as amended by St. 1927, p. 1062).

Power and duty, in proper case, of appellate court in criminal cases to issue writs of probable cause, not being dependent on statute, Pen. Code, § 1243, as amended by St. 1927, p. 1062, did not deprive them thereof.

7. Criminal law 🔑1073—Application to appellate court for writ of probable cause, rather than for mandate to trial court, held proper.

Application to appellate court for writ of probable cause and stay of execution pending appeal from conviction, rather than for writ of mandate to compel issuance of writ of probable cause by the trial court, is proper remedy; appellate court being asked to exercise a jurisdiction reposed in it by the Constitution, or inherently existing in it, and not being asked to pass on or to review the action of the trial court.

8. Criminal law 🔑1084—Appeals held to present debatable case, so that execution should be stayed pending determination of appeals.

Appeals of petitioner from judgments of conviction *held* to present a debatable case, one on which there may be an honest difference of opinion, and not to be frivolous, so that execution should be stayed pending determination of appeals.

9. Bail 🔑44—Mere showing of ill health held not of such a circumstance intervening since conviction as to authorize admission to bail by appellate court.

Mere showing of ill health, without a showing of imminence of dangerous results to life or health, is not the showing of intervention of a circumstance of extraordinary character since conviction, necessary to authorize the appellate court to admit to bail pending appeal.

Two applications by Marco Albori, one for a certificate of probable cause and for a stay of execution of judgment of conviction pending appeal therefrom, the other for admission to bail pending decision on the petition for certificate of probable cause and pending determination of the appeal. Stay of execution granted; admission to bail denied.

In Cr. 1732:

Thos. P. White and Vincent C. Hickson, both of Los Angeles (A. P. G. Steffes, of Los Angeles, of counsel), for petitioner.

U. S. Webb, Atty. Gen., John W. Maltman, Deputy Atty. Gen., and Asa Keyes, Dist. Atty., and Tracy Chatfield Becker, Deputy Dist. Atty., both of Los Angeles, for respondent.

In Cr. 1746:

Thos. P. White, of Los Angeles, for petitioner.

Asa Keyes, Dist. Atty., of Los Angeles, for respondent.

WORKS, P. J. Petitioner is a defendant in two actions, which, until recently, have been pending in the superior court of Los Angeles county. In each action he was found guilty of the crime of assault with a deadly weapon, and under each verdict he was sentenced to confinement in the penitentiary for the term prescribed by law. From the judgments against him, and from orders denying his motions for new trials, petitioner has perfected his appeals to this court. In due time he moved the superior court for a certificate of probable cause for his appeals, and the motion was denied. Petitioner next, and in due time, moved the superior court for an order staying, pending his appeals, the execution of the judgments pronounced against him. This motion also was denied. Petitioner then instituted in this court the proceeding which is above designated by the number Cr. 1732, a proceeding for a stay of execution pending appeal, although differently entitled.

For many years prior to the session of the Legislature held in 1927—indeed, ever since 1874—the language of section 1243 of the Penal Code stood as follows:

> "An appeal to the Supreme Court from a judgment of conviction stays the execution of the judgment in all capital cases, and in all other cases, upon filing with the clerk of the court in which the conviction was had, a certificate of the judge of such court, or of a justice of the Supreme Court, that, in his opinion, there is probable cause for the appeal, but not otherwise."

The section had been held (In re Mayen, 49 Cal. App. 531, 193 P. 813; In re Murphy, 185 Cal. 298, 197 P. 59) to apply to appeals to the District Courts of Appeal as well as to appeals to the Supreme Court, and it had been determined in many cases (see In re Adams, 81 Cal. 163, 22 P 547; People v. Gallanar, 144 Cal. 656, 79 P 378) that an appealing defendant in a criminal case was entitled to the certificate mentioned in the section as a matter of right if his appeal were not clearly frivolous. It was said in one of these cases that the phrase "probable cause for the appeal," as employed in the section, "means only that there is presented a case that is debatable; a case that is not clearly and palpably frivolous and vexatious; a case upon which there may be an honest difference of opinion." In re Adams, supra. The law was also well settled, under the language of section 1243, as it stood before 1927, that:

> "A certificate of probable cause, in all its effects, is, substantially, the equivalent of an order staying execution pending an appeal from a judgment of conviction—nothing more and nothing less. Its filing with the clerk, by whomsoever it may have been granted, operates as a supersedeas." In re Mayen, supra.

The orders of the superior court, denying petitioner's application for a certificate of probable cause and his application for a stay of execution, were made under the provisions of section 1243 as recast by the Legislature in 1927. As enacted at that time the section reads:

> "An appeal to the Supreme Court or to a District Court of Appeal from a judgment of conviction stays the execution of the judgment in all cases where sentence of death has been imposed, but does not stay the execution of the judgment in any other case unless the trial court shall so order. The granting or refusal of such order shall rest in the sole discretion of the trial court. If such order is made, the clerk of the court shall issue a certificate stating that such order has been made. In cases where the defendant has been sentenced to death or life imprisonment he shall be confined in a state prison pending the decision upon his appeal." St. 1927, p. 1062.

Under the old section, as we have already pointed out, the court could not have refused a certificate of probable cause under a proper showing. Under the new section, however, pursuant to the exclusive discretion attempted to be lodged in the court, the certificate was refused and a stay of execution was denied as well.

It is contended by respondent that this court, because of the present language of section 1243, cannot issue to petitioner a certificate of probable cause for the appeals he has perfected, or a stay of execution of the judgments pronounced against him. It is said that petitioner's present fate is settled by the orders of the superior court, and that this court is without power to prevent his incarceration in the penitentiary pending a determination of the appeals which he has taken. Petitioner insists, however, that the new section 1243, in its language attempting to confer upon the superior court the "sole discretion" contemplated by its terms, is unconstitutional, and that our power to issue certificates of probable cause, or to grant stays of execution, in criminal cases, exists in its pristine vigor.

This assertion that the section violates the Constitution is based upon two grounds. It is contended, first, that the enactment is obnoxious to the organic law for the reason that it attempts to confer upon a single individual an unbridled discretion, unregulated by rules for the manner of its exercise and uncontrolled by any limitations whatever. To this proposition Yick Wo v. Hopkins, 118 U. S. 356, 6 S. Ct. 1064, 30 L. Ed. 220, and other cases are cited. The second ground taken is that the section is unconstitutional because it impinges upon the provision of section 4 of article 6 of the state Constitution to the effect that the District Courts of Appeal shall have power to issue all writs "necessary or proper to the complete exercise of their appellate jurisdiction." In determining the fate of the new section 1243 we shall give no attention to the first of these grounds, but shall limit our discussion to the merits of the second.

[1, 2] The right of petitioner to appeal from the judgments pronounced against him is secured to him by the Constitution of the state. Ex parte Hoge, 48 Cal. 3; In re Adams, supra. Indeed, the right of appeal is so clearly the offspring of constitutional guaranty that the Legislature is without power to provide for appeals beyond the scope of the

language of the organic law. People v. McKamy, 168 Cal. 531, 143 P. 752. Also, it is well worth while to observe that the power granted by the Constitution to the courts of review of the state, that is, the power to issue writs in aid of the exercise of their appellate jurisdiction, is not a grant of original jurisdiction, but confers a part of the appellate jurisdiction itself. This is evident from the language of the grant, for the courts are to issue writs necessary or proper to the complete exercise of their appellate jurisdiction. These terms import, of course, that the exercise of such jurisdiction is not complete without the issuance of appropriate writs whenever they are necessary or proper. This view finds ample support in the decided cases. The Supreme Court said in an early case arising under the Constitution of 1849 (italics ours):

> "The appellate power of the Supreme Court is given by the fourth section of the sixth article of the Constitution, which expressly empowers this court to issue all writs and process necessary to the exercise of its appellate jurisdiction. The Legislature, therefore, can pass no act impairing the exercise of *this appellate power*." Haight v. Gay, 8 Cal. 297, 68 Am. Dec. 323.

The Constitution of 1849 provided that the Supreme Court should have power to issue writs of habeas corpus and "all other writs and process necessary to the exercise of their appellate jurisdiction." Article 6, § 4. In construing this provision the court said:

> "It is clear that under the old Constitution this court had no original jurisdiction except in cases of habeas corpus." Tyler v. Houghton, 25 Cal. 26.

This view was in effect carried into another opinion of the court rendered a little later, but at the same term. The reference, in the quotation last made above, to the "old Constitution," was employed to distinguish the provision of the original Constitution of 1849 from an amendment which had recently been adopted. In passing upon this amendment the court said in the later case:

> "The Constitution as amended provides that the Supreme Court shall 'have power to issue writs of mandamus, certiorari, prohibition and habeas corpus, and also all writs necessary or proper to the complete exercise of its appellate jurisdiction.' Article 6, § 4. This section of the Constitution as it stood before it was amended, after enumerating the appellate powers of the Supreme Court, provided that it should have power to issue all writs and process necessary to the exercise of its appellate jurisdiction. The change effected by the amendment seems to have been designed to enlarge the powers of the court by conferring upon it original jurisdiction in the particulars specified in the fourth section of the sixth article. The language of this section is too clear and explicit to leave it open to any other construction, however much the court might be disposed to decline this new jurisdiction, in view of the inconveniences and embarrassments that may attend its exercise." Miller v. Board of Supervisors, 25 Cal. 93.

The same view is reflected in People v. Loucks, 28 Cal. 68, and it was carried forward in Hyatt v. Allen, 54 Cal. 353, the first case in which the question was discussed after the Constitution of 1879 was adopted. In the opinion in the case last cited occurs a particular expression which shows graphically that the power to issue writs necessary or proper to the complete exercise of appellate jurisdiction is a part of that jurisdiction itself:

> "In the absence * * * of any specific prohibition in the Constitution, the court would undoubtedly have the power to issue all writs necessary to the complete exercise of its appellate jurisdiction."

The same idea was expressed in an opinion rendered a few years later:

> "The Constitution provides: 'The court shall also have power to issue writs of mandamus, certiorari, prohibition, and habeas corpus, and all other writs necessary or proper to the complete exercise of its appellate jurisdiction.' The power to issue the writs specified, or any other writ, in a case where it may be necessary or proper to resort to it to secure the complete exercise of the appellate jurisdiction of the court, would exist had the Constitution been silent on the subject." People v. Jordan, 65 Cal. 644, 4 P. 683.

[3, 4] It therefore appears that the right of appeal which is guaranteed to petitioner by the Constitution, or which rests, in part, in the inherent power of the courts as tribunals of appeal, is not merely the right to take appeals, but, as well, the right to have from the appellate tribunal all writs which are necessary or proper to the complete exercise of the jurisdiction set in motion by the perfecting of the appeals. It becomes material next, then, to determine whether the writ now demanded by petitioner—a writ of probable cause, which in effect is nothing more nor less than an order to stay execution—is one of the writs, issuable under an appropriate state of facts, which is necessary or proper to the complete exercise of appellate jurisdiction in a criminal case. So far as the mere rendition of judgment is concerned—the determination whether an affirmance or a reversal shall result—it may be said in a sense that an appellate tribunal has exercised its jurisdiction when its judgment has been pronounced and has become final; but that cannot be the complete exercise of jurisdiction which is contemplated by the Constitution. The right of appeal, in all the fullness with which we have seen that it is characterized, is guaranteed by the Constitution to the appellant. It is he who is to be protected by the appellate tribunal. It surely cannot be said that the constitutional guaranty is safe-

guarded if the court contents itself with a mere decision of the appeal, leaving the victorious party in the court below, in either a civil or a criminal case, to execute, in whole or in part and during the pendency of the appeal, the judgment which is assailed by it. The right of appeal would be but an empty thing, if the appellate court could not, and if in proper cases it did not, afford to the appellant a means whereby the fruits of victory were fully preserved to him in the event of a reversal of the judgment against him. This doctrine has been continually applied in civil cases. In a recent decision, to which only we need refer, it was said, after the citation of earlier cases:

> "The law appears to be well settled that if, after an appeal, the court below seeks to enforce the judgment from which the appeal is taken, the appellate court, in its discretion, may grant a special order restraining the action of such lower court in that regard." Scott v. Larson, 82 Cal. App. 46, 255 P. 248.

One instance of resort to the writ of supersedeas for the purpose of staying the execution of judgment in criminal cases as pointed out in People v. Ross, 135 Cal. 59, 67 P. 13, and in a dissenting opinion in In re Watts, 197 Cal. 611, 241 P. 886, at page 621 of the report (241 P. 887), was in the case of People v. Durant, 119 Cal. 54, 50 P. 1070. In the dissenting opinion mentioned it was said concerning People v. Durant:

> "It was in fact an application to the court for a supersedeas in aid of its appellate jurisdiction, and was dealt with as such."

In one of the cases just cited it was said in the majority opinion, to which the dissent referred to above was filed:

> "Our conclusion is that upon an appeal from a judgment imposing the death penalty a certificate of probable cause may be issued by the judge of the trial court or a justice of this court, the effect of which is to stay the execution of so much of the judgment as requires the imprisonment of the defendant in a state prison pending the hearing and determination of his appeal." In re Watts, supra.

It is true that this conclusion of the court was reached in view of the provisions of section 1243 of the Penal Code—the decision was rendered before 1927—but it shows the justice of the idea that in proper cases a judgment of conviction in a criminal case should be stayed pending appeal. It should be remarked in passing that it was not necessary for the court to base its determination upon section 1243. A writ of supersedeas could have been issued, or an order staying execution of the judgment could have been made, pursuant to the language of the Constitution, for such a writ and such an order amount to the same thing, as we have already seen, as a writ of probable cause. Indeed, under the rule stated in Hyatt v. Allen, supra, and in People v. Jordan, supra, either a supersedeas or a stay of execution could have been issued by the court irrespective of the provision in the Constitution. In addition to the expressions in these two cases it has been said in a much later opinion that "the power to issue the writ of supersedeas is inherent in an appellate court." In re Graves, 62 Cal. App. 168, 216 P. 386.

[5] It is insisted by respondent that it can make no difference to petitioner whether he be confined in the county jail or in the penitentiary pending the hearing of his appeals, especially as, if he be sent to the latter institution, he will, during the consideration of his appeals, be amassing credits against the debit of his conviction in case of an affirmance of the judgments. The rights of an appellant under such circumstances, however, are predicated on the possibility of a reversal of the judgment which has been pronounced against him. But we forbear further to answer the contention of respondent. It is effectually met by a decision of the Supreme Court, in the following quotation from an opinion rendered by the Chief Justice, acting alone, in In re Hoge, 48 Cal. 6:

> "The right to appeal to the Supreme Court is guaranteed by the Constitution to the prisoner, and is as sacred as the right of trial by jury. It is one of the means the law has provided to determine the question of his guilt or innocence. Upon such an appeal, the ultimate question is nearly always as to the validity of the judgment under which the prisoner is to suffer; and it is certainly not consonant to our ideas of justice, if it can be prevented by legal means, that even while the question of guilt or innocence is yet being agitated in the form of an appeal, the prisoner should be undergoing the very punishment and suffering the very infamy which it was the lawful purpose of the appeal to avert. It would be somewhat akin to a practice of punishing the accused for his alleged offense while the jury was yet deliberating upon the verdict." In re Adams, supra.

It is true that In re Hoge had to do with an application for admission to bail, which, of course, contemplated the enlargement of the petitioner from all imprisonment. In Re Adams, however, the court was concerned with an application for a writ of probable cause, and the quotation from the earlier case was introduced by the statement:

> "The case of Ex parte Hoge * * * was an application for admission to bail pending appeal —the giving of bail being, as the law then stood, the only mode of staying execution except in capital cases, and all that was said by Chief Justice Wallace in deciding that case is, in the changed condition of the law, fully applicable here."

The court ordered the issuance of a writ of probable cause.

[6] We cannot avoid the conclusion that, strictly speaking, section 1243 of the Penal Code, as it stood from 1874 to 1927, did not confer jurisdiction upon the Supreme Court or upon the District Courts of Appeal to is-

sue writs of probable cause, or at least to issue its equivalents, and that the section, as amended in the latter year, cannot operate to deprive those courts of their ancient jurisdiction, or discharge them from their duty to petitioners, in proper cases, to issue writs of supersedeas or to make orders staying executions. It is only by the exercise of such a jurisdiction that the courts can properly safeguard the right of appeal guaranteed by the Constitution.

> "The Legislature * * * can pass no act impairing the exercise of this appellate jurisdiction." Haight v. Gray, supra.
>
> "Quo warranto was a case at law; it afforded the legal remedy for the usurption [sic] of an office; and we think this court retains jurisdiction of the *case*, notwithstanding the Legislature may have changed the procedure, enlarged the remedy, and given it a new name. To hold otherwise would be to admit a power in the Legislature to abridge our jurisdiction, and take from parties the right of appeal, by the easy device of a change of procedure, in many cases, where the right and jurisdiction are unquestioned." People v. Perry, 79 Cal. 105, 21 P. 423.
>
> "Jurisdiction * * * having been conferred on the superior court by the Constitution, such jurisdiction could not be taken away or abridged by the Legislature, and a statute existing at the time the Constitution was adopted conferring jurisdiction on some other tribunal was superseded by such constitutional provision, so far, at least, as it could be held to have conferred exclusive jurisdiction upon such tribunal." People v. Bingham, 82 Cal. 238, 22 P. 1029.
>
> "The courts of this state derive their powers and jurisdiction from the Constitution of the state. The constitutional jurisdiction can neither be restricted nor enlarged by legislative act. An attempt to take away from the courts judicial power conferred upon them by the Constitution, or to impose upon them judicial powers not granted or authorized to be granted by the Constitution is void." Pacific Telephone Co. v. Eshleman, 166 Cal. 640, 137 P. 1119, 50 L. R. A. (N. S.) 652, Ann. Cas. 1915C, 822, in a concurring opinion at page 690 (137 P. 1138).
>
> "Concededly the right of appeal from the judgment of an inferior to a higher court must be found either in the state's Constitution or statutes, and it is the settled rule of law that if the right of appeal is constitutionally granted in any given case such right cannot be destroyed nor delimited by legislative enactment." In re Sutter-Butte By-Pass Assessment, 190 Cal. 532, 213 P. 974.

[7] Respondent contends that petitioner's remedy is by application for a writ of mandate to compel the issuance of a writ of probable cause by the superior court. We think not. Petitioner asks this court to exercise a jurisdiction reposed in it by the Constitution, or inherently existing in it, and we think such an application proper. We are not asked to pass upon or to review the action of the superior court.

[8] Our next labor is to inquire whether petitioner shows a proper case for the issuance of the writ or order for which he asks. To apply the test prescribed in In re Adams, supra, do petitioner's appeals present a case that is debatable, a case upon which there may be an honest difference of opinion or are they clearly and palpably frivolous and vexatious? Whatever may be our conclusion upon the actual merits of the appeals, when finally we come to a disposition of them, these are the questions to be answered now.

Petitioner's application shows that, while he was convicted of the crime of assault with a deadly weapon in two cases, apparently tried together, the charge against him in each was the crime of assault with intent to murder. It also appears that the convictions resulted upon a second trial of petitioner, the jury apparently having disagreed upon the first. With this preliminary statement we set forth in full certain allegations of the petition:

> "That the questions raised on the aforesaid appeal of this petitioner present to the District Court of Appeal a case that is debatable. That said appeal is not frivolous or vexatious. That said appeal presents questions upon which there may be an honest difference of opinion.
>
> "Your petitioner respectfully represents that by reason of the nature of the evidence presented at the trial of the above mentioned criminal case, wherein it was shown that defendant did not precipitate or start the altercation which resulted in the shooting; that this petitioner was not the aggressor but was set upon and badly beaten by from three to five people; that this petitioner during all of said altercation up to the time when the shots were fired continually retreated, and by reason of other facts and circumstances brought out in evidence in this case, there is room for an honest difference of opinion as to whether the evidence presented is sufficient to justify or support the verdict of guilty.
>
> "This petitioner further respectfully represents that the failure of the court to give certain instructions and particularly to instruct the jury as to their right to find the defendant guilty of simple assault, an offense necessarily included in the offense of assault with intent to murder, with which the defendant was charged, presents a debatable question of law upon which there may and can be an honest difference of opinion.
>
> "That the filing of affidavits on the motion for a new trial, alleging that the trial judge was told during the progress of the trial by the bailiff in charge of the jury that while said jury was being housed under court order in a hotel, during the progress of the trial, and before the cause was submitted to said jury, that one of said jurors was telling other jurors that a witness for the defense who testified at the first trial of the above mentioned cause received $5,000 for his testimony; and the refusal and neglect of the trial judge upon receiving such information to call same to the attention of counsel, to investigate the same, and if proven to declare a mistrial; in the face of the failure of the trial judge to deny by affidavit or otherwise the truth of the charge contained in the affidavit filed in support of defendant's motion for a new trial, constitute such miscon-

duct on the part of the trial judge as to readily permit of an honest difference of opinion and debate as to whether or not such conduct on the part of the trial judge was prejudicial to the defendant's rights.

"Your petitioner further respectfully represents that the court instructed the jury as follows: 'The court instructs the jury that a person, on whom another is making a mere assault with the fists, not with intent to kill or to do great bodily harm, and who is not deceived as to the character of such assault, is not justified in taking life or using a deadly weapon in self-defense.' Your petitioner respectfully represents that the correctness of such instruction is debatable and that the giving of such instruction readily permits of an honest difference of opinion as to whether the lack of intent to kill or the lack to do great bodily harm, existing in the mind of one making an assault with the fists upon a defendant, is any criterion whatever of the right to engage in self-defense or whether the test is, what would a reasonable man situated as the defendant was situated and seeing what he saw, and knowing what he knew, have done under like circumstances. Your petitioner further represents to the court that the failure of the trial court to instruct the jury, as requested by the defendant, that filing of an indictment raises no presumption or contendment [sic] against the defendant and is no evidence against him, raises a debatable question and permits of an honest difference of opinion as to whether such refusal was prejudicial to the defendant in the light of all the other instructions given. Your petitioner respectfully represents that the failure on the part of the trial judge to instruct the jury, as requested by the defendant, in the instant case, that even though an assault is made upon the defendant only with the fists, still that the defendant could resort to necessary self-defense if an ordinarily prudent and reasonable man situated as the defendant was, knowing what the defendant knew, and seeing what the defendant saw, would have believed that he was in imminent danger of great bodily injury from such an assault with the fists; raises a debatable question and permits of an honest difference of opinion as to whether or not in view of the facts and circumstances in evidence in the case, such instruction should not have been given.

"Your petitioner further respectfully represents that the cross-examination of the witness Kynett testified for the defendant and the remarks of the court at the conclusion of the examination of Police Captain Steckel, who testified in rebuttal for the people, raises a debatable question and permits of an honest difference of opinion as to whether or not such conduct on the part of the court was not prejudicial to the rights of the defendant and in violation of the provisions of section 19, article 6, of the Constitution of the state of California, which prohibits judges from charging juries with respect to matters of fact.

"Your petitioner further represents that there are other and sundry debatable questions raised and issues which permit of an honest difference of opinion are also raised on the appeal taken by this petitioner in the above-mentioned case. That by reason of all of the aforementioned grounds constituting said appeal, as well as divers and other grounds more fully appearing from the files and records in said appeal, it is apparent that said appeal is taken in good faith, presents debatable questions and permits of honest difference of opinion as to whether, during the trial of said cause, the rights of this defendant were prejudiced. That said appeal is not frivolous or vexatious, but on the contrary is brought in good faith and presents debatable questions to the District Court of Appeal."

These allegations as to what matters are presented by the appeals of petitioner are not controverted by respondent. The merits of petitioner's application were orally argued by a deputy district attorney and they were also debated in a brief filed by the attorney general and the district attorney. In both oral argument and brief these officers have contented themselves with a presentation only of the questions arising upon the face of the petition, which we have considered above. It is material also to observe that the deputy district attorney who participated in the oral argument said in the course of his remarks:

> "We are not contending—and the Attorney General joins with me—but what there is under the law existing here some appearances which would seem to be within the rule laid down by Chief Justice Beatty [In re Adams, supra], to which I have referred that the trial court could have, exercising reasonable judgment, come to the conclusion that a certificate [of probable cause] ought to be granted."

The transcript of the testimony and proceedings during the trial of petitioner are before us as a part of the record upon this application, as is also the transcript of the argument made on his motion for a new trial. In determining whether petitioner's appeals are frivolous we have not found it necessary to examine the transcript of the proceedings during the trial. Petitioner's opening brief in support of his appeals has not yet been filed and we have therefore been denied light from that source. We have, however, read carefully the transcript of the argument on motion for a new trial and it is that reading which has made it unnecessary for us to consider the transcript of the testimony. The allegations of the petition, designed to show that the appeals are not frivolous, are some of them not as full and satisfactory as could be desired, but they are amplified and enforced by the points presented and the argument made in support of the motion. Taking petition and argument together, we are fully apprised of the points to be made upon the appeal. We have no hesitation in declaring that the appeal is not frivolous. Several of the questions which we must finally decide are to our minds plainly arguable—debatable, to employ the language of In re Adams, supra—they are points concerning which an honest difference of opinion may be indulged. To this independent conclusion of our own is to be added the voluntary concession of the Attorney General and the district attorney that the superior court might properly have issued a certificate of probable cause. We have no hesitation in concluding that we should make an order staying the execution of the judgments against petitioner pending a determination of his appeals.

[9] Some days after petitioner presented the application of which we have just made disposition, he instituted the proceeding which at the head of this opinion is numbered Cr. 1746. This second proceeding is in the nature of an application for admission to bail pending a determination of petitioner's appeals. It was commenced by a petition general and formal in its terms accompanied by various affidavits tendered in its support. None of these affidavits is controverted. Points and authorities were submitted in support of the petition, but no brief has been filed in opposition to it. The district attorney, who was present at the chamber hearing upon the application, stated that he had no authorities to present and that he had no objection to the making of an order admitting petitioner to bail.

Affidavits of seven of the members of the jury which convicted petitioner are presented with the petition. One of these jurors states that her intention was to find petitioner guilty under but one of the charges against him, that the sentence imposed upon petitioner was too severe, that if she had known the sentence was to be so severe, she would not have voted petitioner guilty, and that some of the witnesses against petitioner were intoxicated at the time of the occurrences to which they testified. Another juror avers that the testimony against petitioner was conflicting and weak, that one of the other jurors told him that petitioner had paid a certain witness the sum of $5,000 to testify in his behalf, and that this statement served to strengthen the weak evidence against petitioner and influenced the affiant juror to agree to a verdict of guilt. Yet another juror says that the fact that brought him mostly to the conclusion of petitioner's guilt was not the evidence as presented in court, that there was conversation in the jury room to the effect that petitioner had paid some of his witnesses to testify in his behalf, and that this conversation was partly the cause of the agreement of the jury to the compromised verdict of guilt. The affidavits of the other four jurors show similar matters.

An affidavit of petitioner and affidavits of several physicians contain statements concerning the effect likely to be wrought upon petitioner's health by his imprisonment. The affidavits of the physicians show the result of various examinations to which they have subjected petitioner, some of these having occurred before and some after his imprisonment began. There is a showing of various symptoms of petitioner and of certain complaints made by him as to his condition of body. The only resultant statements in the various affidavits are that since his incarceration his health has been seriously and dangerously impaired, that it is believed that his present condition and the injury to his health is such that it will be permanently and dangerously affected by further imprisonment, that petitioner's condition is detrimental and subject to serious consequences if not under proper surroundings and care and that he ought not to be subjected to unnecessary worry and hardships, that petitioner will suffer in his general health if compelled to close confinement, and that strain, either mental or physical, will be detrimental to petitioner's health.

The showing made by all these affidavits is utterly insufficient to support the petition for admission to bail. Such an application, made after appeal, should be allowed "only in cases where circumstances of an extraordinary character have intervened." Ex parte Marks, 49 Cal. 680. "What is meant by 'circumstances of an extraordinary character' occurring after conviction was inquired by counsel at the argument. Obviously this question cannot be fully or satisfactorily answered by mere anticipation of possibilities. It might be that, after conviction of a felonious homicide, the supposed deceased was produced and seen to be alive: or it might be discovered that property, the subject of a supposed larceny, had all the time been in the possession of its owner, and overlooked by his mistake. A variety of illustrations might be suggested of circumstances distinguishing a particular case from the general mass of other criminal cases, and appealing more or less strongly to the discretion of the court to admit the prisoner to bail, even after conviction. It is not pretended that any circumstances of an extraordinary character affecting the condition of the petitioners here have occurred since their conviction. None are asserted in the petition for the writ, nor were any such proven at the hearing. The circumstance suggested at bar, that some of the jurors had, since the trial, stated that they had become satisfied that they committed a mistake in rendering their verdict against the accused, is, of course, not entitled to the slightest attention." Ex parte Smallman, 54 Cal. 35. The Supreme Court "ought not to admit to bail after a verdict of guilty, unless when circumstances of extraordinary character had intervened since the conviction." Ex parte Brown, 68 Cal. 176, 8 P. 829. As covering practically the same ground, see Ex parte Smith, 89 Cal. 79, 26 P. 638; Ex parte Turner, 112 Cal. 627, 45 P. 571; Ex parte Hatch, 15 Cal. App. 186, 114 P. 410; In re Wilkins, 66 Cal. App. 754, 226 P. 964; People v. Eiseman, 69 Cal. App. 143, 230 P. 669; People v. Ephraim, 72 Cal. App. 479, 237 P. 801; In re Ephraim, 73 Cal. App. 104, 237 P. 801.

There is nothing in the affidavits of the seven jurors which shows the intervention of any "circumstance" whatever since petitioner's conviction, except the mere making of the affidavits themselves, and that "circumstance" is palpably insufficient to meet the requirement prescribed in the cited cases, granting that these affidavits can be considered at all. The only "circumstance" intervening since conviction, taking the entire case made by petitioner, is disclosed by some of the statements contained in the affidavits concerning the state of his health, but that showing is insufficient. "There is nothing in the case showing the intervention of any such extraordinary circumstance as would justify holding that the application was improperly denied by the judge of the trial court. The evidence does not show that there is such imminence of dangerous results to the life or health of the defendant as to obviously require his removal from the county jail at this time. Should more serious consequences of his confinement hereafter manifest themselves, and such as to render it proper that bail should be allowed, there is nothing to preclude another application for the purpose." Ex parte Turner, supra.

For a review of the authorities upon the question of the effect of confinement upon health as requiring an admission to bail pending appeal, see People v. Cornell, 28 Cal. App. 654, 153 P. 726. "Where the reasonable inference from the showing made is that there is only a fear that further confinement of the prisoner pending appeal will endanger his health or life, and not that there is imminent danger from further confinement, bail should be denied." People v. Eiseman, supra. We have not made an exhaustive presentation of the authorities on this question for the reason that the counsel for petitioner, at the time of the hearing on the petition, conceded that the showing as to to petitioner's state of health was not alone sufficient to entitle him to admission to bail.

Petitioner is granted a stay of execution of the judgments against him pending a determination of his appeals. He is denied admission to bail.

We concur: CRAIG, J.; THOMPSON, J.

95 Cal. App. 70

PEOPLE v. BIESCAR. (Cr. 1735.)

District Court of Appeal, Second District, Division 2, California. Nov. 20, 1928.

1. Criminal law 🔑1084—Execution will be stayed, the appeal presenting a debatable case.

Appeal from judgment of conviction presenting a case that is debatable, on which there may be an honest difference of opinion, and not being frivolous, stay of execution should be granted.

2. Criminal law 🔑1073—Trial court is under duty to grant certificate of probable cause for stay of execution pending appeal (Pen. Code, § 1243, as amended by St. 1927, p. 1062).

Trial courts are as much bound, since the 1927 amendment of Pen. Code, § 1243 (St. 1927, p. 1062), as they were before, by the rules previously laid down as to their duty to grant certificate of probable cause for purpose of stay of execution pending appeal from conviction.

Louis Biescar, being convicted of a criminal offense, petitions for stay of execution pending appeal. Stay granted.

Nathan O. Freedman, William J. Leete, and Virgil G. Lewis, all of Los Angeles, for petitioner.

WORKS, P. J. Petitioner has appealed to this court from a judgment of conviction rendered against him in a criminal case. Before the appeal was perfected, he asked the trial court for a certificate of probable cause for his appeal; but the court, assuming to exercise the "sole discretion" attempted to be conferred upon it by section 1243 of the Penal Code, as amended in 1927 (St. 1927, p. 1062), refused to issue the certificate. Petitioner, upon due notice to the district attorney, asks this court to issue such a certificate, which is, in effect, an order staying execution.

[1] The grounds for petitioner's appeal are set forth in general terms in his petition. Since the petition was filed, the merits of the appeal have been argued before us. From the petition and from the argument we are satisfied, applying the test prescribed in In re Adams, 81 Cal. 163, 22 P. 547, that the appeal presents a case that is debatable, a case upon which there may be an honest difference of opinion, and that the appeal is not frivolous. Under the reasoning of our opinion in In re Albori (Crim. No. 1732) 272 P. 321, decided November 19, 1928, we determine that the petition for a stay of execution should be granted.

[2] In view of the decision in In re Albori, supra, we take this opportunity of calling the attention of trial judges in criminal cases to the fact that they are as much bound by the rules laid down in In re Adams, supra, as they were before the amendment of 1927 to section 1243 of the Penal Code.

Petitioner is granted a stay of execution pending his appeal.

We concur: CRAIG, J.; THOMPSON, J.

95 Cal. App. 192

LUNDBLADE v. PIERCE et al. (Civ. 3425.)

District Court of Appeal, Third District, California. Nov. 27, 1928.

1. Automobiles ⚷385—Purported sale to satisfy mechanic's lien before repairs were completed on automobile was premature and void (Civ. Code, § 3052).

Automobile having been sold before repairs were completed, claim was not due, and purported sale to satisfy mechanic's lien was premature and void, under Civ. Code, § 3052.

2. Replevin ⚷72—In action to replevin automobile, evidence supported court's finding that at time defendants took possession automobile was worth $432.50.

In action to replevin automobile, evidence *held* sufficient to support court's finding that at time defendants took possession automobile was worth $432.50.

3. Replevin ⚷72—In action to replevin automobile, evidence held sufficient to sustain court's finding that plaintiff sustained damages in sum of $100.

In action to replevin an automobile against one who purchased automobile at void mechanic's lien sale and one who purchased from him, evidence *held* sufficient to sustain court's finding that plaintiff sustained damages in sum of $100.

4. Replevin ⚷110—Unsuccessful party to replevin suit may exercise option to restore property to legal owner or retain it and pay reasonable value.

Unsuccessful party to replevin suit may exercise option to restore property to legal owner or return it and pay reasonable value thereof.

5. Replevin ⚷93—In replevin action, court's finding that defendants were illegally withholding possession of automobile held proper, though actual possession was in sheriff under writ.

In replevin action, court's finding that automobile was illegally withheld by defendants *held* proper, even though automobile was in actual possession of sheriff under writ of replevin.

Appeal from Superior Court, Humboldt County; Harry W. Falk, Judge.

Action to replevin an automobile by Fred H. Lundblade against A. L. Pierce and another. From the judgment, defendants appeal. Affirmed.

Henry L. Ford, of Eureka, for appellants.

W. Ernest Dickson, of Eureka, for respondent.

THOMPSON, Justice pro tem. This is an appeal from a judgment in favor of plaintiff in an action to replevin an automobile. While the car was in the possession of Edward Lovell, the registered owner thereof, under an executory contract of purchase from the respondent, the machine was left at the garage of Clarence Norton in Eureka for repairs. While the machine was in this garage for repairs, the respondent commenced an action against Norton for a debt of $121 alleged to have been due upon an entirely different transaction and attempted to attach Norton's claim against Lovell for the repairs upon the automobile involved in this action. October 1, 1925, the officer visited the garage and apparently attempted to attach and take possession of the Lovell car. The repairs upon the car were not completed, and the machine could not be removed, for it could not be operated on its own power. The officer therefore left the garage, and, returning the following morning, found that Norton had sold the car to the appellant Pierce under section 3052 of the Civil Code to satisfy his mechanic's lien for $98 for services performed. The respondent paid this amount to the sheriff and proceeded to attach it in his action against Norton. Pierce resold the Lovell car to the appellant Peterson. Lovell was in default of payments on his contract to purchase the car. November 10, 1925, this action in replevin was commenced, and the sheriff thereupon took and still holds possession of the car pursuant to the writ of replevin issued therein.

The trial court found that the respondent was the owner and entitled to the possession of the car; that it was illegally withheld from respondent's possession to his damage in the sum of $100; that the market value of the machine at the time of the illegal taking thereof was the sum of $432.50. Judgment was thereupon rendered in favor of respondent for the recovery of the possession of the machine and $100 damages, and for the further sum of $432.50 in the event of failure to recover possession of the car.

The appellants contend that they held legal title to the machine by virtue of the sale thereof by Norton to satisfy his mechanic's lien for services performed in repairing the machine, that the record is devoid of evidence of the market value of the machine, and of the amount of damages sustained by respondent on account of the alleged withholding of possession thereof, and that the sheriff's possession of the machine under the writ of replevin was tantamount to respondent's possession, and appellants were therefore not illegally withholding it.

[1] Norton lost his lien upon the automobile when he purported to sell and transfer it to Pierce to satisfy his claim for services performed. Under section 3051 of the Civil Code a lien upon personal property for services performed is valid only while the property is lawfully retained in the possession of the workman who renders the services. In the present case, the automobile having been sold before the repairs were completed, the

claim was not due, and the purported sale to satisfy the mechanic's lien was therefore premature and void. Section 3052, Civ. Code; Peerless Insurance & Brokerage Co. v. Dwyer Equipment Co., 78 Cal. App. 141, 248 P. 303. Since Norton waived his lien by parting with his possession of the car, the question as to whether he had been paid for his services becomes immaterial in this action.

[2-5] There is no merit in appellants' contention that the record fails to show the market value of the machine, or the damages sustained by the respondent. He testified respecting its value at the time appellants took possession of the car, that "Its reasonable market value was $400," and that "Cars of that character, at the date it was taken by the defendants were bringing in the market $400 to $450." This is sufficient to support the court's finding that it was then worth $432.50. The record also discloses evidence of the decrease in the value of the machine at the time of the trial. In this regard the respondent testified, "It is not (now) worth over $100." This is ample evidence upon which to sustain the court's finding that the respondent sustained damages in the sum of $100. Nor can it be said that the appellants were not illegally withholding possession of the car because it was actually in the custody of the sheriff, held by virtue of the writ of replevin. Under such circumstances it was merely held by the officer in custodia legis. The unsuccessful party to the replevin suit may still exercise an option to restore it to the legal owner, or retain it and pay the respondent the reasonable value thereof. 5 Cal. Jur. 178, § 15. In spite of the fact that the car was in the actual possession of the sheriff under the writ of replevin, the court's finding that it was illegally withheld was nevertheless proper.

The judgment is affirmed.

We concur: HART, Acting P. J.; PLUMMER, J.

---

95 Cal. App. 99

CINCOTTA v. CATANIA. (Civ. 6112.)

District Court of Appeal, First District, Division 2, California. Nov. 21, 1928.

1. **Contracts ⚷252—It is unnecessary to prove parties used words, "We do mutually rescind contract," but rescission may be proved otherwise.**

To prove rescission of contract, it is unnecessary to show that parties met and used words, "We do mutually rescind contract heretofore entered into by us," since rescission may be proved by other words and acts.

2. **Sales ⚷391(5)—Seller having rescinded when he refused to perform, thereafter buyer, who made payment, could rescind and sue for moneys had and received.**

Seller rescinded when he refused to perform contract, and thereafter buyer, who made payment, was entitled also to rescind and maintain an action as for moneys had and received.

Appeal from Superior Court, Fresno County; Denver S. Church, Judge.

Action for money had and received by Santoro Cincotta against Santo Catania. From the judgment, defendant appeals. Affirmed.

George G. Graham, of Fresno, for appellant.

M. F. McCormick and L. N. Barber, both of Fresno, for respondent.

STURTEVANT, J. This is the second appeal in this controversy. Cincotta v. Catania, 61 Cal. App. 38, 214 P. 451. The plaintiff inserted in his complaint two causes of action: (1) A common count for money had and received; and (2) a common count for money paid. The defendant appeared and answered. He denied the material allegations set forth in plaintiff's complaint, and then he set forth an oral contract made on the 18th day of October, 1920. The provisions of that contract were that the plaintiff agreed to buy and the defendant agreed to sell and deliver to the plaintiff, f. o. b. cars, 10 tons of black and green cured olives at 12 cents per pound, packed in 30-gallon barrels, and to be delivered during the month of December, 1920. The defendant further alleged that at the time the contract was made the plaintiff paid $1,000, and that thereafter, on the 23d day of December, the defendant tendered the merchandise, but the plaintiff refused to accept it. The defendant further alleged that he had fully performed the contract and that during the month of December, 1920, he was ready and willing to deliver the merchandise as agreed in the contract. Thereupon the defendant further alleges that by reason of the plaintiff's refusal to accept the merchandise he has been damaged in the sum of $1,400. A trial was had before the trial court sitting without a jury. The trial court made findings in favor of the plaintiff on both counts contained in the complaint. As to the allegations contained in the defendant's cross-complaint the trial court found that the special contract was made as alleged, but that said contract was rescinded and terminated on November 1, 1920, by the mutual oral agreement of the parties. From a judgment entered on the findings the defendant has appealed under section 953a of the Code of Civil Procedure.

[1, 2] The defendant presents one point, and that is that the evidence does not sustain the finding that there was a mutual rescis-

sion of the contract. In presenting that point it is the contention of the defendant that the evidence does not show that at any time the parties met and used the identical words, "We do mutually rescind the contract heretofore entered into by us on the 18th day of October, 1920." Of course, it was not necessary that they should do so in order to rescind the contract. As rescission could be proved by other words and acts. Looking into the record, it will be found that there is evidence to the effect that on the 18th day of October, 1920, the parties entered into a contract whereby the plaintiff agreed to buy and the defendant agreed to sell to the plaintiff, f. o. b. cars, 10 tons of black and green cured olives. At a later date, the above contract not having been performed, the parties agreed that the defendant should sell to the plaintiff, instead of olives, a quantity of dried grapes. Later, that contract having been filled, the defendant agreed to sell to the plaintiff a quantity of salt and empty barrels as the subject-matter of the same sale. At a still later date the defendant refused to perform that contract and the plaintiff elected to commence this action. In taking the course that he took the defendant rescinded when he refused to perform. Thereafter the plaintiff was entitled also to rescind and maintain an action as for moneys had and received. Cleary v. Folger, 84 Cal. 316, 24 P. 280, 18 Am. St. Rep. 187. True it is that there was conflicting evidence; nevertheless it may not be said that the evidence was insufficient. An examination of the record discloses that there was an abundance of evidence which, if the court believed it, would justify the finding complained of.

The judgment is affirmed.

We concur: KOFORD, P. J.; NOURSE, J.

---

95 Cal. App. 113

SAN FRANCISCO BANK v. NATIONAL RADIO CO. et al. (Civ. No. 6594.) ★

District Court of Appeal, First District, Division 2, California. Nov. 22, 1928.

Rehearing Denied Dec. 20, 1928.

1. Appeal and error 🔑705—$2,000 attorney fees expended under mortgage authorizing expenditure of sums deemed necessary could not be held excessive on appeal without evidence of value of services.

Where mortgage provided that mortgagee could expend such sums as it might deem necessary in action, which would constitute charge against mortgaged premises, and mortgagee in action affecting mortgaged premises expended $2,000 in defense of action as counsel fees, and there was no evidence concerning value of services rendered except undenied allegations of complaint, it could not be said on appeal that sum of $2,000 paid by mortgagee was in excess of value of services rendered.

2. Mortgages 🔑581(1)—That mortgagee's expenditure in defending mortgaged premises was insured held no defense to mortgagor's liability therefor under mortgage, where insurer was not party to action nor mortgage.

In action on note and to foreclose mortgage authorizing mortgagee to expend sums deemed necessary in action involving mortgaged premises, claim that expenditure of $2,000 for attorneys' fees was covered by title insurance *held* no defense to mortgagor's liability for expenditure expressly agreed to be repaid in mortgage, where insurance company was not party to action nor to mortgage.

3. Mortgages 🔑578, 581(5)—Allowance of attorney's fees within limits of mortgage held within trial court's discretion, not to be disturbed unless abused.

In action to foreclose mortgage involving mortgagor's liability for attorney's fees expended by mortgagee under mortgage providing for attorney's fees of $100 and 5 per cent. of amount found due, allowance of attorney's fees within limits fixed by mortgage was within discretion of trial court, and will not be disturbed on appeal except for abuse of discretion.

4. Costs 🔑260(4)—Appeal from foreclosure involving only issue of attorney's fees held not to require penalty for frivolous appeal.

In action on note and mortgage, appeal involving only issue as to reasonableness of allowance to mortgagee for attorney's fees *held* not to authorize imposition of penalty for frivolous appeal.

Appeal from Superior Court, City and County of San Francisco; Louis H. Ward, Judge.

Action by the San Francisco Bank, formerly the San Francisco Savings & Loan Society, a corporation, against the National Radio Company and others. Judgment for plaintiff, and defendant Jessie S. Gregory appeals. Affirmed.

Grant & Zimdars, Joseph M. Trusty, and George M. Naus, all of San Francisco, for appellant.

Hugh Goodfellow and Stoney, Rouleau, Stoney & Palmer, all of San Francisco (Royal E. Handlos and Bradford W. Bosley, both of San Francisco, of counsel), for respondent.

BURROUGHS, Justice pro tem. This is an action upon a promissory note and to foreclose a real estate mortgage given to secure the payment of said note. Plaintiff had judgment, and the defendant Jessie S. Gregory appeals therefrom.

The note and mortgage in suit were executed September 22, 1922, by the defendant National Radio Company, a corporation, in the principal sum of $30,000.

Immediately after the execution thereof, the said National Radio Company executed a

---

★Rehearing denied.

deed of trust of the property described in said mortgage, in favor of the defendant Jessie S. Gregory, to secure a loan in the sum of $17,500. Thereafter said property was sold by virtue of the terms of said deed of trust, and title passed to said Jessie S. Gregory, subject to the prior lien of plaintiff's mortgage.

In appellant's opening brief appears the following statement:

> "The only question presented by this appeal relates to the reasonableness of the allowance of $3600.00 as and for attorney's fees allowed to plaintiff in connection with the enforcement of plaintiff's rights under the mortgage."

Amplifying the foregoing statement by the record in this case, it appears that the trial court allowed to the plaintiff an attorney fee of $2,000 in litigation effecting the title to the mortgaged premises, and the further sum of $1,600 as and for the services of plaintiff's attorney in this foreclosure suit.

The mortgage contains a provision that if during the existence of the mortgage there be commenced or pending any suit or action affecting the premises described therein, or if any adverse claim for or against the premises, or any part thereof, be made or asserted, the mortgagee might appear in said suit or action and retain counsel therein and defend the same or take such other action as it might be advised, and for said purposes might pay and expend such sums of money as it might deem necessary, and all sums of money expended should bear interest at the rate of 1 per cent. per month and should be secured by the mortgage and be a lien upon the mortgaged property and deducted from the proceeds of any sale thereof.

In accordance with the foregoing provision of said mortgage, the commencement of an action affecting the mortgaged premises and the title thereto, in which action this plaintiff was made a party defendant, and the necessity for the plaintiff to retain counsel and appear therein, is alleged in the complaint. There is then set forth in appropriate language allegations of services rendered in said action covering a period of several months and including proceedings and hearings in the superior court, the District Court of Appeal, and the Supreme Court of the state of California. It is further alleged that plaintiff expended in the defense of said action the sum of $2,000 as counsel fees, and that no part thereof nor the interest thereon has been repaid to plaintiff.

The answer herein does not deny the rendition of the services in said action, but does deny that the charges therefor are proper or a lien upon the premises set forth in the mortgage, and further alleges that any sum for said services in excess of the sum of $500 would be excessive.

[1] No authorities are cited in support of appellant's position. The evidence shows that plaintiff did pay its attorneys for services in said action the sum of $2,000, and, under the express terms of the mortgage any sum so paid and which this plaintiff "might deem necessary" was a proper charge against the mortgaged premises. Such a condition in a mortgage is analogous to provisions for the payment of taxes, insurance, and other charges. So far as the value of the services rendered in said action is concerned, there is no evidence in the record except the undenied allegations of the complaint, and from a review thereof we cannot say the sum of $2,000 paid by the plaintiff was in excess of the value of the services rendered.

[2] Appellant also argues that said expenditure was covered by title insurance, but this claim is answered by the fact that the insurance company is not a party to this action, nor a party to the mortgage contract by which the mortgagor expressly agreed to repay the mortgagee any sum of money so expended.

[3] It is also claimed by appellant that the allowance of $1,600 to plaintiff as an attorney fee for services rendered in this action is excessive and that said services were not worth more than the sum of $500. The provisions of the mortgage bearing upon this subject are that the court may allow as counsel fees the sum of $100 and also a sum equal to 5 per cent. upon the amount found due. By the decree in this case the court found the amount to be due plaintiff was the sum of $38,774, making the amount allowed as an attorney fee less than that provided for by the terms of the mortgage itself. However, it is well settled that such allowance within the limits fixed by the mortgage itself is peculiarly a matter resting in the discretion of the trial court, and will not be disturbed upon appeal except for an abuse of that discretion. Huber v. Shedoudy, 180 Cal. 311, 181 P. 63; Damon v. Quinn, 143 Cal. 75, 76 P. 818. There being no abuse of the discretion of the court shown, the point is without merit.

[4] Counsel for respondent insists that this appeal is frivolous and the court should impose a fine upon appellant, but we are of the opinion that the case is not one in which the court should impose a penalty.

The judgment is affirmed.

We concur: NOURSE, Acting P. J.; STURTEVANT, J.

95 Cal. App. 195

RAMSDELL v. KREHMKE. (Civ. 3472.)

District Court of Appeal, Third District, California. Nov. 27, 1928.

1. Brokers 🔑84(1)—Where sale is not consummated, broker, to recover commissions, must show signing of enforceable contract to purchase or that parties were brought together.

Where sale is not consummated, broker, in order to recover commission, must show actual signing of an enforceable contract to purchase property on part of customer, or that parties have been brought together to enable owner to consummate sale.

2. Brokers 🔑54—Customer's "ability to purchase," which broker must prove to recover commission, means he must have property, credit, or ability to provide for consideration.

Customer's "ability to purchase," which broker must prove in order to recover commission, does not necessarily mean that he must have actual cash on hand with which to consummate transaction, but it means that he must have property, credit, or ability to provide for necessary consideration on terms and within time required.

[Ed. Note.—For other definitions, see Words and Phrases, First, Second, and Third Series, Ability.]

3. Brokers 🔑86(5)—In action for broker's commission, evidence supported finding customer was ready, willing, and able to purchase.

In action to recover broker's commission, evidence *held* sufficient to support finding that customer was ready, willing, and able to purchase property on terms prescribed.

4. Vendor and purchaser 🔑76—Reasonable construction of contract provision for down payment was that purchaser should proffer cash upon tender of evidence of merchantable title.

Reasonable construction of provision of land contract for payment of $6,000 down was that such cash was to be proffered by purchaser on tendering of evidence of merchantable title.

5. Brokers 🔑86(4)—In broker's action, evidence showed vendor and prospective purchaser were brought together by broker to afford vendor opportunity to consummate sale.

In action to recover broker's commission where sale was not consummated, evidence *held* sufficient to show that vendor and prospective purchaser were brought together by broker so as to afford vendor an opportunity to consummate sale.

6. Brokers 🔑84(1), 86(1)—Broker suing for commissions has burden of proving case, but no higher degree of evidence is required of him than in other cases.

Broker suing for commissions has burden of proving his case, but in assuming this burden no higher degree of evidence is required of him than in any other case, and same principles apply to weight and character of evidence.

7. Brokers 🔑86(1)—Where sale is not consummated, broker suing for commission must prove, by satisfactory evidence written agreement was signed by customer or that parties were brought together by broker.

While, in absence of actual consummation of sale, it is necessary to prove that either written agreement to purchase has been signed by customer or that parties have been brought together by broker so as to enable owner to close sale, all that is required is such satisfactory evidence of these acts as would suffice to prove any other material fact.

8. Brokers 🔑86(3)—Postscript, signed by customer, to broker's letter to owner, held sufficient written agreement of purchase to entitle broker to commission.

Postscript, signed by prospective purchaser, to broker's letter to owner, stating that purchaser agreed to purchase property on terms contained in written authorization to broker, *held* to constitute sufficient written agreement of purchaser to be signed by customer to entitle broker to commissions, where sale was not consummated.

9. Appeal and error 🔑1048(6)—In broker's action for commission, excluding cross-question to prospective purchaser whether she saw owner and offered to buy held harmless error.

In broker's action for commission, where sale was not consummated, sustaining objection to cross-examination of prospective purchaser as to whether she ever saw owner and offered to buy property on basis of authorization to broker *held* harmless error, hence it was not necessary that prospective purchaser should have personally interviewed owner and offered to buy property.

10. Appeal and error 🔑1050(1)—Excluding question whether broker suing for commission brought purchaser to owner's place to consummate deal held harmless.

In action for broker's commission where sale was not consummated, sustaining objection to question purported to defendant, as to whether broker ever brought prospective purchaser to owner's place for purpose of consummating any deal to buy that place, *held* harmless, since it was not necessary for broker to consummate deal at owner's premises.

Appeal from Superior Court, Butte County; H. D. Gregory, Judge.

Action to recover real estate broker's commissions by H. R. Ramsdell against C. F. Krehmke. From the judgment, defendant appeals. Affirmed.

J. Oscar Goldstein, of Chico, for appellant.

A. H. Hewitt and Lloyd E. Hewitt, both of Yuba City, for respondent.

THOMPSON, Justice pro tem. This is an appeal from a judgment for $700 broker's commissions for procuring a customer, ready, willing, and able to purchase real property situated in Butte county, upon the terms specified. April 5, 1926, the appellant signed an exclusive 10-day contract to pay respondent 5 per cent. commissions for the sale of lots 18 and 19 of Gridley tract No. 5, situated in Butte county, Cal., for the sum of $14,000, upon the following terms:

> "$6,000.00 down, and the balance secured by mortgage and contract for five years to pay $1,600.00 a year, with interest at 6 per cent per annum until paid. * * * Evidence of title to be in the form of certificate of title issued by a responsible Title Company to be furnished and paid for by the seller."

The following day the respondent took Mrs. Ollie Osborne, a prospective purchaser who resided at Live Oak, to inspect the property, where she met the appellant on his ranch near Gridley. She was entirely satisfied with the property and agreed to purchase it upon the terms specified, paying the respondent $500 to bind the bargain. April 13, 1926, the respondent, who also lived in Live Oak, within a few miles of Gridley, wrote the appellant at Gridley informing him that he had procured a customer in the person of Mrs. Ollie Osborne, who was ready, willing, and able to purchase the property upon the exact terms specified in their listing contract of April 5, and enumerated these terms in the letter, requesting the appellant to at once procure his certificate of title so as to enable them to close the sale within the time mentioned. At the bottom of this letter the proposed purchaser signed the following postscript:

> "I have agreed with Mr. H. R. Ramsdell to purchase the property above mentioned for the sum of $14,000.00, upon the terms contained in the written authorization dated April 5, 1926, and given to said H. R. Ramsdell by C. F. Krehmke, and I have funds on hand to make the initial payment of $6,000.00, and I have deposited with said H. R. Ramsdell the sum of $500.00 to be applied on the purchase price of said property, and as evidence of good faith on my part. Dated, April 13, 1926. (Signed) Ollie Osborne."

The owner, however, evidently sought to avoid the contract, and the sale was not consummated.

Upon the assumption that the evidence supported the findings that the respondent had procured a customer within the allotted time who was ready, willing, and able to purchase the property upon the terms specified, the court rendered judgment in his favor for the sum of $700. The appellant contends that the findings and judgment are not supported by the evidence, for the reason that: (1) The proof fails to show that the customer was able to purchase the property upon the terms specified; (2) a written contract of purchase was neither procured from the customer, nor were the parties brought together so as to enable the owner to consummate the sale; and (3) the contract for broker's commissions was procured by fraud.

[1] The well-established rule requiring the payment of broker's commissions is not disputed, to the effect that a broker is deemed to be the procuring cause of sale so as to entitle him to his commissions, when he has secured a customer, ready, willing, and able to purchase the property upon the terms prescribed in the contract of employment, and has either obtained from the customer an enforceable written contract to buy the property on the terms designated, or, in lieu thereof, has succeeded in bringing the parties together so as to enable the owner to consummate the sale. 4 Cal. Jur. 582, § 25. Where the sale is not consummated, proof is required showing the actual signing of an enforceable contract to purchase the property on the part of the customer, or that the parties have been brought together to enable the owner to consummate the sale. Mattingly v. Pennie, 105 Cal. 514, 39 P. 200, 45 Am. St. Rep. 87; Gunn v. Bank of California, 99 Cal. 349, 353, 33 P. 1105; Deovletian v. Whitney, 55 Cal. App. 76, 202 P. 905; Douglas v. Spangenberg, 23 Cal. App. 294, 137 P. 1103; Cone v. Keil, 18 Cal. App. 675, 124 P. 548.

[2-5] The customer's ability to purchase does not necessarily mean that he must have the actual cash on hand with which to consummate the transaction. It merely means that he must have the property, credit, or ability to provide for the necessary consideration upon the terms, and within the time required. Pellaton v. Brunski, 69 Cal. App. 301, 231 P. 583; Russell v. Ramm, 200 Cal. 348, 254 P. 532. The evidence in the present case sufficiently supports the finding that the customer was ready, willing, and able to purchase the property upon the terms prescribed. The contract called for "$6,000.00 down, and the balance to be secured by mortgage" on the premises. Mrs. Osborne testified as follows:

> "Q. Did you have any funds to meet the payments specified in the contract? A. I did. * * * I deposited them in the (Lodi National) Bank on the 7th of April, 1926.
>
> "Q. How much did you deposit? A. Five thousand dollars. * * * It was my own money; I had sold property and obtained it. * * * I also had money in account with the Bank of Italy, * * * enough to make up the $6,000, lacking $500. * * * The Bank of Italy said they would let me have it (the $500) so I had the $6,000. * * * I could put my hand on it any time I wanted it."

Corroborating this evidence, Mr. Cobeen, the manager of the Bank of Italy at Live Oak, testified:

> "Q. Do you know Mrs. Ollie Osborne? A. I do.
>
> "Q. In April, 1926, did she make arrangements with your bank to obtain funds for the purchase of land, the Krehmke place? A. She did. * * * She asked for approximately $500, and we told her that we would loan her (that amount) on an open note."

The contract provided that the vendor would furnish a certificate of title at his own expense. A reasonable construction of this provision for the payment of "$6,000 down" is that this cash was to be proffered upon the tendering of evidence of a merchantable title. The certificate of title was never procured or tendered by the appellant. The record also adequately shows that the vendor and prospective purchaser were brought together by the respondent so as to afford the appellant an opportunity to consummate the sale, and that a sufficient written contract of purchase was signed by the customer. The appellant knew the identity of respondent's customer before the contract of employment of the broker was signed. The appellant testified:

> "Q. He (respondent) had notified you he had a purchaser * * * before you met on that date; that he had a purchaser in the person of Mrs. Osborne, didn't he? A. Yes, sir."

Mrs. Osborne was actually introduced to the appellant as a prospective purchaser the day following the execution of the broker's contract. She testified:

> "Q. Have you met the defendant, Mr. Krehmke? A. Yes, sir.
> "Q. Where did you meet him? A. At his place at home.
> "Q. At his ranch near Gridley? A. Yes, sir.
> "Q. When did you see him first? A. It was the 6th of April * * *
> "Q. What was the occasion of your calling at that place? A. I came to look at the place.
> "Q. Had you been apprised of the price? A. Yes, I knew the price."

April 13th respondent wrote a letter to the appellant notifying him that he had procured a purchaser in the person of Mrs. Osborne, who was able and willing to buy the property on the exact terms of the contract, enumerating these terms specifically. As a postscript to this letter, Mrs. Osborne signed a written acceptance, in which she agreed to purchase the property "upon the terms contained in the written authorization dated April 5th, 1926." This communication, referring to and construed with the original contract of April 5, 1926, constituted a sufficient written agreement on the part of the customer to bind the appellant to pay the agreed broker's commissions.

[6-8] It is not the purpose of the law to adhere to a rule of evidence in proof of the ability and readiness of a customer to purchase the property so stringent as to encourage an owner to breach his contract without just cause. In the case of Pellaton v. Brunski, 69 Cal. App. 306, 231 P. 585, it is said:

> "The burden * * * is upon the broker to prove his case, but in assuming this burden no higher degree of evidence is required of him than in any other case, and the same principles apply to the weight and character of the evidence."

While, in the absence of an actual consummation of sale, it is necessary to prove that either a written agreement to purchase has been signed by the customer, or that the parties have been brought together by the broker so as to enable the owner to close the sale, all that is required is such satisfactory evidence of these acts as would suffice to prove any other material fact. The statement made by Mrs. Osborne that, "I *have* agreed * * * to purchase the property * * *," considered in view of the written contract, communications and circumstances involved in this transaction, should be construed to mean, "I *do* agree * * * to purchase the property * * * upon the terms contained in the written authorization dated April 5th, 1926." There is no uncertainty of this language employed. It is apparent that Mrs. Osborne intended to thereby notify the appellant she was consenting to buy the property upon the terms mentioned in respondent's contract for broker's commissions, and that she had the means with which to do so, and had deposited the sum of $500 with the broker to bind the bargain. We are of the opinion that this communication is a sufficient compliance with the rule requiring a written agreement of purchase to be signed by the customer.

[9, 10] The appellant complains of the rulings of the court sustaining objections to his cross-examination or Mrs. Osborne, most important among which was the following question:

> "Did you ever see Mr. Krehmke and offer to buy his property on the basis of the authorization?"

This was a proper question tending to indicate a presence or absence of willingness on her part to purchase the property. It cannot be said to be prejudicial error, however, for the reason that it was not necessary that she should have personally interviewed the appellant and offered to buy the property. She could have just as conclusively bound herself to purchase the property dealing only with appellant's agent, the broker. If the purpose of this question was to refute the evidence that she had been taken into the presence of the appellant, the question was misleading because it included the unnecessary element to the effect that she had then offered to buy the property. The requirement of the law is that the parties shall have been brought together, only so that the owner may have the opportunity of closing the bargain. Other questions along this line were complex and misleading, and while answers to them might well have been permitted, we are of the opinion that reversible error was not committed in sustaining objections to these questions. Likewise, an objection was sustained to a question propounded to the appellant, as follows:

"Did Mr. Ramsdell ever bring Mrs. Osborne to your place after April 5th, 1926, for the purpose of consummating any deal to buy that place?"

It is apparent that it was not necessary for the broker to consummate the deal at the appellant's premises. His purpose in taking the customer to view the premises might properly be to merely interest her in the purchase of the property with a view to consummating the sale elsewhere and later. The answer to this question might properly have been permitted. The sustaining of this objection, however, was not prejudicial. The record discloses no error upon which to base a charge that the contract was procured by fraud. The appellant makes no serious effort to indicate that he relies upon this charge.

The judgment is affirmed.

We concur: HART, Acting P. J.; PLUMMER, J.

---

95 Cal. App. 151

POWELL v. CITY OF LOS ANGELES.

(Civ. 3565.)

District Court of Appeal, Third District, California. Nov. 26, 1928.

1. Municipal corporations 🔑1002—City held not liable for penalty in form of interest for withholding funds from assignee of improvement contractor, collected and disbursed by city as trustee.

Where city was acting merely as trustee in collecting and disbursing funds for construction of tunnel, city *held* not liable for penalty in form of interest for withholding money and bonds from assignee of contractor.

2. Municipal corporations 🔑1002—Assignee of improvement contractor cannot recover damages in form of interest from city withholding bonds and money due, absent special agreement or statute.

Assignee of improvement contractor cannot recover damages in form of interest from city withholding bonds, money, or interest due him, in absence of special agreement or statute authorizing collection of interest on money and bonds so withheld.

3. Mandamus 🔑105—Remedy of assignee of improvement contractor against city withholding funds due is by mandamus proceedings.

Remedy of assignee of improvement contractor against city, withholding money and bonds due assignee, is by mandamus proceedings.

4. Municipal corporations 🔑1002—Retention by city council, without authority, of money and bonds due assignee of improvement contractor, was ultra vires, and city is not liable for interest.

Retention by city council, without lawful authority, of money and bonds due assignee of improvement contractor, was ultra vires and void, and city cannot be held liable for interest.

Appeal from Superior Court, Los Angeles County; Harry A. Hollzer, Judge.

Action by C. L. Powell against the City of Los Angeles to recover interest on bonds and money withheld. From a judgment for defendant, plaintiff appeals. Affirmed.

Emmet H. Wilson, of Los Angeles, for appellant.

Jess E. Stephens, City Atty., and Cecil A. Borden, Deputy City Atty., both of Los Angeles, for respondent.

PRESTON, Justice pro tem. This action was commenced by plaintiff to recover from defendant interest on money unlawfully withheld from plaintiff by the city council of defendant. Defendant interposed a general demurrer to the complaint, which was sustained by the court, without leave to amend, and judgment was thereupon entered in favor of defendant. From this judgment, plaintiff prosecutes this appeal.

Plaintiff, by appropriate allegations in his complaint, alleges the following facts:

In October, 1917, pursuant to the provisions of the Street Improvement Act of 1913 (Stats. 1913, p. 954), the city council of the city of Los Angeles passed an ordinance declaring its intention to order the construction of a tunnel in a portion of Second street in the city of Los Angeles, together with other improvements particularly described in said ordinance. Thereafter, pursuant to said Improvement Act the ordinance ordering the work was adopted. In these proceedings the city council declared that serial bonds should be issued to represent assessments of $25, or more, for the cost and expenses of said work or improvements; the said bonds to bear interest at the rate of 7 per cent. per annum. Thereafter notices inviting proposals or bids for the doing of the work were published and posted, and at the time appointed therein bids were received for the work, among the same being a proposal from one John Hayes. In March, 1918, the contract for the performance of the work was awarded to the said John Hayes, and subsequently a contract was entered into between the defendant, city of Los Angeles, and the said John Hayes, whereby the latter agreed to perform the work for $995,773.21, which contract was accompanied by good and sufficient bonds in the amount required by law. Thereafter an assessment was levied upon the property in the assessment district, pursuant to which certain assessments were paid in cash, and by reason of the failure to pay certain other assessments in excess of $25, bonds were issued against the property upon which the assessments had been levied; the total amount of the bonds being $542,656.17. In March, 1921, pursuant to the provisions of said Improvement Act, the bonds were duly and regularly advertised for sale, and upon the date specified for the sale thereof bonds in the total sum of $8,497.07 were sold, leaving bonds unsold in the amount of $534,159.10. The bonds unsold, together with the cash received at the said sale, were placed in the "Second Street Tunnel Improvement Fund," and, pursuant to the terms of said statute, at all times thereafter were deemed and treated as "so much money in said fund."

Immediately after the sale of said bonds, the said John Hayes was notified by the city that there was sufficient money and bonds in the special fund, devoted to said improvement to pay the price agreed by said contract to be paid, and within 20 days after receipt of said notice the said John Hayes commenced work on said improvement, and thereafter the said work was completed and the same was accepted as completed by the city council of said defendant on August 28, 1924. On January 9, 1922, by an assignment in writing, the said John Hayes assigned and transferred to the plaintiff herein all moneys and bonds then due, or that should thereafter become due, under the provisions of said contract, and authorized payment and delivery to plaintiff of all moneys and bonds then due, or that should thereafter become due, pursuant to said contract. On the same date the assignment was delivered to and filed with the board of public works, which board then had custody of the contract and also had charge and control of the improvements. The assignment was thereupon accepted and filed by the board of public works and attached to the contract.

During the progress of the work, portions thereof were from time to time accepted in the manner provided by law. Prior to the date of the assignment partial payments were made to Hayes, and subsequent to the date of the assignment partial payments were made to plaintiff, by warrants drawn on said improvement fund. On April 28, 1924, bonds had been paid by property owners in the total sum of $72,518.11, and between April 28, 1924, and August 28, 1924, other bonds were paid in the sum of $3,578.57, making a total of $76,096.68 in bonds which were paid in full prior to the acceptance of the work. On April 28, 1924, the city council adopted a resolution directing that all bonds then remaining in the said improvement fund, at their par value, should be issued and delivered to defendant, city of Los Angeles, by the treasurer of said city, and that the par value of said bonds in money should be transferred from the general fund of the city of Los Angeles to the special fund for the said improvements. Prior to April 28, 1924, the date of the adoption of said resolution, interest in the sum of $101,825.12 had been paid on account of the bonds in said fund, and between the said last-mentioned date and August 28, 1924, the date of the completion and acceptance of the work, additional interest had been paid in the sum of $14,874.88, making a total of $116,700 interest in the fund at the time of the completion and acceptance of the work. On August 28, 1924, the date of the acceptance of the work, the plaintiff as assignee of the contractor, was entitled to receive from the defendant, the said interest amounting to $116,700; also the said sum of $76,096.68, which had been paid by the property owners in full payment of bonds upon their respective properties; also the sum of $1,957.05, which was the remaining portion of the cash originally paid into the fund, making a total of $194,753.73, which the plaintiff should have received from the defendant on August 28, 1924.

The defendant refused to pay any portion of said sum to plaintiff until April 25, 1925. and then paid the said sum to plaintiff solely by reason of a writ of mandate issued out of the District Court of Appeal in and for the Second Appellate District. Powell v. Allan, 70 Cal. App. 663, 234 P. 339. Under this mandate of the court, all the bonds and money above referred to, together with all accrued interest thereon, were delivered and paid over to plaintiff by defendant.

Plaintiff brought this action for the purpose of recovering interest from defendant, city of Los Angeles, at the rate of 7 per cent. per annum, on the total amount withheld by it, from August 28, 1924, the date of the completion and acceptance of the work, to April 25, 1925, the date that actual payment was made to plaintiff.

In the opinion in Powell v. Allan, supra, rendered on January 21, 1925, this court held that the city council of the city of Los Angeles was without right or power to adopt the resolution of April 28, 1924, purporting to transfer the bonds to the city of Los Angeles, and to transfer an amount in money equal to the face value of the bonds from the general fund of the city into the said special improvement fund, and ordered a peremptory writ of mandate to issue, requiring the officials of the city of Los Angeles to deliver the bonds to the plaintiff in payment pro tanto of the balance of the contract price for the work done. This mandate of the court, however, as above stated, was not complied with until April 25, 1925.

Plaintiff contends that he is entitled to interest from the city of Los Angeles on the amount so withheld, from the time it became due and payable until the time the same was actually paid. We think that the law of this state prohibits plaintiff's recovery.

The case of Engebretson v. City of San Diego, 185 Cal. 475, 197 P. 651, was an action to recover the balance of the contract price for certain street improvements, together with interest thereon, from the time the obligation accrued, and the court said:

"In order to recover interest against a municipality there must be some statutory provi-

> sion authorizing it. The rule is thus stated in Ruling Case Law (15 R. C. L. § 14, p. 17): 'It is well settled, both on principle and authority, that a state cannot be held to the payment of interest on its debts unless bound by an act of the legislature or by a lawful contract of its executive officers made within the scope of their duly constituted authority. This principle applies to bonds, claims, judgments and warrants. The theory upon which the rule is based is that whenever interest is allowed either by statute or by common law, except in cases where there has been a contract to pay interest, it is allowed for delay or default of the debtor. But delay or default cannot be attributed to the government. It is presumed to be always ready to pay what it owes. The apparently favored position of the government in this respect has been declared to be demanded by public policy.' * * * The same reasons apply with equal force to a municipal corporation, although the authorities are not uniform on this subject. 15 R. C. L. § 15, p. 18. Appellant relies upon sections 1915 and 1917 of the Civil Code to establish his right to recover interest, but in Savings, etc., Society v. San Francisco, 131 Cal. 356, 363, 63 P. 665, it was held that these sections do not apply to the state or any of its subdivisions. The court there stated: 'The code sections cited relate to interest as compensation or damage between parties to an action, and the language of the statute is general and does not include the state or any of its political subdivisions. The state is not bound by general words of a statute which would operate to establish a right of action against it. Mayrhofer v. Board of Education, 89 Cal. 110, 26 P. 646, 23 Am. St. Rep. 451; Whittaker v. County of Tuolumne, 96 Cal. 100, 30 P. 1016. The action here is brought under a new section of the Political Code—3819—in which no provision is made for the payment of interest. Stats. 1895, p. 335.' This case was followed in Columbia Sav. Bank v. Los Angeles, 137 Cal. 467, 471, 70 P. 308, in Miller v. Kern Co., 150 Cal. 797, 90 P. 119, and in Spencer v. Los Angeles, 180 Cal. 103, 115, 179 P. 163. * * * We conclude, therefore, that the plaintiff is not entitled to recover interest and that his remedy to avoid delay was by mandamus to compel the auditor to issue the warrants and thus secure payment."

The case of Savings & Loan Society v. City and County of San Francisco, 131 Cal. 356, 63 P. 665, was an action to recover certain taxes paid under protest, together with interest thereon from the date of the payment of the taxes, and in denying plaintiff's right to interest the court said:

> "It is claimed that the court erred in not allowing interest from date of payment of the tax under protest [citing Civ. Code, §§ 1915, 1917; Perley on the Law of Interest, § 135]. The Code sections cited relate to interest as compensation or damage between parties to an action, and the language of the statute is general and does not include the state or any of its political subdivisions. * * * "

The case of McNutt v. City of Los Angeles, 187 Cal. 259, 201 P. 592, was an action brought to recover judgment against the city of Los Angeles for damages resulting in changing the grade of streets bordering on plaintiff's lot, together with interest thereon from the date that such damage accrued. Judgment was given to plaintiff for the principal sum but interest denied him, and he appealed on the ground that the court erred in not including interest in the amount of the judgment, and the court, among other things, said:

> "As against the state or a municipality thereof interest cannot be recovered except under special statutory authorization," citing Engebretson v. City of San Diego, supra; Savings & Loan Society v. San Francisco, supra.

The case of Reclamation District v. Reclamation Board, 197 Cal. 502, 241 P. 560, was a proceeding in mandamus to compel the reclamation board in the Sacramento and San Joaquin drainage district to allow and provide for the payment of certain sums alleged to be due, together with interest thereon, arising out of the construction of certain levees, and in denying the right of plaintiff to recover interest the Supreme Court said:

> "* * * the petitioner insists upon the application of the rule laid down in section 1915 et seq. of the Civil Code, relating to the payment of interest for the detention or forbearance in the payment of liquidated sums of money. This rule, while doubtless applicable to ordinary debtors, has no application to state agencies or political subdivisions, the liabilities of which are entirely regulated by the statutes providing for their creation and the limitations of their powers. This question is practically set at rest by the decision of this court in the case of Engebretson v. City of San Diego, 185 Cal. 475, 197 P. 651, wherein the doctrine as laid down in Ruling Case Law (15 R. C. L. § 14, p. 17) * * * was approved. * * *"

Appellant contends that in the instant case the city was not liable at any stage of the proceedings for any portion of the contract price of the work, and for that reason the rule established by the foregoing authorities has no application.

[1] It is true that the contract between the city of Los Angeles and John Hayes provided:

> "That in no case, except where otherwise provided in the Improvement Act, or in the contract itself, will the city of Los Angeles, or any officer thereof, be liable for any portion of the expense of the work aforesaid, or of any delinquency of persons or property assessed."

The city was acting merely as a trustee in collecting and disbursing the funds, but the exacting of interest from the city for withholding the funds would be the imposition of a penalty for which, under the above authorities, the city of Los Angeles would not be liable.

[2, 3] Appellant loses sight of the fact that the city of Los Angeles *does not now hold in its possession any bonds, money or interest that belongs to plaintiff under the contract. Appellant is seeking to recover damages in the form of interest from the city of Los Angeles, and from no one else,* on money and

bonds for the period the same were withheld from him. This he cannot do in the absence of a special agreement or statute authorizing the collection of interest on the money and bonds so withheld. Appellant's only remedy against a municipality in such a case is by mandamus proceedings. Engebretson v. San Diego, supra. Appellant, however, does not claim any agreement by which the city was to pay the interest demanded, nor does he claim there is any special statutory authorization for the collection of interest.

[4] The city council of Los Angeles had no authority to retain the bonds and the money in its possession during the time complained of and its act in so doing was without authority, wrongful and unlawful. The retention of said money by the city council, without lawful authority, was ultra vires and therefore void, for which the municipal corporation of the city of Los Angeles cannot be held liable. Healdsburg Electric Light & Power Co. v. City of Healdsburg, 5 Cal. App. 558, 90 P. 955; Foxen v. City of Santa Barbara, 166 Cal. 77, 134 P. 1142. In the latter case the Supreme Court said:

> "It is undoubtedly the rule that a municipal corporation is not liable for the deeds or omissions of its servants done ultra vires. And this is true whether they acted with or without the express command of the municipality."

We are of the opinion that appellant is not entitled to recover interest from the city of Los Angeles on the money and bonds so withheld from him.

The judgment is affirmed.

We concur: FINCH, P. J.; PLUMMER, J.

The PEOPLE of the State of California, Plaintiff and Respondent, v. James GARRETT, Defendant and Appellant. (Cr. No. 1662.)

District Court of Appeal, Second District, Division 2, California. Nov. 17, 1928.

Appeal from Superior Court, Orange County; E. J. Marks, Judge.

George W. Rochester, of Los Angeles, for appellant.

U. S. Webb, Atty. Gen., and H. H. Linney, Deputy Atty. Gen., for the People.

PER CURIAM. The opinion rendered by this court in the above-entitled cause on July 5, 1928, and reported in 268 P. 1071, is hereby amended in the following respects:

At page 1071, amend the first sentence reading: "Appeal by defendant from a judgment of the Superior Court of Orange County, E. J. Marks, Judge, of conviction of unlawful sale of intoxicating liquor and from an order denying motion for new trial," by striking therefrom the words "and from an order denying motion for new trial."

At page 1071, amend the first paragraph of the opinion by striking from the first two lines thereof the words "and an order denying a motion for new trial."

At page 1072, amend the last sentence thereof by striking therefrom the words "and order," and the word "are," and inserting in lieu thereof the word "is" reversed.

---

95 Cal. App. 12

BAILEY v. JAMES. (Civ. 5384.)

District Court of Appeal, Second District, Division 1, California. Nov. 17, 1928.

1. Brokers 🔑55(2)—Abandonment of agreement for exchange of properties, and subsequent consummation of deal directly with third party after refusing to deal with broker, did not defeat broker's right to commission.

Defendant who entered into agreement with third party for purchase of property, as result of efforts of real estate agent, *held* liable for commissions, though original exchange agreement was abandoned by mutual consent, where defendant, after refusing to complete exchange through instrumentality of broker, closed transaction directly with third party.

2. Evidence 🔑314(1)—Court did not err in striking defendant's hearsay testimony.

Trial court did not commit error in striking out testimony given by defendant which was merely hearsay.

Appeal from Superior Court, Los Angeles County; Hartley Shaw, Judge.

Action by Robert T. Bailey against David J. James. Judgment for plaintiff, and defendant appeals. Affirmed.

Horace E. Vedder, of Los Angeles, for appellant.

J. Vincent Hannon and T. G. Dalton, both of Los Angeles, for respondent.

HOUSER, J. The salient facts affecting this appeal were that defendant, who was the owner of certain real property, employed plaintiff and his assignor as agents to negotiate an exchange thereof. Thereafter, through the efforts of plaintiff and his assignor, and in pursuance of such employment, an agreement was entered into between defendant and a Mrs. Robertson by which defendant agreed to exchange his real property for certain real properties or interests therein of which Mrs. Robertson was the owner, and she agreed to exchange her several properties for that owned by the defendant. In the same agreement defendant agreed to pay to plaintiff and his assignor the sum of $1,000 as a commission for effecting such exchange. Following the usual custom in such matters, the respective parties then placed the matter in escrow with a title company, with appropriate instructions with reference thereto. Four or five days thereafter, on account of some misunderstanding on her part with reference to the assignability of a lease which existed on the property belonging to defendant, Mrs. Robertson announced to plaintiff and defendant that she "could not go through with the deal"; to which remark defendant responded that he "didn't care very much for the deal, and it is all right." At the same time he orally agreed that he would "release her (Mrs. Robertson's) lots," the interest in which theretofore had been assigned to him, but which he thereafter failed to do. Within a period of three or four days following the above-mentioned circumstance, defendant made the statement to plaintiff:

> "Mr. Bailey (plaintiff), I want that deal; I believe it is a good deal; I believe Mrs. Robertson might go ahead with it."

Thereupon plaintiff again approached Mrs. Robertson with reference to the proposed exchange, and obtained her consent "to go ahead with the deal." By this time, however, several weeks had elapsed since the original agreement to exchange the respective properties of the interested parties was effected. After many excuses and evasions on the part of defendant, he finally refused to complete the transaction. However, the original escrow was never canceled, nor did defendant ever "release," or reassign, to Mrs. Robertson the interests in the several properties which she had transferred to him when the escrow was initiated. Approximately three weeks after defendant's refusal to complete the exchange, he personally reopened negotiations with Mrs. Robertson respecting an exchange of their respective properties, with the result that the transaction was finally completed. With reference thereto, Mrs. Robertson testified that, at the time the exchange was actually made, in substance the terms of the first agreement were practically identical with those of the second. She further testified that, as a matter of fact, in the course of adjusting details concerning payments on properties covered by trust deeds, etc., "Mr. James did get two or three hundred dollars the best of me; but I was alone and excited and didn't notice that." It further appears from the evidence that the second agreement to exchange the properties was the culmination of the avowed plan on the part of defendant to avoid the payment of any commission to plaintiff and his assignor. After the completion of the transaction, defendant refused to pay any commission to plaintiff and his assignor. An action instituted by plaintiff resulted in a judgment in his favor, from which defendant appeals.

[1] On the ground that the evidence was insufficient, appellant specifies error as to each of several findings of fact made by the trial court. Although no special argument has been presented by appellant with reference thereto, after an examination of the record herein, it satisfactorily appears that the evidence is ample to support each of the findings of fact to which attention has been directed. However, the main point made by appellant is that (as claimed by him) it appeared that the original exchange agreement was abandoned and that therefore no liability was incurred by defendant in his subsequent act which resulted in the exchange being thereafter consummated. Although some general authorities are cited in support of the principle for which appellant contends, this court is of the opinion that in circumstances such as are here presented, in conformity with the rule as announced in the analogous case of Dunne v. Colomb, 192 Cal. 742, 747, 221 P. 912, the liability of defendant is absolute.

[2] Appellant complains that the trial court erred in striking out certain testimony given by defendant on the trial of the action. As it clearly appears that the evidence to which appellant refers was hearsay, no error was committed by the trial court in that regard.

The judgment is affirmed.

We concur: CONREY, P. J.; YORK, J.

---

95 Cal. App. 85

GLADIUM CO., Inc., v. THATCHER.
(Civ. 3213.)

District Court of Appeal, Third District, California. Nov. 20, 1928.

1. Evidence ⟹417(16)—In action for price of steel, refusal to permit defendant to show that omitted name of shipper in shipping receipt covering steel was that of defendant corporation held error.

In action for purchase price of steel sold and delivered, in which defendant offered shipping receipt covering steel in which name of shipper was omitted, refusal to permit defendant to show that omitted name of shipper was that of defendant corporation *held* prejudicial error, since this was material evidence to establish delivery.

2. Evidence ⟹408(1)—Receipts for money or goods may be explained by parol evidence.

It is invariable rule that mere receipts for money or goods, as well as bills of lading, are subject to explanation by parol evidence.

3. Sales ⟹178(4)—One taking delivery of personal property, paying transportation charges, and using it or conveying it to another for consideration, cannot deny acceptance.

One who takes delivery of personal property, pays freight charges for transportation, and either uses it for his own benefit or conveys it to another for consideration, is estopped from denying acceptance of property.

4. Sales 🔑178(3)—Consignee is deemed to have accepted goods not promptly rejected.

It is duty of consignee to promptly reject goods which are shipped to him, or he will be deemed to have accepted them.

5. Sales 🔑200(3)—Where buyer reserves right of inspection, title does not pass till after reasonable opportunity to inspect goods, but right of inspection must be promptly exercised.

Where goods are not shipped f. o. b., and right of inspection is reserved, title does not pass till buyer has had reasonable opportunity to inspect goods, but, in absence of agreement, right of inspection must be promptly exercised.

6. Sales 🔑177—Consignee of goods, which are defective or shipped without sale agreement, holds property for owner, but must exercise reasonable care to preserve from loss or damage.

Where goods are shipped without agreement to purchase, or are materially defective, they need not be accepted, and consignee becomes bailee, holding property for owner's benefit, and, while he need not necessarily return property, he must exercise reasonable care to preserve against loss or damage.

7. Sales 🔑168½(9)—Buyer must exercise reasonable care to preserve goods for seller's benefit, notwithstanding attempted rejection by letter after goods were shipped.

Buyer's letter, written to seller after goods were shipped, in which attempt was made to reject goods, did not relieve buyer from exercising reasonable care to preserve property for benefit of seller, on delivery to him.

8. Principal and agent 🔑137(1)—Person appropriating property, or accepting benefits of transaction, with knowledge of circumstances, cannot deny authority of agent through whom it was consummated (Civ. Code, § 2310).

Where, with full knowledge of circumstances, one appropriates property or accepts benefits of transaction, he will be estopped from denying authority of agent through whom it was consummated, under Civ. Code, § 2310.

Appeal from Superior Court, Butte County; H. D. Gregory, Judge.

Action by the Gladium Company, Inc., against F. M. Thatcher. Judgment for defendant, and plaintiff appeals. Reversed.

See, also, 267 P. 1118.

J. Oscar Goldstein, of Chico, for appellant.

Guy R. Kennedy, of San Francisco, and George F. Jones, of Oroville, for respondent.

THOMPSON, Justice pro tem. This is an appeal from a judgment in favor of the defendant in an action for the purchase price of 4,501 pounds of steel, alleged to have been sold and delivered.

[1] The appellant is a corporation of the state of New York. Through its agent, an order for the purchase of steel bars for foundry use was obtained from an employee of the respondent August 1, 1922. This order was written upon a form furnished by the respondent in the following language:

> "Office of F. M. Thatcher. Order No. 8180. Sterling City, Cal., Aug. 1, 1922; To Gladium Company. Please forward supplies listed below, to Sterling City, Calif.; Invoice to Sterling City. Ship by S. P. Co., 4 bars 1"x10" soft steel bumpers for car bunks; 4 bars ½"x10" for plates; 2 bars 2½"x10" round for hooks. Price 20¢ per pound. Approved, C. A. Williams, Manager."

On August 16, 1922, this order was shipped from New York by way of the Panama Canal. The evidence satisfactorily shows that this steel was delivered to respondent's mills, in Sterling City, December 29, 1922. On January 1, 1923, for a consideration, respondent's mills, together with all equipment and supplies were transferred to the Diamond Match Company. This shipment of steel was never returned to the appellant, nor was it accounted for by the respondent. The evidence tends to prove that it was in fact conveyed to the Diamond Match Company upon the sale of respondent's mills. On September 22, 1922, after the steel had been shipped from New York, but before its arrival at Sterling City, the respondent wrote the appellant, charging it with having procured the order for steel by means of misrepresentations, refusing to accept the shipment, and declaring that upon its arrival the steel would be immediately returned.

The respondent contends that his agent, Williams, had no authority to order the steel, and that he had no knowledge of its actual delivery, and did not know what had become of it. For years, however, Williams had acted as respondent's bookkeeper and manager. A serious doubt is raised by the record as to whether an ostensible agency may not have existed, which would have authorized the purchase of steel by Williams. He admitted that he signed the order for the steel, but asserted that he was persuaded to do so through the misrepresentations employed by the appellant's agent. Upon delivery of the goods, Williams also paid the Southern Pacific Company's freight bill for transportation. Regarding his knowlege of the delivery and disposition of the steel, the respondent himself testified:

> "Q. I want to find out what became of the steel [which was] delivered? A. I can tell you; the Diamond Match Company got it—no doubt they got that steel.
>
> "The Court (interrupting): Q. Do you know whether it did or not? A. I don't know; to tell the truth, I don't know.'
>
> "Mr. Goldstein (interrogating the witness for appellant): Q. When you quit business on the

1st day of January, 1923, did you turn over all the property you had to the Diamond Match Company for a consideration? A. Yes sir.

"Q. And that included all the steel you had on hand, and all the merchandise? A. Everything used in the operations."

In further proof of the delivery of the steel in question, Mr. J. B. Barnes, the local agent of the Southern Pacific Company at Sterling City testified that ten bars of steel corresponding to the description of the goods in the written order and weighing 4,501 pounds, was delivered at respondent's mills December 29, 1922. A receipt for the identical number of bars and the exact weight of the steel ordered was signed by respondent's agent Williams on that date, and was offered in evidence. Concerning appellant's offer of this shipping receipt, the following proceedings occurred in the examination of the agent Barnes:

"Q. I show you a paper and ask you if that is the original receipt for the steel at Sterling City? A. Yes, sir. * * *"

Thereupon it was offered in evidence. The respondent objected to the offer on the ground that the receipt failed to identify the specific bars of steel in question, and because it did not contain the name of the shipper. Appellant's attorney then offered to prove by this witness that the omitted name of the shipper was that of the appellant corporation, but was denied this privilege. Upon this subject the following colloquy occurred. The court asked the witness Barnes:

"Q. Did you testify that this was a shipment of the Gladium Company? A. *I can explain this to you.* No; I didn't testify that it was delivered by the Gladium Company—the freight bill doesn't show that.

"The Court: That is all.

"Mr. Goldstein: Have him explain [that]; he can explain about that receipt.

"The Court: That must stand on its face. * * * He cannot explain it. The motion is overruled."

Mr. Goldstein then suggested that he could definitely prove that the steel bars described in the shipping receipt were the identical bars shipped from the Gladium Company to the respondent, and that the inventory of the stock transferred from the respondent to the Diamond Match Company would show that it received this steel. He said:

"Now, if your honor please, in view of your last question, I desire to state that I can definitely establish (the fact that) this steel was turned over to the Diamond Match Company, and, also, that it is the identical steel delivered by the Gladium Company, and I would like the court to give me a chance to do that. * * *"

To this request the court replied: "The motion is overruled."

From a fair reading of the record, there appears to be no reasonable doubt that the identical steel was in fact delivered to the respondent the day before his mill, equipment, and materials were conveyed to the Diamond Match Company for a consideration. Evidently the respondent himself believed this to be true. It was prejudicial error to deny the appellant the privilege of supplying the name of the shipper which was omitted from the receipt, for this was material evidence to establish the delivery of the steel. Both the questions regarding the delivery to, and the disposition of the property by, the respondent were material in determining whether there was a legal acceptance of the property. The court found that the steel in question was neither sold nor delivered to the respondent.

[2-7] It is an invariable rule that mere receipts for money or goods, as well as bills of lading, are subject to explanation by parol evidence. 4 Jones, Comm. on Evidence, p. 2985, § 1630; Id., p. 3030, § 1652; Comptoir D'Escompte de Paris v. Dresbach, 78 Cal. 15, 20 P. 28; San Pedro Lumber Co. v. Schroeter, 156 Cal. 158, 103 P. 888; Winans v. Hassey, 48 Cal. 634; Hawley & Co. v. Bader & Co., 15 Cal. 44.

Had the appellant been permitted to establish, not only the delivery of the steel to the respondent, but also his disposition of it, this evidence would furnish persuasive proof of acceptance. One who takes the delivery of personal property, pays the freight charges for its transportation, and either uses it for his own benefit or conveys it to another for a consideration, will be estopped from denying acceptance of the property. It is the duty of a consignee to promptly reject goods which are shipped to him, or he will be deemed to have accepted them. It is true that when goods are not shipped f. o. b., and the right of inspection is reserved by the buyer, the title does not pass until he has had a reasonable opportunity to inspect the goods. In 23 Ruling Case Law, 1433, § 256, it is said:

"Where goods are shipped by car or vessel, it seems to be generally recognized that the buyer is not required to make his inspection before removal of the goods from the car or vessel, but may remove them to a warehouse for such purpose, and such removal for the purpose of inspection alone does not constitute an acceptance."

But, in the absence of an agreement to the contrary, this right of inspection must be promptly exercised. Jackson v. Porter Land & Water Co., 151 Cal. 32, 39, 90 P. 122; Imperial Gas Engine Co. v. Auteri, 40 Cal. App. 419, 424, 180 P. 946; 52 A. L. R. 608, note. When goods are shipped without an agreement to purchase, or when they are materially defective in quality or quantity, as contrasted with the terms of the contract, they need not be accepted, and under such circumstances, the seller becomes a mere volunteer with respect to the shipment, while the consignee then becomes a bailee holding the property for the benefit of the owner, and while he need not necessarily return the property to the shipper, he must exercise reasonable care to preserve the property against loss or damage. 2 Williston on Sales (2d Ed.) 1295, § 497.

In the present case, an attempt was made on the part of the respondent to reject the goods, as his letter of September 22, 1922, indicates. But that letter was written after the goods were shipped from New York, and while they were in transit. This would not relieve the respondent from exercising reasonable care to preserve the property for the benefit of the appellant upon its delivery to him. Retaining the property or conveying it for a consideration are acts indicating that he treated the property as his own, and would amount to an acceptance which would make the respondent liable for their value. Jones v. Werthan Bag Co. (Mo.) 254 S. W. 4; Reading Steel Casting Co. v. U. S., 268 U. S. 186, 45 S. Ct. 469, 69 L. Ed. 907. In 23 Ruling Case Law, 1434, § 257, it is said:

> "Without doubt the buyer's retention of the goods beyond a reasonable time for examination and communication with the seller, standing alone, will be regarded as warranting the conclusion that he has accepted the goods and thus become liable, especially if the delay has worked prejudice to the seller. * * * Receipt (of the goods) will become acceptance if the right of rejection is not exercised within a reasonable time, or if anything has been done by the buyer which he would have no right to do unless he were the owner of the goods." 23 R. C. L. 1436, § 259.

[8] The respondent contends that his manager, Williams, had no authority to purchase the steel in question. The record raises a serious doubt as to whether an ostensible agency for that purpose may not have existed. But, regardless of whether an ostensible agency existed, when, with full knowledge of the circumstances, one appropriates the property, or accepts the benefits of a transaction, he will be estopped from denying the authority of his agent through whom it was consummated. Section 2310, Civ. Code; Gardner v. City of Glendale, 45 Cal. App. 641, 188 P. 307; Tomasini v. Smith, 26 Cal. App. 227, 146 P. 691. The record in the present case does not affirmatively show that the respondent had personal knowledge of the entire transaction, and the last-mentioned principal is merely announced for guidance of the court upon a new trial. In Gribble v. Columbus Brewing Co., 100 Cal. 67, 34 P. 527, it is said:

> "That which a principal may authorize an agent to perform he may ratify when performed by the latter without authority. And where, with full knowledge of all the facts involved, a principal reaps the fruits of the unauthorized contract of his agent, and for some time yields acquiescence to its provisions, he will be deemed to have ratified it, and will be estopped, as against one who has fully performed the contract on his part, from repudiating it to the injury of the latter."

And in Lawrence v. Johnson, 131 Cal. 175, 63 P. 176, it was likewise held, where an officer had no power to assign certain pledges as security for a debt, that the principal could not retain the money received on the transfer of the pledges, and at the same time repudiate the transaction. In the present case, the respondent could not retain the proceeds of a sale of the steel bars in question, and at the same time deny the purchase thereof.

For the foregoing reasons, the judgment should be reversed; and it is so ordered.

We concur: HART, Acting P. J.; PLUMMER, J.

---

95 Cal. App. 1

COOVER et ux. v. COX et al. (Civ. 5281.)

District Court of Appeal, Second District, Division 1, California. Nov. 16, 1928.

1. Principal and agent ⚷146(2)—Person, to excuse himself from responsibility on contract on ground of agency, must disclose principal, unless already known.

If person would excuse himself from responsibility on ground of agency, he must disclose his principal at time of making contract, unless already known, so as to enable party with whom he deals to have recourse to principal, in case agent had authority to bind him.

2. Principal and agent ⚷146(1)—Agent, failing to disclose principal, becomes personally liable when principal is not known, or agent exceeds his powers.

Agent, failing to disclose his principal at time of making contract, becomes personally liable when principal is not known, or when agent exceeds his powers.

3. Brokers ⚷96—Broker required by receipt to retain deposit on purchase price until some termination of deal held agent of purchaser in retaining deposit.

Where by terms of receipt given by real estate broker on deposit on purchase price by purchaser, broker was to retain deposit until some termination of deal, rather than to immediately deliver deposit to owner, *held*, that broker was agent of purchaser in retaining deposit.

4. Brokers ⚷96—Broker holds money paid to him by purchaser as agent of purchaser, and misappropriation thereof is loss of purchaser, and not seller.

A real estate broker has no authority to accept money offered by purchaser to conclude sale, and, when purchaser pays money into hands of broker, latter holds such money as agent of purchaser, and not of seller, and any misappropriation thereof is loss of former, and not latter.

5. Brokers 🔑4—On broker's failure to return deposit made in 1923 on demand therefor in 1924, defalcation is presumed to have occurred in 1924, and covered by 1924 bond (Gen. Laws, Act 112, § 9a).

Where, under provisions of deposit receipt given by broker for deposit on purchase price made by purchaser in 1923, broker was not required to return deposit until demand was made, and such demand was made in 1924, for which year broker was obliged to get a new license, *held*, that failure of broker to return deposit was covered by bond required by Gen. Laws, Act 112, § 9a, which was effective for year 1924, since, in absence of evidence as to when defalcation occurred, it will be presumed that it occurred in 1924.

6. Appeal and error 🔑926(5)—Trial court is presumed, in absence of contrary showing, to have admitted in evidence receipt, exclusion of which would have been error.

Actions of trial court being presumed to be regular, appellate court will presume, in absence of showing to contrary, that trial court admitted in evidence receipt, exclusion of which would have been error, though there is no formal order in record admitting such receipt in evidence.

7. Brokers 🔑4—Deposit receipt, given on deposit on purchase price, held properly admitted in evidence as obligation of broker.

Deposit receipt, given in return for deposit on purchase price, was properly received in evidence as obligation of broker, where broker testified that check representing deposit was delivered to him by salesman, that he cashed check, received copy of receipt, and that its conditions were those under which he accepted check.

8. Frauds, statute of 🔑71—Sales deposit receipt held not an "agreement for sale of real estate," invalid unless authority of agent is in writing, subscribed by party to be charged (Civ. Code, § 1624).

Sales deposit receipt, constituting contract between purchaser making deposit and real estate broker as agent of purchaser, for deposit of funds to be used as therein designated, otherwise to be returned to plaintiffs, *held* not an "agreement for sale of real estate," within Civ. Code, § 1624, so as to render it invalid, unless authority of agent is in writing, subscribed by party to be charged.

[Ed. Note.—For other definitions, see Words and Phrases, Second and Third Series, Agreement for Sale of Real Estate.]

Appeal from Superior Court, Los Angeles County; John L. Hudner, Judge.

Action by C. S. Coover and his wife against Vincent J. Cox and the American Surety Company of New York. Judgment for plaintiffs, and the Surety Company appeals. Affirmed.

John M. Hall, of Los Angeles, for appellant.

E. O. Leake, of Los Angeles, for respondents.

CRAIL, Justice pro tem. On December 6, 1923, the plaintiffs delivered to a real estate salesman, named Washire, in the office of defendant Cox, a check for $1,000 as a deposit upon the purchase price of certain real estate, and received from Washire a "sales deposit receipt" signed "Vincent J. Cox, Agent, by Vincent J. Cox Pr H W." The check was cashed by defendant Cox. The sales deposit receipt provided for the payment of the balance of the purchase price in cash through escrow upon delivery of a deed and a guaranty of title showing title to be in the vendor "free and clear also unrestricted."

On December 31, 1923, the broker's license of defendant Cox expired and in connection with his license for 1924 he and the appellant surety company, as surety, executed to the people of the state a real estate broker's bond, as required by section 9a, General Laws, Act 112. The condition of the bond was that the defendant Cox would comply with said law and would faithfully perform every undertaking entered into by him as a licensed real estate broker. It also authorized the plaintiffs to commence and maintain an action against appellant for the recovery of any damages sustained by the failure of the broker to perform his duties or any of them.

On January 5, 1924, plaintiffs received a letter from the title company, stating that the property was subject to certain building restrictions, and it is conceded that these restrictions were contrary to the terms of sale. A day or two later the plaintiffs made oral demand on Cox for the return of the $1,000, and on February 4, 1924, plaintiffs made a written demand, but the deposit was never returned. Thereafter this action was commenced against the defendants, and judgment obtained. It is from this judgment the appeal is taken.

[1, 2] It is the contention of the appellant that there has been no breach of the bond executed by the surety company, because the breach of duty, if any, was the breach of the owner of the property, and not of the defendant Cox. An examination of the sales deposit receipt shows that it does not state the name of the owner of the property therein described, nor in any way disclose the principal, if any, for whom defendant Cox might be acting, and there is substantial evidence that plaintiffs did not know the name of the alleged owner until two days after making the deposit. It is well settled that, if a person would excuse himself from responsibility on the ground of agency, he must disclose his principal at the time of making the contract, unless already known, so as to enable the party with whom he deals to have recourse to the principal in case the agent had authority to bind him. On the other hand, an agent becomes personally liable when the principal is not known, or when the agent exceeds his powers. Murphy v. Helmrich, 66 Cal. 69, 4 P. 958; Tafft v. Presidio, etc., R. R.

Co., 84 Cal. 131, 24 P. 436, 11 L. R. A. 125, 18 Am. St. Rep. 166. See, also, 1 Cal. Jur. p. 819.

[3, 4] Among other things, the receipt provided that the sale of the property, upon the terms therein set forth, should be agreed to and accepted by the owner within five days from date, or the deposit refunded upon demand, and that if, during the course of the search of the title of the property, any defect should be discovered whereby the property could not be conveyed as agreed, then the amount therein receipted for should be returned to the purchaser upon demand, but if the purchaser did not complete the purchase as therein provided for, *the said deposit should thereupon be paid, less the commission of the agents, to the owner.* It thus appears by the very terms of the deposit receipt itself that defendant Cox was to retain the deposit until some termination of the deal, rather than to immediately deliver the deposit to the owner of the property. In this respect defendant Cox was the agent of the purchaser.

Even in the absence of the above provisions, defendant Cox would have been the agent of the purchaser under a new line of decisions. "It is of course elementary that the authority of a real estate broker is only to produce a purchaser who is willing to contract with the seller upon the terms prescribed, and that such a broker has no authority to accept money offered by the purchaser to conclude the sale; and when the purchaser pays money into the hands of the broker in such a case the broker holds it as the agent of the purchaser and not of the seller, and any misappropriation thereof is the loss of the former and not the latter." Hicks v. Wilson, 197 Cal. 269, 240 P. 289; Gold v. Phelan, 58 Cal. App. 471, 208 P. 1001.

[5] Appellant next contends that the undertaking, if any, on the part of Cox, with respect to the return of the deposit, was entered into on December 6, 1923, and therefore not covered by the bond, which was effective for the year 1924. As already stated, the bond in question also authorized the plaintiffs to commence and maintain an action against appellant for the recovery of any damage sustained by the failure of the broker to perform his duties or any of them. By reason of the provisions of the "sales deposit receipt," there was no duty on the part of defendant Cox to return the deposit until demand was made upon him for it, and this demand was made during the year 1924. Again, Cox's authority as a broker ceased on December 31, 1923. Under the law he was obliged to get a new license to act as such for the year 1924. Upon the acceptance of his bond he was given in effect a new term of office; also in effect he renewed or re-entered into all of his unfinished and unexecuted undertakings. As his own successor he then assumed and took over all his unfinished business of the year 1923, including his undertaking with regard to the deposit. In the absence of all evidence as to when the defalcation occurred, it will be presumed that it occurred in the year 1924. The situation is analogous to that of a public official, who is required to give bond for the faithful performance of his duties. It is settled law that, where such an official has been in office for more than one term and has different bondsmen for the different terms, the bondsmen for the term during which a defalcation occurs are liable, regardless of when the money was first received by the official, or when the undertaking was first entered into, and, in the absence of all evidence as to when the defalcation occurred, it will be presumed that it occurred during his last term. Brandt on Suretyship and Guaranty (3d Ed.) vol. 2, §§ 650, 652, 653; Governor v. Robbins, 7 Ala. 79; Kelly v. State, 25 Ohio St. 567; Independent School Dist., etc., v. McDonald, 39 Iowa, 564.

[6] Appellant's next contention is that the sales deposit receipt was not received in evidence by the court, and therefore should not have been considered by the court. The receipt was offered in evidence under circumstances which entitled it to be received. When objections to its admission were made, the court said, "Mark it for identification, and I will consider the matter as to whether it will be allowed in or not." It would have been error on the part of the trial court to have excluded it; and while there seems to be no formal order in the record admitting the receipt in evidence, yet the findings expressly set out that the deposit was "to be held, used and disposed of in accordance with a certain agreement and receipt," etc., describing said sales deposit receipt. The actions of the trial court are presumed to be regular, and this court will presume that the trial court so acted in the instant case, in the absence of a showing to the contrary.

[7, 8] It is the final contention of appellant that the receipt could not have been properly received in evidence because it was not shown to have been the obligation of defendant Cox. Defendant Cox testified that his salesman, Washire, delivered the $1,000 check to him, that he cashed the check, that he also received a copy of the receipt at the time he received the check, and that the conditions of the receipt were the conditions under which he accepted the check.

Appellant contends that the deposit receipt is an agreement for the sale of real estate, and that under section 1624 of the Civil Code such a contract is invalid, unless the authority of the agent is in writing subscribed by the party to be charged, and that in this case there was no such writing. We have already found that the sales deposit receipt was a contract between the plaintiffs, on the one hand, and the defendant Cox, a real estate broker, as agent of plaintiffs, on the other, for the deposit of certain funds to be used as therein designated; otherwise, to be returned to the plaintiffs. An authorization to receipt for money and to agree to return the money on certain conditions is not within the provisions of section 1624 of the Civil Code.

The judgment is affirmed.

We concur: HOUSER, Acting **P. J.**; YORK, J.

94 Cal. App. 748

LEWIS v. PACIFIC ELECTRIC RY. CO. et al. (Civ. 3640.)★

District Court of Appeal, Third District, California. Nov. 14, 1928.

Rehearing Denied Dec. 14, 1928. Hearing Denied by Supreme Court Jan. 10, 1929.

1. Carriers 🔑320(10)—Interurban electric railroad's negligence in operating car which struck prospective passenger held, under evidence, jury question.

In action for injury to prospective passenger struck by interurban electric car while crossing tracks at station, whether defendant was negligent in operation of the car *held*, under the evidence, a question of fact for determination of jury.

2. Carriers 🔑327—Prospective passenger was negligent, as matter of law, in stepping directly in front of approaching interurban car without looking, if "railroad station rule" was not involved.

Prospective passenger who stepped directly in front of one interurban electric car, and was injured while crossing tracks to board another car, was contributorily negligent as matter of law, if "railroad station rule" be left out of consideration, where, though he had seen car approaching, he did not look again, but continued crossing tracks looking continuously at car he desired to board, and headlight and lights within car which struck him were lit so that car could have been seen if he had looked.

3. Street railroads 🔑74—Ordinance held to limit speed of cars only when running on streets, not on private right of way.

City ordinance limiting speed of street cars and interurban cars to 20 miles an hour "along or across any street or portion of any street * * * provided, however, that provisions of this section shall not apply to the crossing of any street by any such car when the same is running upon a private right of way," if gate or flagman is regularly maintained thereat, *held* intended to limit speed of cars only when running on surface of streets, and is not applicable to cars running on private right of way.

4. Trial 🔑260(8)—Refusal of plaintiff's requested instruction as to interurban railroad's duty to avoid injuring him held not prejudicial, in view of full instructions thereon.

In action for injury to prospective passenger struck by interurban electric car while crossing tracks at station, refusal to instruct that defendant owed duty to plaintiff to use great care to avoid injuring him, and defining such case, *held* not prejudicial to plaintiff, where court fully instructed on such issues.

5. Trial 🔑296(4, 5)—Instruction, though stating too strongly prospective passenger's duty to have seen approaching interurban car, held not misleading, in view of other instructions.

Instruction that it was prospective passenger's duty to exercise ordinary care for his own safety, and to have seen the interurban car and heed its approach as an ordinarily prudent person would have done under the same circumstances, and that he could not recover for injury if his negligence in that respect contributed to accident, though stating too strongly plaintiff's duty to look and listen for approaching car, *held* not misleading, in view of other correct instructions.

6. Trial 🔑295(6)—Instructions that it was interurban railroad's duty to exercise great care in operating cars to avoid injuring prospective passenger held, when taken as a whole sufficiently favorable to passenger.

Instructions, which as a whole stated that it was interurban electric railroad company's duty to exercise great care in operation of its cars to avoid injury to prospective passengers at station, and that, in determining whether such a passenger exercised ordinary care for his safety, consideration must be given to his right to assume that defendant would so operate its car on tracks which passenger was required to cross as not to place him in peril, *held* as favorable statement of the law as injured passenger was entitled to.

Appeal from Superior Court, Los Angeles County; Carlos S. Hardy, Judge.

Action by Parker M. Lewis against Pacific Electric Railway Company and another. From an adverse judgment, plaintiff appeals. Affirmed.

Hearing denied by Supreme Court: CURTIS, PRESTON, and LANGDON, JJ., voting for a transfer.

Munson T. Case and Tanner, Odell & Taft, all of Los Angeles, for appellant.

Frank Karr, E. E. Morris, and C. W. Cornell, all of Los Angeles, for respondents.

FINCH, P. J. The plaintiff brought this action against the defendants to recover damages for injuries sustained by him when struck by an electric car operated by the defendant corporation, which will be referred to herein as the defendant. The jury returned a verdict in favor of the defendant, and the plaintiff has appealed from the judgment entered thereon.

The defendant operates a double-track electric railway between Los Angeles and Pasadena. For several hundred feet in both directions from the scene of the accident the tracks are upon the defendant's private right of way, which is about 34 feet in width, and lies immediately west of Pasadena avenue and in the city of Los Angeles. The distance between the tracks is 9 feet 10 inches, and the distance between the rails of each track is 5 feet 9

★Rehearing denied. Hearing denied by Supreme Court.

inches. The distance between the westerly curb of Pasadena avenue and the nearest rail is approximately 7 feet. Pasadena avenue is 59 feet in width. At the place of the accident the defendant maintains cement platforms about 53 feet in length, between the outer rails and the boundary lines of its right of way, with seats upon the westerly platform for the use of passengers. These platforms, referred to by the witness as the station, appear to be on a level with the tops of the rails, and the intervening space is filled with a mixture of cement and gravel to the same level. In going from Pasadena avenue to the westerly platform it is necessary, of course, to cross both tracks. Cars going in either direction stop on signal to receive and discharge passengers. About 186 feet in a southerly direction from the station the tracks curve to the right, skirting the foot of a hill. Between the tracks is a line of electric power poles. Commencing with the first pole south of and near the station and going in a southerly direction, the successive distances between the poles are, in round numbers, 49, 63, 49, 43, and 44 feet, These poles obstruct the view from the easterly platform to some extent, but the motorman in charge of the car which struck the plaintiff testified, that, "going north approaching that station I would say about 400 feet away you can see the station." The outbound cars from Los Angeles to Pasadena, use the easterly track and the inbound cars, the westerly one.

February 12, 1923, the plaintiff, who was then of the age of about 62 years and was a resident of Chicago, having been in Los Angeles for only 48 hours, took one of the defendant's outbound cars to the station mentioned and alighted on the easterly platform at 7:30 in the evening, thence going to the home of relatives in that vicinity. He returned to the station shortly before 10 o'clock the same evening for the purpose of boarding an inbound car. "It was dark and cloudy, and had been raining." In approaching the station, he walked in a southwesterly direction, diagonally across Pasadena avenue to the easterly platform, and stepped thence immediately in front of an outbound car, which struck him, causing the injuries of which he complains. The plaintiff testified:

> "There was an incoming car at that time on the track approaching that station and I noticed it. When I first noticed it, it was five or six hundred feet from the station. * * * I was intensely interested in getting the car that was coming from the north. I did glance down in a southerly direction and I did not at that time see any car coming from the southerly direction. * * * When I came to the platform I got upon it not far from the middle. * * * I was looking in the direction of * * * the car I wanted to take. At that time it was, say, a couple of hundred feet from me. * * * I immediately * * * proceeded to go across the tracks with the idea of getting to the other side of both tracks, so that I would be in a position to take the incoming car promptly when it arrived. * * * As soon as I had stepped over off the platform on to the track I saw this car coming from the south, or from Los Angeles, and before I could get across or get back it struck me. * * * It was 15 or 20 feet. * * * I did not hear the car coming from the south—did not hear any bell rung or any whistle. * * * My hearing then was good as it is now. * * * I had never been at this station before the time I got off at 7:30 that evening. At that time it was dark. At that time I paid no attention to the fact that there was a curve in the road just before reaching that station. I had not noticed such curve."

The plaintiff further testified that he "knew that cars operated back and forth" at that place; that when he looked to the left to see if an outbound car was approaching he was "not quite half way across Pasadena avenue"; and that thereafter until he stepped on the outbound track he was continuously "watching the incoming car." The headlight of the car which struck the plaintiff and the lights inside the car were on at the time of the accident. The atmospheric conditions were not such as to prevent the plaintiff from seeing such lights, because, according to his testimony, he saw the inbound car when it was 500 or 600 feet from the station. The evidence is conflicting as to whether the motorman sounded his gong as the car approached the station. It appears from the motorman's testimony that he gave no warning signal after rounding the curve, except at a time too late to avoid the accident. Estimates of the speed of the car range from 18 to 25 miles an hour.

[1, 2] Whether or not the defendant was negligent in the operation of the car was, under the evidence, clearly a question of fact for the determination of the jury. If the "railroad station rule" be left out of consideration, the plaintiff's own testimony shows, as a matter of law, that he was guilty of contributory negligence. Klusman v. Pacific Electric Ry. Co., 190 Cal. 441, 213 P. 38; Lord v. Stacy, 68 Cal. App. 517, 229 P. 874; Atkins v. Bouchet, 65 Cal. App. 94, 223 P. 87; Finkle v. Tait, 55 Cal. App. 425, 203 P. 1031; Ross v. Pacific Electric Ry. Co., 39 Cal. App. 658, 179 P. 538; Mayer v. Anderson, 36 Cal. App. 740, 173 P. 174. Appellant relies on Wilkinson v. United Railroads, 195 Cal. 185, 232 P. 131, as authority for his contention that the "railroad station rule" is applicable to the facts of this case. The court instructed the jury in accordance with such rule. Without expressing any opinion as to the merits of this contention, it will be assumed, for the purposes of this opinion, that such rule is so applicable, although in material respects the facts involved herein are unlike those of the Wilkinson Case.

[3] An ordinance of the city of Los Angeles limits the speed of street cars and interurban cars to 20 miles an hour "along or across any street or portion of any street in the city of

Los Angeles; * * * provided, however, that the provisions of this section shall not apply to the crossing of any street by any such car when the same is running upon a private right of way if a gate is maintained at such crossing, or if a flagman is regularly stationed thereat, as a protection against accident." The court instructed the jury, in effect, that this ordinance has no application to the cars of the defendant while they are running on its private right of way. Appellant contends that the word "along" as used in the ordinance means "by the side of," or "in a line parallel with the length" of a street. If the ordinance were otherwise of doubtful meaning, the proviso therein makes it perfectly clear that it was the intention to limit the speed of cars only when they were running on the surface of streets.

[4] The court modified some of the instructions requested by the plaintiff, but the modification did not change the meaning thereof in any material respect. The court refused to instruct the jury that—

> At the time and place of the accident, "the defendant owed a duty to plaintiff to use great care to avoid injury to him; that is, such care as, under the situation and circumstances, a prudent and reasonable person, guided by such considerations as ordinarily regulate the conduct of human affairs, would use."

The court instructed the jury as follows:

> "The care that an ordinarily prudent person must use in the exercise of ordinary prudence in dealing with agencies that because of power or momentum or for any other reason are liable to do great injury is very much greater than under other circumstances. So an ordinarily prudent person may be called upon under some conditions to exercise great care."

At the request of the plaintiff the court instructed the jury that—

> Under the circumstances shown by the evidence, "the defendant was bound to exercise a higher degree of care in so operating its trains as not to endanger the safety of the plaintiff, than it would have been if plaintiff were crossing or about to cross its tracks at a crossing or other intermediate points, and failure so to do is negligence on the part of defendant."

In view of the foregoing instructions given by the court, it cannot be held that the plaintiff was prejudiced by the refusal to give the instruction requested by him.

[5, 6] In other instructions the court told the jury:

> That "the same duty was imposed on the plaintiff to prevent being injured as was imposed on the defendants to prevent injuring him, and if the plaintiff received his injuries directly and proximately through the mutual fault or negligence of himself and the motorman, then your verdict must be for the defendants"; that "a railroad track upon which cars are frequently run is of itself a warning * * * that it is unsafe to go upon the track without exercising reasonable diligence in order to be aware of the approach of cars"; that if "the plaintiff, by exercising his senses with ordinary care and prudence, before he was struck, could have ascertained the approach of said car which came in contact with him, and could have known of the danger, if any, to be reasonably apprehended, but that he failed to exercise such care at that time, and thereby directly or proximately contributed to the happening of the accident, there can be no recovery"; and that "it was the duty of the plaintiff to exercise ordinary care for his own safety, and if you believe that the plaintiff failed to look and that the car was visible and was approaching in dangerous proximity, then it was the duty of plaintiff to have seen said car and to heed its approach as an ordinarily prudent person would have done under the same circumstances, and if you find that the plaintiff was negligent in this respect and that such negligence contributed to the accident, then the plaintiff cannot recover."

Standing alone, the latter part of the foregoing instruction states too strongly the plaintiff's duty to look and listen for an approaching car, but it is highly improbable that the jury was misled thereby, because in a later instruction, dealing particularly with the duty of the plaintiff to exercise care at the station, the court, at plaintiff's request, instructed the jury that—

> Under the circumstances proved, "plaintiff, in the absence of knowledge on his part of the approach of any car on said intervening track in time to have avoided the collision therewith, had the right to assume that defendant would so operate its car on its intervening track aforesaid as not to place plaintiff in peril and plaintiff was not under the same obligation to look out for his own safety by looking and listening as would be incumbent in general upon a person approaching railroad tracks at a grade crossing with intent to cross said tracks, but it is for you to say, upon consideration of the whole evidence, whether the failure on plaintiff's part to effectively look and listen before he was struck by the defendant's car on the night in question, amounted to a want of ordinary care on his part."

Considering the instructions together as a whole, any intelligent juror would understand therefrom that it was the defendant's duty "to exercise great care" in the operation of its cars to avoid injury to the plaintiff at the station, and that in determining whether the plaintiff exercised ordinary care for his own safety, consideration must be given to his "right to assume that defendant would so operate its car on its intervening tracks * * * as not to place plaintiff in peril." The plaintiff was not entitled to a more favorable statement of the law applicable to the case. Other alleged errors are without merit, and need not be specifically discussed.

The judgment is affirmed.

We concur: HART, J.; PLUMMER, J.

95 Cal. App. 60

PEOPLE v. ALLEN et al. (Cr. 1059.)

District Court of Appeal, Third District, California. Nov. 19, 1928.

1. Criminal law 🔑369(2)—Evidence that defendant prior to robbery took gun from home of party robbed held not objectionable as showing a distinct offense.

Evidence in prosecution for robbery showing that defendant prior thereto had taken box from home of one of parties robbed to get gun and deprive owner of its use *held* admissible as showing a preparatory step and not objectionable as showing a distinct offense.

2. Criminal law 🔑511(1)—Testimony in robbery prosecution held sufficiently to corroborate accomplice and to support conviction (Pen. Code, § 1111).

Testimony in prosecution for robbery *held* sufficiently to corroborate that of accomplice under Pen. Code, § 1111, and hence sufficient to support conviction.

3. Criminal law 🔑1186(4)—Erroneous instruction directing jury's special attention to testimony of defendant held not to require reversal (Const. art. 6, § 4½).

Error in instructing on weight to be given defendant's testimony in prosecution for robbery because singling out and directing jury's special attention to testimony of defendant *held* not prejudicial under Const. art. 6, § 4½, where instruction stated merely what competent jurors should know.

Appeal from Superior Court, San Joaquin County; C. W. Miller, Judge.

Leo Allen, whose true name is Leo Alemian, was convicted of robbery and he appeals. Affirmed.

H. W. Coale and Berry & Watson, all of Stockton, for appellant.

U. S. Webb, Atty. Gen., and J. Chas. Jones, Deputy Atty. Gen., for the People.

PLUMMER, J. The appellant and one Leonard Moore were indicted for the crime of robbery alleged to have been committed in the city of Stockton on or about the 26th day of July, 1928. Leonard Moore pleaded guilty and appeared as a witness against the appellant. The appellant's motion for a new trial being denied, an appeal therefrom and from the judgment of conviction was taken to this court.

Three reasons are assigned as causes for reversal. First: That the court erred in admitting testimony as to other offenses. Second: That the appellant was convicted on the uncorroborated testimony of an accomplice. Third: That the court erred in refusing to give certain instructions requested by the defendant, and in giving other instructions alleged to be prejudicial to the rights of the defendant.

The record shows that prior to the year 1928 the appellant and Leonard Moore had been acquainted with each other for a period of between four and five years; that for some period of time they had been together at intervals in the town of Truckee, where Leonard Moore was employed; that some time early in the year 1928 the appellant left Truckee for the city of Fresno, and after remaining there a short period of time, came to Stockton, where he had resided for about two months preceding the date of the alleged robbery. At the city of Stockton the appellant resided with Alec T. Darak, an Armenian who was engaged in the business of making repairing, and renovating rugs; that while the appellant was residing with said Darak, a woman by the name of Mrs. Bertie Devereaux also resided at the same place. It further appears from the record that the appellant and Mrs. Devereaux were on very friendly terms for at least a few weeks preceding the 26th day of July, 1928; that during this friendly association some conversation was had relative to purchasing a roadhouse somewhere outside the limits of the city of Stockton; that Mrs. Devereaux stated that she had diamonds upon which she could raise approximately $1,500; the appellant stated he had no money but had a friend living in Truckee who possibly had some; accordingly, the appellant wrote a letter to Leonard Moore in the Armenian language, which was translated into English by Mr. Darak; in this letter the appellant stated that he had a business proposition or a proposition in which money could be made, and asked Leonard Moore to come to Stockton: this letter was written on or about the 20th day of July, 1928; at about this time it appears that while at the residence of Mr. Darak, the appellant and Mr. Darak were having some conversation about guns, jewelry, etc.; that Darak stated to the appellant that he had a gun; this gun was kept in a wooden box under a bed occupied by Darak; Darak got this wooden box from under the bed, unlocked it, and exhibited the gun to the appellant, also the watch and some articles of old jewelry; whether these articles of jewelry were of any value or not does not appear in the record. Following this incident the record shows that thereafter, and on or about the 23d day of July, 1928, Darak missed the revolver referred to; also, the old jewelry and the watch. There is some testimony in the record that the watch was missed at an earlier period, but this is doubtless an error in memory, which is shown by the fact that the witness Darak testified that the box containing the articles in question was taken some time previous to the 23d of July and missed by him on that date.

Responding to the letter written by the appellant, the defendant Leonard Moore arrived in Stockton on the afternoon of the

---

🔑For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

24th of July, and went to a rooming house recommended by the appellant, and there registered under an assumed name, and was assigned to room No. 11. The testimony of the rooming-house keeper shows that the appellant knew of the registration of Leonard Moore under an assumed name, and also the room to which he was assigned. It further appears from the record that Mr. Darak and Mrs. Devereaux left Stockton and went to Sacramento on the afternoon of July 24th to deliver rugs, and did not return to Stockton until shortly before midnight of July 25th. The testimony of the accomplice Moore is to the effect that the appellant arranged the details of the robbery as follows: That he would advise Moore of the return of Mrs. Devereaux and Mr. Darak; that he would get them both intoxicated, and then Moore could come to the Darak residence, which was known as 420 Channel street in the city of Stockton, and rob Mrs. Devereaux of the diamonds possessed by her. The testimony of Moore is to the effect that appellant gave him the gun and watch, also the jewelry heretofore referred to; that these articles were given to him on the afternoon of the 24th of July, during the absence of Darak and Mrs. Devereaux. The record further shows that Darak and Mrs. Devereaux returned to Stockton at about 11 p. m. on July 25th; that after the return of said parties from Sacramento they proceeded to prepare a dinner, which was eaten, and then some liquor was drunk by said parties from a flask furnished by the appellant. Just when and where this flask of intoxicating liquor was obtained by the appellant does not appear. It further appears that at some time after 11 o'clock on the night of July 25th, and after Mr. Darak and Mrs. Devereaux had been supplied with liquor by the appellant, the appellant went to the rooming house occupied by Mr. Moore and knocked at room No. 11. At just what hour this incident occurred can only be inferred from the chain of circumstances shown in the record. The keeper of the rooming house testified that he went to bed at 11 o'clock; that he had fallen asleep; just how long he slept he did not know, but that he was awakened by some one coming and knocking at room No. 11; that he arose, looked to see who it was and recognized the appellant; that shortly after the appellant had knocked at the door of room No. 11, and receiving no response, the defendant Moore came to the room, got his belongings, including a suitcase, left the rooming house, went down and got into an automobile. The defendant Moore testified that the appellant met him outside the rooming house; notified him in substance that conditions were as planned; that he got his belongings, including his suitcase, got into an automobile and drove to a point on Channel street opposite the Darak residence; that shortly after he arrived there the appellant came out and told Moore to come in and make the holdup. Following this the defendant Moore entered the room where the appellant, Darak and Mrs. Devereaux were, with a drawn revolver, and ordered all persons to throw up their hands, at which juncture the defendant Moore proceeded to take the diamond rings from the fingers of Mrs. Devereaux, using considerable force in so doing; that during the course of the robbery the defendant Moore put the gun referred to in his pocket, and at that time the appellant and Darak lowered their hands, Darak remarking to the defendant, in Armenian, that they might help Mrs. Devereaux, to which the appellant replied, in Armenian, that there was a man with a gun in the room that had been occupied by the appellant and that if they made a move they would be dead men, or words to that effect. After the robbery the defendant Moore went out of a side door of the Darak residence and started toward the waiting automobile, when he was intercepted by a watchman and arrested. The diamonds, watch, jewelry and gun being found in the possession of the defendant Moore, the defendant Moore told the whole story and pleaded guilty. There were other minor details bearing slightly upon the occurrences related, such as the appellant leaving the Darak residence on the night of the 26th of July and going out to make some small purchases, and also as to the various times the appellant and Moore were together while awaiting the return of Darak and Mrs. Devereaux from Sacramento.

[1] The appellant urges that the admission of the testimony in relation to the gun, jewelry and the watch constituted reversible error; that such testimony related to and showed a separate and distinct offense, and, therefore, under several authorities cited by appellant, was inadmissible. The authorities collected and cited by this court in the case of People v. Avila, 78 Cal. App. 415, 248 P. 693, show, as there said:

> "The universally recognized rule is that a defendant in a criminal cause can be tried for no other offense than that charged in the indictment or information. It is not competent for the prosecution to prove the commission of independent crimes by the defendant, the evidence of which has no tendency to prove some material fact in connection with the particular crime charged."

Again, in the case of People v. Coan, 259 P. 998, this court had occasion to examine the authorities having to do with the admission of evidence relating to other offenses than the one charged in the indictment or information. An examination of those cases will show that this court stressed the point that such testimony is inadmissible when it relates solely to independent and unrelated offenses, and that the rule does not exclude testimony relative to offenses connected with the main charge upon which a defendant is being tried. Thus, if the prior or other offense to which the testimony relates shows that it is connected with the offense set forth in the main charge, such as being preparatory to the commission of the major offense or a motive for its commission, or, to use the language most commonly employed, connected with the offense upon which the defendant is being tried, then and in that case such testimony is admissible. There is no question in our minds that depriving Darak of the means of defense, such as taking away his gun, was a step preparatory to the commission of the offense for which the defendant was placed on trial. It is true that the theft of the gun, in point of time, was prior to the actual holdup, but it was likewise subsequent in time to the letter written to Moore to come to Stockton and engage in the business enterprise or "money-making proposition," and is just one of the steps leading up to the robbery, as testified to by the accomplice. The accomplice testified that the appellant gave him the watch, the jewelry, and the gun. The testimony of Darak shows that the box in which the gun, the watch, and the jewelry were kept was shown by him to the appellant several days preceding the robbery, and that the box and its contents had been taken prior to the arrival of the accomplice from Truckee. While the testimony as to the watch and the jewelry, if not accompanied by testimony as to the taking of the gun, could not be considered as testimony showing preparation, but in view of the fact that the watch, the jewelry and the gun were kept, as testified to by Darak, all in one locked box, and, in taking the box, the taker necessarily took all its contents, we do not very well perceive how any testimony as to the watch or the jewelry could be considered as grounds for reversal, when the taker of the box, in order to take the gun, had either to break open the box or take the box with all of its contents. The taking of the box in order to get the gun and deprive Darak of its use, and making sure that there would be no dangerous opposition to the robbery, can only be considered under the circumstances as a preparatory step, and clearly admissible.

[2] Does the testimony in this case, as heretofore recited, sufficiently fill the requirements of section 1111 of the Penal Code, which specifies that a conviction cannot be had on the testimony of an accomplice unless it be corroborated by such other evidence as shall tend to connect the defendant with the commission of the offense? The authorities are so numerous upon this question, and the rule so plain, that we do not need citation of many cases. One only will suffice. In People v. Flood, 41 Cal. App. 373, 182 P. 766, it is said that such testimony is sufficient if it tends to connect the defendant with the commission of the offense, and that such testimony, standing alone, might be considered weak and wholly insufficient to justify conviction. Thus, it is not a question whether the corroborating testimony establishes the appellant's guilt in this case, or whether, if it stood alone, a judgment of conviction might be supported, but simply whether the corroborating testimony tends to connect the appellant with the commission of the crime charged. Does the corroborating testimony so tend? In the first place, the appellant and the accomplice had been acquainted for a number of years. There is no testimony showing that either one of them was possessed of sufficient funds to embark in any business enterprise. Both of them were working around restaurants and ranches as employees. The appellant, knowing of the possession of diamonds by Mrs. Devereaux, upon which she thought approximately $1,-500 might be raised, wrote to his acquaintance (not to say friend) in Truckee, stating that he had a money-making proposition, and asking his acquaintance Moore to come to Stockton. In answer to this letter Moore journeyed to Stockton, registering at a rooming house recommended by the appellant under the assumed name of "Hill." The appellant was aware of this registration. The testimony showed that he examined the register of the rooming house; that he visited Moore at room No. 11, to which Moore had been assigned; that on the night of the robbery, a few minutes before its occurrence, the appellant was seen knocking at the door of room No. 11; that he did not find the defendant Moore in his room; that a few moments after the appellant left the rooming house, Moore came to room No. 11, got his belongings and departed; that both Darak and Mrs. Devereaux had been given intoxicating liquor from a flask obtained by the appellant; that at the time of the robbery the appellant when spoken to in the Armenian language by Darak, to the effect that an opportune moment had arrived when help might be given Mrs. Devereaux, remarked that there was a man in the room formerly occupied by the appellant, armed with a gun, and that if they made a move they would be dead men. There is some testimony that another person was outside the house but there is absolutely no testimony that there was any such man in the room occupied by the appellant at a former period. Upon being arrested the testimony further shows that the appellant denied his acquaintance with the defendant Moore. Subsequently he admitted the former acquaintance. All this followed what we have said about the occurrence of the disappearance of the gun belonging to Darak. When taken to the jail after his arrest, as heretofore stated, the gun belonging to Darak, the jewelry, and the watch were found in the possession of the defendant Moore. All of these incidents, the taking of the gun, the plying of Darak and Mrs. Devereaux with intoxicating liquor, the going to the rooming house occupied by Moore a short time before the rob-

bery, tally exactly with the plan of the robbery as disclosed by the testimony of the accomplice Moore, and we think, beyond controversy, tends to connect the appellant with the commission of the crime charged in the indictment, and furnishes ample justification for the jury accepting the testimony of the accomplice as to the robbery as being true and correct, and of the appellant's planning the same and participating therein.

[3] We find no error of the court in refusing requested instructions, and will confine our further discussion to the alleged error of the court in giving the following instruction:

> "The defendant has offered himself as a witness on his own behalf on this trial, and, considering the weight and effect to be given his evidence, in addition to noticing his manner and the probability of his statements taken in connection with the evidence in this cause, you should consider his relation and situation under which he gives his testimony, the consequences to him relating from the result of this trial, and all the inducements and temptations which would ordinarily influence a person in his situation. You should carefully determine the amount of credibility to which his evidence is entitled; if convincing and carrying with it a belief in its truth, act upon it; if not, you have a right to reject it."

Under the authorities cited in the case of People v. Longland, 52 Cal. App. 499, 199 P. 546, this instruction should not have been given, and it is error for the court to single out and direct the jury's special attention to the testimony of any particular witness. This, however, does not, in view of section 4½ of article 6 of the state Constitution, necessitate a reversal of the judgment. While the court should not, by any language in its instructions, tend to either disparage or strengthen the testimony of any witness, yet if the language used by the court is only the statement of a commonplace fact, or the recital of what is, we may say, universally known by all persons competent to act as jurors, we cannot, for such error on the part of the trial court, conclude that there has been a miscarriage of justice. It is surely commonplace to say that any one who would plan or participate in a crime such as that with which the appellant stands charged would not hesitate to testify at least strongly in his own behalf. The jury, if possessing common intelligence, is aware of the predicament in which a defendant stands when charged with a robbery committed by force of arms. The jury is aware that a defendant under such circumstances is facing a possible long period of incarceration. The jury will necessarily notice the manner in which the defendant testifies; they will consider the probability of his statement; they will also fully weigh the situation under which he gives his testimony, and likewise, the consequences resulting to the defendant from a verdict of guilty. While the court should not have given the instruction set forth herein, we cannot say that because the court told the jury what all jurors competent to act as such must necessarily know, constitutes grounds of reversal.

The order and judgment appealed from are affirmed.

We concur: FINCH, P. J.; HART, J.

94 Cal. App. 779

DODGE et al. v. MITCHELL, County Superintendent of Schools. (Civ. 6112.)

District Court of Appeal, Second District, Division 1, California. Nov. 15, 1928.

1. Schools and school districts ⚷42(2)—Petition for election cannot be had to determine whether elementary or common school districts annexed to city high school districts shall be withdrawn and independent high school district organized (Pol. Code, § 1733a).

Right under Pol. Code, § 1733a, of majority of heads of families or electors of specified elementary school districts, which are part of one or more union or joint union high school districts to petition for election to determine whether independent school district shall be organized, cannot be extended to elementary or common school districts which have been annexed to city high school districts.

2. Constitutional law ⚷70(1)—Courts must construe law as written.

Courts must construe law as written, not as it might be written, however advantageous or desirable such latter course might be to interested citizens or prospective litigants.

Appeal from Superior Court, Orange County; H. G. Ames, Judge.

Petition by Donald J. Dodge and others for writ of mandate requiring R. P. Mitchell, as County Superintendent of Schools of Orange County, to call an election. From a judgment denying the writ, petitioners appeal. Affirmed.

Diehl & Anderson, of Costa Mesa, for appellants.

Z. B. West, Jr., S. B. Kaufman, and D. G. Wettlin, all of Santa Ana, for respondent.

HOUSER, J. This is an appeal from a judgment by virtue of which an application for a writ of mandate was denied.

The essential facts are that, under the provisions of section 1734b of the Political Code, by order of the board of supervisors of Orange county, certain common school districts therein were annexed to a city high school district. Several years thereafter, for apparently satisfactory reasons, in presumed accordance with procedure outlined in section 1733a of the Political Code, "a majority of the heads of families" living within such common school districts, presented a petition to the county superintendent of schools, by which the petitioners, on behalf of the common school districts theretofore annexed to the city high school district, sought to have an election called for the purpose of determining whether such common school districts might withdraw from said city high school district and from such elementary school districts form an independent high school district. The county superintendent of schools denied such petition. Thereupon a writ of mandate was sought from the superior court requiring the county superintendent of schools to call such election. The petition for the writ was denied, and judgment entered accordingly. It is from such judgment that this appeal is taken.

[1] So far as concerns the questions here involved, section 1733a of the Political Code, in substance, provides that, in circumstances therein set forth "a majority of the heads of families or of the electors" of certain specified elementary school districts which "are a part of one or more *union* or *joint-union* high-school districts" may present a petition to the county superintendent of schools to the effect that he shall call an election for the purpose of determining whether or not an independent union or joint union high school district shall be organized, to be composed of the elementary school districts represented by the petitioners. Neither by the terms of the statute to which reference has been had, nor by any other statute to which the attention of this court has been directed, is a similar right or privilege extended to elementary or common school districts which have been annexed to *city* high school districts.

Judged by the opening brief, it would seem to be the contention of appellants that the statute (section 1734b) is unconstitutional, in that it is not uniform in its operation. However, by their closing brief, the following admission is made:

> "However, in this appeal, the appellants do not contend that section 1734b of the Political Code is unconstitutional. In fact they admit, for the purposes of this appeal, and in accordance with the decisions cited above, that section 1734b of the Political Code is constitutional. Their contention is that section 1734b is constitutional, that it being constitutional, it must have a uniform operation, and in order that it have a uniform operation, all elementary school districts annexed to high school districts under its provisions must have an equal opportunity to withdraw from the high school districts to which they were annexed, and if some of them thus annexed be able to use the provisions of section 1733a of the Political Code, all must be able to do the same."

[2] In other words, the position finally assumed by appellants is that, notwithstanding the absence of statutory law granting the privilege which is sought by appellants, the right should be accorded the elementary school districts which they represent, because by the statute to which they refer other elementary school districts annexed to *union* high school districts, as distinguished from *city* high school districts, are given such right. No authority is cited by appellants in support of such suggested legal principle. It is clear that a judgment in accordance with appellants' contention in effect would amount to judicial legislation and be a plain usurpation of legislative functions. Assuming that the statute is constitutional so far as concerns the situation here involved, the law must be construed as written, not as it might be written, however advantageous or desirable such latter course might be to interested citizens or prospective litigants.

The judgment is affirmed.

We concur: CONREY, P. J.; YORK, J.

---

95 Cal. App. 15

CHAMPAGNE v. PASSONS et ux.
(Civ. 3634.)

District Court of Appeal, Third District, California. Nov. 17, 1928.

1. Joint adventures 🔑1—Agreement for development and sale of land, whereby plaintiff was to devote all his time without compensation and defendant to furnish money, held joint adventure.

Agreement between plaintiff and defendant for development and sale of land purchased by defendant, whereby defendant was to advance money for development and equipment and plaintiff was to devote all his time and do all necessary work for its development without compensation, and at end of three years an accounting was to be had under which plaintiff was to pay defendant one-half of all money expended and defendant was to convey to plaintiff one-half of property, *held* to constitute a joint adventure.

2. Joint adventures 🔑5(1)—On defendant's attempted termination of joint adventure without cause, plaintiff could sue for accounting and apportionment of profits.

Where agreement between plaintiff and defendant for development and sale of land constituted joint adventure, on attempted termination of agreement by defendant without sufficient cause, plaintiff had right to sue for an accounting, and equity will decree an accounting and just apportionment of profits.

3. Joint adventures 🔑5(2)—That complaint for accounting alleges partnership does not bar relief, though testimony establishes only joint adventure.

The fact that complaint for an accounting and division of profits alleged a partnership does not bar relief in event testimony establishes only joint adventure.

Appeal from Superior Court, Los Angeles County; Albert Lee Stephens, Judge.

Action for an accounting by Joe Champagne against T. B. Passons and wife. From the judgment, plaintiff appeals. Reversed and remanded for further proceedings.

I. Henry Harris and Chas. Mitschrich, both of Los Angeles, for appellant.

J. P. Adams and W. W. Orme, both of Los Angeles, for respondents.

PLUMMER, J. This is an action by plaintiff for an accounting and division of profits based upon an oral contract relative to the development of a tract of land embracing 52½ acres. The trial court denied the plaintiff an accounting; held, that the agreement sued upon being in the nature of employment, the defendant T. B. Passons had a right to discharge the plaintiff at pleasure; and awarded judgment to the plaintiff for wages calculated on the basis of $5 per day.

From this judgment the plaintiff appeals.

(During the course of this opinion the word "defendant" will be used as referring to T. B. Passons alone, unless otherwise stated.)

The record shows that on or about the month of January, 1922, the defendant entered into an agreement of purchase for the tract of land involved in this action, the purchase price being fixed at $25,000. After this agreement was entered into litigation arose, and for a period of about one year it appeared doubtful that title to the property could be secured. During this period the land was damaged to a considerable extent by flood waters, and the probability of developing the property so as to make it productive of any profitable income appeared doubtful. During this period of time the plaintiff and the defendant had been engaged in a ditch-filling enterprise in which they were both jointly interested. The defendant was not able, of himself, to do the work necessary to develop the property in question, by reason of physical infirmities, while the plaintiff, as shown by the record, was an excellent worker, capable of directing the manual labor and performing the manual labor necessary to be done upon the premises to which the defendant desired to acquire title. With these circumstances in view the defendant proposed to the plaintiff, some time during the month of March, 1923, that they go in together in the development and exploitation of the land, and divide the profits between them, equally; that this association should be continued for three years from and after the 31st day of March, 1923, at which date an accounting was to be had and a division of profits made, if any. The agreement provided that the defendant was to contribute the money necessary to finance the enterprise, furnish the teams, machinery, and equipment necessary to be used in making the improvement; to pay for the land and to manage the business portion of the venture. The plaintiff was to contribute all his time and services to the improvement and development of the land during the three-year period; was to use the machinery and equipment in securing outside work whenever possible, and to turn over to the defendant, to be applied to the common fund, all the earnings so obtained. These funds were to be taken charge of by the defendant, and an account kept thereof. Out of the money derived from the sale of products of the land or the land itself, and the earnings of the plaintiff, there should be paid the living expenses of the plaintiff and of the defendant's family, the expenses of developing and improving the land, and such items as might be properly attributed thereto. At the end of the three-year period it was agreed that an accounting should be had between them, at which time the plaintiff was to pay to the defendant one-half of the amount invested in the ranch, the improvements, the expense of development and operation, and living expenses, with interest thereon at the rate of 7 per cent. per annum. It was further agreed that the purchase price of the land should be reckoned at $28,000 in the settlement between the plaintiff and the defendant, the difference between the $25,000, the real purchase price of the land, and the price agreed upon, representing cost and expense and trouble of litigation incurred by the defendant. The agreement further provided that if at any time during the course of the three-year period, and before the end thereof, the agreement was terminated, the plaintiff was to receive $5 a day for the time that had elapsed after the 31st day of March, 1923, or that if the plaintiff died, within that period, the defendant would send to the mother of the plaintiff a like amount in lieu of plaintiff's interest.

After the making of this agreement, the plaintiff proceeded to do and perform all the work contemplated under the agreement for and during the period of 14 months, earned approximately $5,000 by outside work which he either performed himself or had charge and management in the performance of by others. This money was turned over to the defendant, who took charge of it and entered the same in a book in which the receipts and expenditures were kept. It appears that the plaintiff and defendant obtained a book of accounts in which all the items showing receipts and expenditures during the period mentioned were entered. This account book shows that during the period in question the total receipts amounted to the sum of $23,561.58, and the total amount expended aggregated $17,970.88, leaving a net receipt of $5,590.70.

During the course of the 14-month period a part of the 52½-acre tract of land was subdivided and sold, and the proceeds, so far as received from the sale thereof, it would appear, were applied on the original purchase price of the land. Just what amount of the proceeds of the sale of the subdivided tract were applied on the original purchase price does not appear. The defendant, however, testified that he was "pretty sure" that $9,100 of the proceeds of the sale of the subdivided tract were so applied.

The record shows that the work and labor performed by the plaintiff was entirely satisfactory, and that there was never any disagreement between the plaintiff and the defendant relative to the development work, the outside work performed by the plaintiff, or the handling or expenditure of any of the funds, and that the premises had been developed so that the unsold portion had reached the value of at least $60,000. On the 2d day of June, 1924, the defendant, yielding to the insistence of the defendant Ella M. Passons, his wife, acting upon the theory that the association was one of master and servant or employer and employé, notified the plaintiff that he would have to quit, or was discharged and tendered him $5 a day for the 14-months period. This sum the plaintiff declined to accept, and thereafter instituted this action.

The trial court, among other things, found as follows:

> "That in the latter days of March, 1923, the plaintiff and defendant T. B. Passons, entered into a working agreement, but not a copartnership; * * * that said agreement between the plaintiff and defendant T. B. Passons was oral, and never reduced to writing; that in said agreement it was provided that the said property was to be developed and a portion thereof might be sold; that defendant, T. B. Passons, should advance such money as might be necessary to purchase such tools or implements as he did not then have, to be used in and about the development of said property; that the plaintiff was to devote his entire time and attention to the enterprise, and do any and all work necessary in the development of said land for a term of three years, without compensation, except that the defendant T. B. Passons should furnish the plaintiff with a room in his house, board him, do his washing and furnish him with necessary spending money; * * * that in the event work could be obtained by using the tractor and other implements owned by the defendant, the plaintiff was to do said work, and the proceeds therefrom should be paid to the defendant, T. B. Passons; that either party to said agreement might terminate the same at his pleasure at any time during the said three years, and that in the event of such termination, at the request of either party, the plaintiff should be paid in full for his services, in addition to his board, room, washing and necessary spending money, at the rate of $5.00 per day; that at the end of the three-year period, in the event that the agreement continued in full force during that time, and plaintiff had performed all his said duties under said agreement, an accounting was to be had between the plaintiff and defendant of all moneys had and received, at which time the plaintiff should pay to the said defendant one-half of all the moneys the defendant had expended in connection with said property, including the cost of the improvement, upkeep, and other expenses connected therewith, interest on said $28,000.00, and taxes, and that thereupon the said defendant would convey to the plaintiff one-half of all of said property remaining unsold, but there was no provision in said contract that in the event of a loss, any portion thereof was to be borne by the plaintiff."

It may be here stated that the testimony shows without contradiction that the agreement between the plaintiff and the defendant provided that in the event of the land or improvement being washed away by floods, or that there was no profit, that the plaintiff was to have nothing for his three years' work and the defendant was to lose the money which he had invested in the property. This uncontradicted testimony appears to have been entirely overlooked. The trial court further found that under said contract the defendant had received approximately $16,000 on contracts of sale for the portion of the tract subdivided and sold, and that he would receive approximately the further sum of $25,000, and that the value of the remaining portion of the premises was about the sum of $60,000. The court also found:

> "That for a long time prior to June 1, 1924, while the plaintiff was living in the home of the defendants', plaintiff spent a great part of his time in gambling in the house and on the premises of the defendant, over the objections of the defendant, and for a long time prior to June 1, 1924, in the home of the defendants', he maintained intimate, illicit relations with women, and with one woman habitually for some time, without the consent of the defendants, or either of them."

And after finding that the defendants objected to such conduct, the court found that on the 1st day of June, while such conduct on the part of the plaintiff was continuing, the defendant informed the plaintiff that by reason of such conduct and the plaintiff's refusal to desist therefrom, that he elected to and did terminate the agreement and offered to pay the plaintiff the sum of $5 per day, etc.

The record shows that so far as objection to the gambling on the part of the plaintiff, in the house where the plaintiff and the defendants resided, is concerned, no objection was ever made thereto by the defendant. The record also shows that the defendant, at various times participated in the games of poker that were played on the premises referred to, and the record further shows that no objection was ever made by any one to whatever drinking took place upon the premises. The record does show, by the admission of the plaintiff himself, and not by any testimony introduced by the defendants, that some time during the year 1923 the plaintiff had had illicit relations with a certain woman on the premises occupied by the parties to this action, but of this the defendants had no knowledge until the date of this trial. There is no testimony, however, showing such relations at any time during the year 1924. The only testimony that lends any color whatever to the claim that the plaintiff was guilty of any improper act or conduct during that period is the testimony of Ella M. Passons to the effect that one night about ten days or three weeks previous to the 2d day of June, 1924, she passed through the lighted dining room wherein was situated a cot on which a Mrs. Sullivan slept, and that as she passed through the room she saw the plaintiff engaged in rubbing the back of Mrs. Sullivan, and in explanation plaintiff stated that Mrs. Sullivan was ill and suffering from a severe backache. Mrs. Sullivan was clad in her nightclothes, and the plaintiff had on his overalls (which we take to be ranch clothes). That there were any improper relations between the plaintiff and Mrs. Sullivan was denied by both of them. The doors to the room were unlocked, and, as stated, the room was lighted. It appears that the plaintiff occupied a bedroom which could be reached by going through the dining room, and that the defendants occupied a room adjoining the room occupied by the plaintiff. The testimony does not show that anything was said to either the plaintiff or Mrs. Sullivan about this incident. That Mrs. Sullivan, who then was an employé upon the premises, was not discharged by reason of said incident, and remained on the premises until the house occupied by the plaintiff, the defendants, and herself was leased to other parties; this lease taking effect on the 3d day of June, 1924.

The contention of the appellant is that the circumstances disclosed by the record establishes a copartnership. On the part of the respondents it is urged that the relationship was terminable at the pleasure of either one of the parties, and that the relationship was one of employment. The trial court, as we have stated, found that the relationship might be terminated at the pleasure of either of the parties; found that there was no copartnership, and designated the arrangement as a "working agreement." As to what the agreement establishes, we think is shown beyond question by the testimony of the plaintiff and the defendant, between which there is really no substantial conflict. Other witnesses testified as to their recollection, as to what was told them, but as to the oral agreement we think the contract must be held to be such as testified to by the plaintiff and defendant as no other persons were present when it was made. The plaintiff testified in substance as follows:

> "T. B. Passons, in March, 1923, made me this proposition: He asked me if I would stick with him for three years, and at the end of three years to divide the ranch in half that he was going to buy. He said: 'If you don't want to stick with me, I can't buy the ranch.' He said he was going to develop the ranch to the best interests of the copartnership, and if we could sell part of it or all of it to good advantage, we would do it, and if we couldn't, we would divide the land at the end of three years. He was to attend to the business part, and I was to do whatever he told me about the working part. I was to work on the outside; that whatever money I could make would be turned over. The defendant said he could attend to the financing part, either from the money from operations from sales of the ranch or work I did on the outside, and then borrow and pay from that. I was to get nothing for three years. At the end of three years I was to get half, after we deducted the cost of the ranch expenses with my half of the cost and expenses at 7 per cent. interest; that if we could not meet our payments and we lost the ranch, I was to lose all my labor. If the water came up and we lost the ranch he was to lose his money, I was to lose my labor. Each party was to buy his own clothes. The provisions for Mrs. and Mr. Passons and his family was to be charged to the account, and to be kept track of as expenses. In the event that we did not get enough out of the property, Mr. Passons was furnishing the money. If it came to losing his money, I was to lose my labor. When he told me what he would do I told him I would stick with him for three years. The only way he could let me go was if I died he was to pay my mother $5.00 a day for the time I had put in, including Sundays and holidays. Also, if I proved dishonest or refused to do my work."

The witness then testified that an account book was obtained and all the expenses of maintaining both the plaintiff and the defendants, and all the cost and expenses of managing the property, all the receipts from the property and receipts of money earned by the plaintiff for outside work and in managing the truck and tractor when used by other persons under his direction, were entered in this book so as to show a complete account which was to be taken into consideration at the end of three years in making division of the profits and with what remained in the event of there being any profit or property to divide.

Mrs. Passons, one of the defendants, testified as to her recollection of the agreement as told to her by the plaintiff and the defendant as follows:

> "Mr. Passons said to the plaintiff: 'Now, I will make an agreement with you. If you will stay with me three years and fulfill all your work and do everything that you should, and at the end of three years you will pay half of the first cost of the place, which was $28,000.00, 7 per cent. interest thereon, half of the upkeep and improvements, half of the living and all the expenses, then I will go 50-50 with you, but if at any time you do not do your work, or do not suit in any manner, you are to take $5.00 a day for your work,' and the plaintiff replied, 'All right, I am perfectly satisfied.' He was to get his board, room and washing and the $5.00 a day all the time that he put in, if they did not get along or he did not suit."

The defendant, after testifying as to the purchase of the ranch and that he bought it in pursuance of the contract therefor, herein referred to, testified as to what took place between himself and the plaintiff, as follows:

> "Well, I had talked with Joe, that is, roughly, over the matter several times previous to this about his taking a working interest in this ranch. We were working together in filling a ditch, and we had talked it over in a rough manner, and we got it down to the point where we thought we could agree, and we went over it that night after we came in from work, like we had talked it over at different times. We got together where it seemed like it was plausible for everybody concerned, and that I was to pay the first costs of the ranch, which was $28,000.00. Mr. Champagne was to stay with me for three years. I said: 'Joe, we have about decided to go in together. Now, we want to understand each other thoroughly,' and I went into the first costs of the ranch that he was to pay half of the first costs back, and he was to remain with me three years; he was to pay half of the expenses of the upkeep on the ranch and improvements on the ranch, at the rate of 7 per cent. interest, and if we were together at the end of three years, after the expense of half of the upkeep, and I got half of my money back of the first cost, that he was to receive half of the net profits of this ranch, and in case we couldn't agree in the meantime, that Joe was to receive $5.00 a day straight for the time that he was with me."

The defendant further testified that the word "partnership" was not used. Also testified as to the keeping of the accounts, and it maybe here stated that there is no conflict in the testimony that all the expenses of operating the ranch, living expenses, etc., of all the parties was charged up, and that all of the money which came from the outside from work performed by the plaintiff, as herein stated, was entered in the account book and used in payment of expenses of developing the land and maintaining the parties to this action.

While the court found that the agreement might be terminated at pleasure, the defendant, testifying along the theory that the agreement was one of employment, testified as follows:

> "Q. Well, you had a right to discharge him any time you felt like it? A. Not when I felt like it.
>
> "Q. Well, you only had a right to do it then for cause; is that right? A. For cause, yes, sir.
>
> "Q. And it was not understood that you could arbitrarily discharge him? A. I don't understand that question.
>
> "Q. If the notion struck you that you did not want Joe at any time during the three years, you did not have the right to discharge him and give him $5.00 a day because he did something that was wrong. Is that right? A. Well, I couldn't do that just because I took a notion, if he hadn't done anything and everything was pleasant, why, I couldn't just say 'Joe, I don't want you any more; here is your money;' I couldn't do that."

In relation to the land overflowing, the witness testified:

> "It was understood that he go out and I go out without anything; we couldn't hold each other to nothing.
>
> "Q. Well, now, I don't know that I have got it exactly clear, Mr. Passons, but you don't contend, do you, that you could if you wanted to, after Joe had worked there we will say a great length of time like 2 years, 11 months, if you made up your mind that you didn't like Joe any more, you were not as fond of him as you were, that you could discharge him and give him $5.00 a day for the 2 years and 11 months, although the property had advanced in value to a large sum of money? A. For no cause?
>
> "Q. Yes. A. Why, no, I couldn't do that."

While other witnesses testified some to the effect that they were told by the defendant, in the presence of the plaintiff, that in case of disagreement, either one could terminate the association, and some witnesses testified that they understood it could be terminable at pleasure, what we have stated, taken from the testimony of the plaintiff and the defendant, and in substance corroborated by Mrs. Passons, one of the defendants, we think must be accepted as correctly showing what the agreement was between the parties, and that as against the statement of the defendant, irrespective of the statement of the plaintiff that the contract could not be terminated at pleasure, is not really controverted by testimony of witnesses as to their recollection of the use of words and understanding gained by having the agreement related to them at a considerable period of time antedating the hour of giving their testimony.

[1] It would serve no useful purpose to summarize the testimony of the different witnesses, but the record, a part of which we have set forth, shows beyond controversy the following: That the property was purchased after the agreement was entered into between the plaintiff and the defendant dated as of March 31, 1923. That a contract for its purchase had been entered into a little over a year previously. That the development of the land was attended with difficulties. That it would require a great deal of labor. That the circumstances showed that everything put into the property might be lost. That the plaintiff and the defendant, on or about March 31, 1923, entered into an agreement to develop the property. That a portion of the property was to be subdivided. That the defendant was to advance the money for development and equipment. That the plaintiff was to devote his time and do all necessary work for its development, without compensation. That the plaintiff was to do outside work with the equipment, and turn in the earnings. That an account was to be kept of all the receipts and expenditures, including the costs and expenses of operating the land, payments made on the land, subdividing the land, and also of all money expended in paying the living expenses of the plaintiff and the defendants. That the plaintiff was to room with the defendants, and

have his board and washing. That at the end of the three years an accounting was to be had of all the receipts and expenditures. That the plaintiff was to pay to the defendant one-half of all the money expended or that there was to be charged against the plaintiff one-half of all the money expended for all the items which we have mentioned, and interest thereon at 7 per cent. The defendant was then to convey to the plaintiff one-half the property. That during the course of the 14-month period, some 20 acres of the land were subdivided and sold on contracts, the defendant having received approximately $16,000, and has coming on the contracts approximately $25,000 additional. That the plaintiff's work was satisfactory. That the work done with the equipment amounted to the sum of $4,981.04. That the plaintiff was ready, able, and willing to do all the work required of him. That the defendant was to attend to the financial part of the business, and the defendant was also to direct the work of improvement which was to be performed by the plaintiff. The record shows that an account was kept of all moneys received as herein stated, the money paid for labor, for lumber, groceries, oil, gas, etc., one of the items charged as expenses for maintaining the plaintiff and the defendant or for maintaining a family being $500 for groceries. The cost of buying the horses was also entered as a charge, to be considered as an item of expense upon making settlement at the end of three years.

Irrespective of the finding of the court that the plaintiff and defendant entered into a "working agreement," we think the foregoing facts constitute, uncontrovertibly, a joint adventure. It lacked only one element of constituting a copartnership. It does not appear that the plaintiff had any authority to contract so as to bind the interest of both the plaintiff and the defendant, but it does appear that the plaintiff and the defendant were entering into an agreement or undertaking relative to the development and sale which included first the purchase price of the lands to be bought and all the expenses thereof, and were contemplating a venture where the defendant was staking what money it would be necessary to advance over and above the receipts that might be had, against the labor of the plaintiff. This, we think, without citation of authorities, conclusively establishes a joint adventure. If a joint adventure, irrespective of the fact that the defendant himself testified that the agreement could not be terminated at pleasure, then the finding of the court that the agreement could be terminated at pleasure has no support.

In 33 Corpus Juris, p. 841, a "joint adventure" is defined as follows:

> "A joint adventure has been aptly defined as a special combination of two or more persons where in some specific venture, a profit is jointly sought without any actual partnership or corporate designation."

We do not need to cite any further authorities than the chapter on joint adventure found in 33 Corpus Juris, beginning on page 839. Here, there is every element of the parties entering into an undertaking seeking a profit, and, in addition thereto, a stipulation that in a certain event one shall lose all of his labor, all the earnings that he has turned over to the joint account, and the other loses all the money that he has put into the venture.

[2, 3] We do not need to discuss the question as to whether the defendant did or did not have sufficient cause to cancel or terminate the agreement had it been one of employment. Not being one of employment, and there being no objection to the work carried on and performed by the plaintiff, all of which is expressly testified to by the defendant as being entirely satisfactory, no cause is shown for the termination or attempted termination of the relationship of joint adventurers, even though it may be conceded that the defendant had a right to insist that the plaintiff occupy some other room, notwithstanding at least six months had expired, if not more, since any conduct on his part was such as would have laid a foundation for terminating the relationship of employer and employee or master and servant, if such relation had existed. All we need to say is that the attempted cancellation of the defendant laid the foundation for an action of accounting on the part of the plaintiff, and the refusal of the court to take an accounting constitutes reversible error.

While the respondent has cited a few authorities to the effect that the relationship of master and servant may be terminated by reason of the improper conduct of the servant, those cases are not applicable, for the reason that the relationship of master and servant did not exist in this case. The fact that the agreement provided for a basis of settlement under certain contingencies did not warrant either party in arbitrarily excluding the other from accruing benefits. Such a construction is not only inconsistent with equitable principles, but offers a premium on fraud. Especially is this true where, as shown by the record in this case, the repudiating parties stand to gain several thousand dollars by barring the other party from the enterprise. The venture was proving exceedingly profitable, and under such conditions the temptation to exercise one's "pleasure" and deprive the other party from participating in the "harvest money" was so great that equity will hestitate to stamp such action with approval. A definite period was fixed for the continuance of the adventure, and even though the relationship is such that it may be dissolved at will, this does not carry with it the correlative that the rescinding party shall thereby become entitled to appropriate to his own use and benefit all the enhanced value and emoluments arising from the venture. Equity will decree an accouning and just apportionment of the profits. As said in Butler v. Union Trust Co., 178 Cal. 195, 172 P. 601, quoting from page 198 (172 P. 602):

> "A joint adventure, however, is similar to a partnership, and, being of a similar nature, the right to an accounting of profits in accordance with the agreement therefor and the obligations growing out of such agreement between the parties are governed by the same rules of law"—citing 23 Cyc. 453; Petrie v. Torrent, 88 Mich. 43, 49 N. W. 1076; Causten v. Barnette, 49 Wash. 659, 96 P. 225; H. B. Claflin Co. v. Gross (C. C. A.) 112 F. 386.

See, also, annotations to case of Lind et al. v. Webber et al., Ann. Cas. 1916A, 1202, 1210, and annotations to Jones v. Kinney et al., Ann. Cas. 1912C, 204; 33 Cor. Jur. P. 66; 14 Cal. Jur. 768.

The fact that the complaint alleged a partnership does not bar relief in the event that the testimony establishes only a joint adventure. 14 Cal. Jur. 768; Peardon v. White, 65 Cal. App. 463, 224 P. 263.

The judgment is reversed and the cause remanded for further proceedings in accordance with this opinion.

We concur: FINCH, P. J.; HART, J.

LOS ANGELES COUNTY FLOOD CONTROL DIST v. SUPERIOR COURT IN AND FOR LOS ANGELES COUNTY et al. (Civ. 6137.)★

District Court of Appeal, Second District, Division 2, California. Nov. 22, 1928.

Rehearing Granted by Supreme Court Dec. 20, 1928.

Prohibition ⟹20—Truth of allegations of undenied complaint, incorporated in petition for writ of prohibition, held admitted by petitioner.

Where enforcement of assessments of flood control district had been restrained at suit of city, and district petitioned for writ of prohibition to require court to dissolve the injunction, the district, having incorporated in its petition the city's complaint together with the district's demurrer thereto, was bound by the allegations of such complaint; they not having been denied.

On petition for rehearing. Petition denied. For former opinion, see 271 P. 518.

Everett W. Mattoon, Co. Counsel, Roy W. Dowds, Flood Control Counsel, and W. Sumner Holbrook, Jr., Deputy Co. Counsel, all of Los Angeles, for petitioner.

R. C. McAllaster, City Atty., and Harold P. Huls, Deputy City Atty., both of Pasadena, for respondents and intervener.

Jess E. Stephens, City Atty., and Alan Patten, Deputy City Atty., both of Los Angeles, W. Turney Fox, City Atty., of Glendale, Chester L. Coffin, City Atty., of Santa Monica, and Nowland M. Reid, City Atty., and C. A. Windham, Chief Deputy City Atty., both of Long Beach, amici curiæ.

PER CURIAM. In its petition for a rehearing herein, petitioner district contends that this court erred in holding that the district is bound in its application for a writ of prohibition by admissions of the truth of the allegations contained in the complaint of the city of Pasadena, intervener herein, filed in the city's action in the superior court for an injunction and to have the assessments under consideration declared void. Petitioner also contends that this court committed further error in holding that the rules of law laid down in the case of Crocker v. Scott, 149 Cal. 575, 87 P. 102, do not apply in this proceeding.

The district embodied in and made parts of its petition herein for a writ of prohibition a copy of the complaint of the city and a copy of the demurrer of the district to the complaint, which demurrer has not yet been passed upon by the superior court. By making the undenied complaint a part of its petition for the writ, for the purposes of its petition for the writ, the district adopted the allegations of the complaint as true. The demurrer raised the question whether the complaint states a cause of action. While the demurrer remains undisposed of, the admissions thereby made that the matters well pleaded in the complaint are true continue to bind the district. When a party to an action, as in this proceeding, stands upon a pleading and his demurrer thereto, so long as he stands thereon, in legal effect, for the purposes of the action, he admits and continues to admit the truth of the matters well pleaded in the pleading. Estate of Chase, 169 Cal. 625, 627, 147 P. 461.

Further elaborating upon our holding that the rules of law laid down in the case of Crocker v. Scott, supra, do not apply in this case, attention is called to the fact that the complaint in that case affirmatively showed that the taxing authorities had jurisdiction to levy the taxes complained of and proceeded regularly in making the assessment and levy, and that injunction should not have issued, while in this proceeding it appears that the assessing authorities failed to acquire jurisdiction to assess. Under the latter circumstance the law does not afford the city adequate redress.

Judge Cooley announces in his work on taxation (3 Cooley, Taxation, § 2, pp. 1414, 1447, 1453) the following:

> "Cases of fraud, accident or mistake, cases of cloud upon the title to one's property, and cases where one is threatened with irremediable mischief, may demand other remedies than those

---

★Hearing granted. 280 P. 366.

the common law can give, and these, in proper cases, may be afforded in courts of equity."

Our Supreme Court said in Las Animas, etc., Land Co. v. Preciado, 167 Cal. 580, 584, 140 P. 239, 241, that—

> "The fundamental proposition * * * is that equity will afford relief to a party from whom an illegal tax has been collected or is sought to be collected. But as equity makes good only the deficiencies of the law, it will not interpose between the property owner and the fiscal officers where the law then or thereafter affords him adequate redress. But stating it conversely, where the law then or thereafter does not afford the owner adequate redress, equity will interpose for the protection of his property rights."

In the latter case the Supreme Court also announced that where the complaint is addressed to asserted irregularities or illegalities in the ministerial and executive processes fixing the lien upon property, and there is an equitable duty to pay some tax, courts have shown a proper reluctance to come to the relief of an individual and enjoin the collection of the tax as a whole to the great disturbance of the revenues. But, where a cloud is cast upon the individual's title by the void assessment it would be a grievance which would entitle him to go into a court of equity for relief. In that case injunction was granted restraining the proper officers from advertising the plaintiff's property for sale and from selling it for nonpayment of the tax, and the holding in Crocker v. Scott was carefully considered and was held not to apply where the tax was void, for the reason that the law does not afford adequate relief against the cloud of the void tax.

In this matter we held that the void assessments were clouds upon the titles to the city's lands and that extrinsic evidence is required to show that fact. Therefore, the titles are not merchantable and the equitable remedy of injunction may be invoked in the city's action to remove the cloud.

Rehearing denied.

205 Cal. 568

SCHADE v. STEWART. (L. A. 9233.)

Supreme Court of California. Nov. 27, 1928.

1. Executors and administrators 🔑102—Realty described in trust deed securing note constituting asset of estate, when purchased by executrix at trustee's sale, becomes asset of estate.

Real property described in deed of trust given to secure note constituting asset of decedent's estate, when purchased at trustee's sale by executrix acting in representative capacity, also becomes asset of estate, subject to possession and control of representative for purposes of administration.

2. Executors and administrators 🔑39—Title to realty purchased by executrix and becoming asset of estate vests on acquisition in persons succeeding to estate.

Where real property described in deed of trust given to secure note which constitutes asset of decedent's estate is purchased at trustee's sale by executrix and becomes asset of estate, legal title to such property in same manner as title to property owned by decedent at date of death vests eo instanti on acquisition in persons entitled to succeed thereto under provisions of decedent's last will, or, in cases of intestacy, in heirs at law according to laws of succession.

3. Trusts 🔑200(1)—Trustee's deed, executed during administration to executor, need not designate specific persons as grantees.

Trustee's deed, executed during pendency of administration, pursuant to purchase by personal representative in representative capacity, need not name specific heirs or devisees as grantees, since property thus vested in heirs or devisees is subject to representative's right of possession and control for purpose of administration.

4. Trusts 🔑200(1)—Trustee's deed, if made to executrix or to estate, would have been sufficient to vest title in person succeeding to property.

Trustee's deed executed during administration pursuant to purchase by personal representative in representative capacity, if granting property to executrix or to estate, naming it, would have been sufficient to vest title in persons entitled to succeed to property.

5. Deeds 🔑31—Language indicating with reasonable certainty intent to pass title to realty of estate to heirs or devisees is sufficient.

Any language which indicates with reasonable certainty intent to pass title to realty of decedent's estate to those entitled to succeed as heirs or devisees is sufficient.

6. Trusts 🔑200(1)—Trustee's deed to "heirs or devisees" of decedent showed intention to vest property in persons entitled to take pursuant to decision of probate court, and was not void for uncertainty of grantees (Code Civ. Proc. §§ 1452, 1581; Civ. Code, § 3538).

Deed by trustee pursuant to deed of trust in favor of decedent conveying real property to "heirs or devisees" of deceased, reciting note and trust deed in favor of deceased, default of trust deed and note, exercise by executrix, of option to declare full amount of indebtedness due, and sale of property to heirs or devisees of deceased, furnished intrinsic evidence of intent to convey to heirs if court should determine property vested in heirs and to devisees if probate court determined property vested in devisees pursuant to decedent's will, and delivery of deed to executrix vested title in persons entitled to succeed to property, and hence deed was not void for uncertainty in designation of grantees, in view of Code Civ. Proc. §§ 1452, 1581, and Civ. Code, § 3538.

7. Executors and administrators 🔑438(8)—Executrix held proper party to sue in ejectment against grantor of trust deed, conveying property to heirs or devisees of decedent without joining heirs and devisees (Code Civ. Proc. § 1582).

In action in ejectment by executrix against maker of trust deed in favor of decedent under which property was conveyed by trustee to heirs and devisees of decedent, executrix was proper party to action without necessity of joining heirs and devisees under Code Civ. Proc. § 1582, since property was subject to control and possession of executrix in same manner as realty vested in decedent at date of death.

Shenk, J., dissenting.

In Bank.

Appeal from Superior Court, Los Angeles County; Victor R. McLucas, Judge.

Action in ejectment by Clara K. Schade, as executrix of the estate of Jennie C. Hurd, deceased, against Addie L. Stewart. Judgment for plaintiff, and defendant appeals. Affirmed.

Superseding opinion in 264 P. 750.

Matthews & Walter, of Los Angeles, for appellant.

Hugh A. McNary and O'Melveny, Tuller & Myers, all of Los Angeles, for respondent.

SEAWELL, J. This appeal is taken from a judgment for plaintiff in an action of ejectment to recover the possession of certain real property in the city of Watts, county of Los Angeles, this state. Plaintiff sued as executrix of the estate of Jennie C. Hurd, deceased. Defendant purchased said real property from said Jennie C. Hurd in 1912, and as a part of the purchase price thereof executed a promissory note payable to decedent, which was secured by a deed of trust covering said real property. Defendant having made default in the payment of installments of principal and interest, plaintiff, as executrix, exercised the option contained in the note to declare the full amount of the indebtedness due, requested the trustee, Title Guarantee & Trust Company, a corporation, to sell the property as provided in said deed of trust and, as executrix, became the purchaser at the sale held. Thereafter, and while the will of Jennie C. Hurd, deceased, was still in course of probate and open to attack, said trustee executed a trustee's deed, naming as grantees the "heirs or devisees of Jennie C. Hurd, deceased." In her will, duly admitted to probate by the superior court of the county of Los Angeles, decedent name the Salvation Army and sixteen natural persons as legatees and devisees.

It is appellant's contention that the deed naming the "heirs or devisees of Jennie C. Hurd, deceased," as grantees, through which plaintiff claims the right of possession in her representative capacity, is void for uncertainty in the designation of a grantee. Appellant argues that such a designation falls under the condemnation of the rule of the common law that a grant to J. S. or W. S. in the disjunctive is void for uncertainty. Respondent's theory is that the effect of the conveyance was to vest title to the property in the same manner as if the deed had been executed to Jennie C. Hurd during her lifetime and said property upon her death had become a part of her estate; that is, respondent asserts, the deed conveys title to the class of persons (who must inevitably be either heirs or devisees) which the probate court by its decree of distribution shall determine are entitled to the said property. That the intent of the grantor and also of the executrix was as respondent contends it to have been there can be nc doubt. The two important questions in the case go to the intent of the parties to the deed and the certainty of giving it effect.

[1-3] The note secured by deed of trust upon the property in question was an asset of decedent's estate. Real property described in a deed of trust given to secure a note constituting an asset of a decedent's estate, when purchased at a trustee's sale by an executrix acting in her representative capacity, also becomes an asset of the estate, subject to the possession and control of the said representative for purposes of administration. The legal title to such property, in like manner as the title to property owned by decedent at the date of death vests eo instanti upon acquisition in those entitled to succeed thereto under the provisions of the decedent's last will and testament, or, in cases of intestacy, in the heirs at law according to the laws of succession. State v. Miller, 149 Cal. 208, 210, 85 P. 609; Estate of Patterson, 155 Cal. 626, 637, 102 P. 941, 26 L. R. A. (N. S.) 654, 132 Am. St. Rep. 116, 18 Ann. Cas. 625; Western Pacific Railroad Co. v. Godfrey, 166 Cal. 346, 349, 136 P. 284, Ann. Cas. 1915B, 825; Estate of Yorba, 176 Cal. 166, 169, 167 P. 854. Although the decree of distribution does not create, but only declares, the title which accrued at the moment of decedent's death, or, in the case of after-acquired property, at the date of acquisition, until the title has been thus declared, it is often impractical, if not impossible, to determine the persons in whom it is vested. To require a trustee's deed executed during the pendency of administration, in pursuance of a purchase by the personal representative in her representative capacity, to designate as grantees the specific heirs or devisees in whom title is vested would often demand a solution of difficult questions of law and fact within the exclusive jurisdiction of the probate court to be settled only by the decree of distribution. By reason of this fact and the further circumstance that property thus vested in heirs or devisees is subject to the representative's right of possession and control for purposes of administration, a designation other than one naming specific persons as grantees is necessary and appropriate.

[4] A deed granting the property to plaintiff, as executrix, or to the estate, naming it, would have been sufficient to vest title in those entitled to succeed to the property. In commenting upon the effect of a deed granting real property to executors, this court, in Newlove v. Mercantile Trust Co., 156 Cal. 657, 105 P. 971, where the grant was to Joseph H. Newlove and Charles W. Newlove, "as executors of the last will of said John Newlove, deceased, * * * in trust for all the persons interested in the estate of said John Newlove, deceased, according to their respective interests therein," said:

"We are satisfied that it must be held, in view of the deed made by Kaiser to the executors of the will of John Newlove subsequent to his death in execution of the agreement of sale, that the Newlove Ranch must be treated as part of the property of deceased at the time of his death. * * * As we have before said, the effect of the conveyance of the Newlove Ranch by Kaiser to the executors of the will of John Newlove was to vest a legal title to the property in the same manner as if the deed had been executed prior to the death of John Newlove. The property was thenceforth, if not before, a part of his estate, and plaintiff had a legal title to an undivided one-twelfth, subject to the possession of the executors for purposes of administration."

[5] It is to be observed that under such a deed title is declared to vest, not in the personal representative named as grantee, but in those entitled to succeed to the property, either by virtue of decedent's will or the laws of succession, whose identity is not legally determinable until the decree of distribution shall have been entered. The circumstances of the situation admit of no greater definiteness in the ascertainment of a grantee. It is not declared, either in Newlove v. Mercantile Trust Co., supra, or in any other case brought to our notice, that a grant to the personal representative is the sole way in which title may be conveyed to

those entitled to succeed as heirs or devisees. Any language which indicates such an intent with reasonable certainty is sufficient.

In Arnett v. Fairmont Trust Co., 70 W. Va. 296, 73 S. E. 930, the testatrix's will contained the following provision: "If any money left after distribution let it be return to *the estate of C. W. Arnett.*" C. W. Arnett was testatrix's predeceased husband. The court interpreted the provision as vesting the property in the individual who succeeded to title to the property of C. W. Arnett upon his death, which in the state of West Virginia was the executor of his estate, to be taken, held, and administered by said executor as a part of the estate of said Arnett and distributed as the terms of his will directed. See, also, McKee v. Ellis (Tex. Civ. App.) 83 S. W. 880. In Hill v. Jackson (Tex. Civ. App.) 51 S. W. 357, the grantees were named as "the heirs of John Jackson and Sabina Jackson (or * * * whoever under the law is entitled to take the same)." The designation was held sufficient. In McKee v. Spiro, 107 Mo. 453, 17 S. W. 1013, a deed to "the heirs and legal representatives, whether, under her last will and testament, or by inheritance of her, Evelina J. Sharp, deceased," was upheld, and in Webb v. Den, 58 U. S. (17 How.) 576, 15 L. Ed. 35, a deed to the "legatees and devisees of Anthony Bledsoe, deceased," was held to be sufficient on the ground that it necessarily referred to the will of said Bledsoe to ascertain the persons who were legatees and devisees. So in the instant case, a reference to the will, if it were not set aside, would make certain the class of persons who were to take as grantees, and, if the will were set aside, the laws of succession to property in cases of intestacy (Civ. Code, §§ 1383–1405) would make certain those entitled to take.

[6] The above-cited decisions are illustrative of a tendency on the part of the courts to give effect to the obvious intention of a person as revealed by the language of the deed interpreted in the light of the circumstances which most probably influenced the conduct of the person whose purpose or intent is the subject of inquiry. The deed in the instant case, executed by the Title Guarantee & Trust Company, a corporation, and conveying the real property therein described to the "heirs or devisees of Jennie C. Hurd, deceased." recites the execution of said note and deed of trust made in favor of Jennie C. Hurd, since deceased; the default of the maker of the said deed of trust and note; the exercise of the option to declare the full amount of the indebtedness due by the executrix; the sale, pursuant to notice duly given, of the property embraced in the deed of trust to the parties of the second part ("the heirs or devisees of Jennie C. Hurd, deceased"), and the conveyance of said property "unto the said parties of the second part herein, their heirs or assigns forever." We think the deed thus indubitably furnishes intrinsic evidence of an intent to convey to heirs if the probate court should thereafter determine the property to have vested in heirs and to devisees if the probate court should determine said property to have vested in devisees pursuant to the last will and testament of decedent. In brief, it was the intention of the grantor to augment the estate of Jennie C. Hurd, deceased. This construction is strengthened by a consideration of the circumstances of the transaction, which conclusively show that such should have been, and in fact was, the object of the parties. A delivery of the deed to plaintiff as executrix vested title in the persons entitled to succeed to the property. It was but the natural, logical, and just effort to return the title back into the stream from which the deed from decedent to defendant diverted it.

The case of Hogan v. Page, 2 Wall. (69 U. S.) 605, 17 L. Ed. 854, furnishes a helpful analogy. It is there stated that a difficulty had occurred at the land office in respect to the form of patent certificates and patents, arising out of applications to have them issued in the name of an assignee of the original grantee, thereby imposing upon the office the burden of inquiring into the derivative title presented by the applicant. As a result, a formula was adopted of issuing the patent to the original grantee "or his legal representatives." The formula was held to embrace representatives of the original grantee in the land by contract, such as assignees or grantees, as well as by operation of law, and to leave the question open to inquiry in a court of justice as to whom the certificate, patent or confirmation should inure.

In Ready v. Kearsley, 14 Mich. 215, a deed to "S or his heirs" was upheld. The court, in an opinion written by the eminent Mr. Justice Cooley, said:

"The deed is to Stewart or his heirs; and it is supposed to fall under the condemnation of that rule of the common law, that a grant made to J. S. or W. S. in the disjunctive, is void for uncertainty [citing authorities].

"It is evident, however, that the reason upon which the case instanced rests, does not apply to this deed. A grant to J. S. or W. S. is void from the manifest impossibility of determining which shall take, when the grantor has failed to express his intent. But no such difficulty can arise in the case of a grant to J. S. or to his heirs. If J. S. is living, he has no heirs; and no two parties can claim adversely as grantees under the deed. The manifest intent here was to vest the title in Stewart, if living, *and in his heirs or devisees, if he were then dead.* Conveyances in this form by public officers or boards have not been uncommon, for the reason that such conveyances are usually made at a period subsequent to that when the right to the conveyance accrued; and it is not always known when the deed is made, that the party entitled is living."

By applying the reasoning adopted by Mr. Justice Cooley in the above-quoted excerpt to the concrete facts of this case no uncertainty is left to cloud the situation. "That is certain which can be made certain." Civ. Code, § 3538. The will makes absolute disposition of all decedent's property to certain named devisees and legatees. If the will is valid, the question of heirship would not arise. If, on the other hand, the will should be held to be invalid, the question of devisees or legatees would not be in the case. It is certain that the fixing of the status of one class would eliminate the other as distributees of the estate. The common-law rule that a deed to "J. S. or W. S." is void for uncertainty cannot rule the decision in the instant case. In the former case there was no method by which the grantor's intent could be discovered. In the instant case no such irremediable uncertainty exists. But even the common-law rule of strict construction as applied to deeds has been greatly relaxed or modified in this state by statutes and judicial decisions, with a view of effecting the grantor's intent as shown by extrinsic circumstances pertinent to that issue. Authorities are numerous on this point. It is not, however, intended by this decision to depart from the rule of the common law in proper cases, but to withhold a strict application with respect to cases like the present one, wherein a good and sufficient reason appears upon the face of the transaction for so doing.

Respondent calls upon us to keep in mind the far-reaching effect that a decision adverse to that rendered by the trial court would have upon title as affecting many persons and unsettling vast property rights. It is claimed that it is, and for many years has been, the practice of the large title companies of this state to make deeds in the form of the one here in question; that this practice is not limited to the state of California, but obtains in other states. From what has been said, it is not necessary to decide whether courts will take judicial notice of such a practice or usage on the theory that they ought to take notice of the "due course, rules and forms of business." Sections 1452 and 1581, Code of Civil Procedure, wherein "heirs" and "devisees" are coupled with the disjunctive "or," as in the deed before us, are cited by respondent as buttressing her claim that the phrase "heirs or devisees," as used in the Code, has exactly the same relative meaning as those words were used and intended to be used by the grantor in the deed before us for construction. The suggestion adds support to the view already expressed. Ready v. Kearsley, supra.

[7] The property being subject to the control and possession of the plaintiff as executrix in the same manner as real property vested in decedent at the date of her death, the plaintiff was a proper party to bring the action, and the joinder of heirs and devisees was not required. Code Civ. Proc. § 1582.

The judgment is affirmed.

We concur: WASTE, C. J.; RICHARDS, J.; LANGDON, J.; CURTIS, J.; PRESTON, J.

SHENK, J. I dissent. There are two ways by which title to real property may devolve. One is by operation of law, and other is by an instrument in writing. Section 1091, Civ. Code. The devolution here attempted was by an instrument in writing which was voluntary. In such case the party who is to take as grantee must be sufficiently ascertained by the writing itself, or it is a nullity. Rixford v. Zeigler, 150 Cal. 435, 88 P. 1092, 119 Am. St. Rep. 229. The general rule that a deed to "J. S. or W. S." would be void for uncertainty is not questioned. Here the deed runs to the "heirs or devisees." It must be assumed that there may be heirs who are not devisees, and likewise that there may be devisees who are not heirs. If A and B are heirs and not devisees and C and D are devisees and not heirs, a conveyance to "A and B or C and D" would seem to me to be fatally uncertain as to the parties' grantee. Furthermore, to constitute a delivery of a voluntary conveyance, there must not only be delivery by the grantor but an acceptance by the grantee. Bank of Healdsburg v. Bailhache, 65 Cal. 327, 4 P. 106; 9 Cal. Jur. p. 149. Who is to accept the conveyance here involved? Neither of the designated classes would act for the other. Their interests may be adverse. The analogy between the effect of this deed and the passing of title to the "heirs or devisees" by operation of law is by no means satisfactory. In the one case the law requires the voluntary act of the grantor to designate his grantee, who must be a natural or an artificial person capable of taking title, and this designation must be certain. In the other case the law designates the repository of the title of deceased persons subject to administration. The one is a matter of contract, among the incidents of which is certainty of the contracting parties. The other is a matter of legislative control unrestrained by contract or by constitutional provision safeguarding the contractual relation. Without something further in the designation of the grantees herein, I fail to see how the title vested in them, if it be vested, may be disturbed by creditors of the estate who would be privileged to resort to the property to satisfy their claims if the title had been taken by the representative of the estate subject to administration. If they take at all, they take by means of a voluntary conveyance from a third party, not subject to administration, or in a representative capacity, but as persons in esse. When the deed is recorded, section 4132 of the Political Code requires the recorder to index the "Names of Grantees." This is impossible in the case of this deed, for the grantees are unnamed, are in the disjunctive, and no means are provided in the instrument itself for their determination except by a lawsuit or other court proceedings. This, to my mind, is neither authorized nor contemplated by our law governing the voluntary transfer of title to real property.

---

205 Cal. 707

BERTSCHMAN v. COVELL et al.

(Sac. 4102.)

Supreme Court of California. Dec. 11, 1928.

1. Mortgages 🔑343—Member of law firm representing trustee had authority to conduct foreclosure sale under trust deed which permitted sale by trustee or agent.

Member of law firm, representing trustee in foreclosure of deed of trust which expressly provided that sale might be conducted by trustee or agent, had authority to conduct sale, notwithstanding want of express or formal authorization.

2. Mortgages 🔑343—Trustee's acceptance of proceeds and execution of deed cured any irregularity in attorney's conduct of foreclosure sale under deed of trust.

If trustee's appointment of member of his law firm to act as agent in conducting foreclosure sale under deed of trust was informal, rendering sale irregular, informality was cured by subsequent ratification by trustee's acceptance of proceeds of sale and execution of deed to purchaser's transferee.

3. Mortgages 🔑369(6)—Subsequent incumbrancer held not entitled to avoid foreclosure sale because of agreement restricting bidding; objection being available to debtor alone.

Subsequent incumbrancer *held* not entitled to set aside foreclosure sale under prior trust deed because of agreement of two of bidders not to bid against each other, since subsequent incumbrancer had right to attend sale and bid in property, and debtor alone was entitled to complain of improper agreement among bidders.

Department 2.

Appeal from Superior Court, Stanislaus County; J. C. Needham, Judge.

Action by Maude M. Bertschman against George F. Covell and others. From an adverse judgment, plaintiff appeals. Affirmed.

Hawkins & Hawkins, of Modesto, for appellant.

A. J. Carlson and Vernon F. Gant, both of Modesto, and Young & Hudson, of San Francisco, for respondents.

RICHARDS, J. The plaintiff prosecutes this appeal from a judgment in the defendants' favor after the sustaining of a demurrer to her amended complaint, the plaintiff declining to further amend. The plaintiff was the holder of a mortgage upon certain real property in Stanislaus county, owned by one Blanche B. Morton, who, prior to the making of said mortgage, had made, executed, and delivered to the defendant Western American Realty Company, as trustee for the defendant Anglo-California Trust Company, a trust deed to secure the payment of a promissory note to the latter for the sum of $100,000, and which trust deed had been duly recorded prior to the execution of the plaintiff's mortgage. Blanche B. Morton having defaulted in her payments upon the aforesaid note, the trustee proceeded to sell the property covered by both these incumbrances at trustee's sale. It is not disputed that notices of default and of the election to sell under the terms of the deed of trust were duly made, given, and recorded as required by the terms thereof, nor is it disputed that the notice of sale was duly and regularly given by the trustee for the prescribed period, nor is there anything in the record to show that the plaintiff was not made fully aware of the foregoing facts and of the time and place of said sale prior to the holding thereof. The record disclosed that Blanche B. Morton, subsequent to the creation of said incumbrances, had leased the property covered thereby to one W. W. Cox, who had engaged in farming operations thereon, and was so engaged at the time of the giving of the trustee's notice of default and election to sell the property under said trust deed. Thereafter, and before said sale, Cox purchased and became the owner of said note and of the deed of trust securing the same, and was the owner thereof at the time of such sale. On the date of the sale, and at the place thereof, one R. G. Hudson, a member of the law firm of Young & Hudson, who were attorneys for the trustee, appeared and, assuming that he had power so to do, proceeded to conduct said sale and to continue the holding thereof to a later date, upon which he proceeded to hold said sale, offering the property for sale in a single parcel, and selling the same to the defendant George F. Covell, who bid $50 more therefor than the amount of $100,000 due upon said note, with interest and of the added cost of the sale. The property thus being sold to Covell, he recognized the lease of Cox, and permitted him to retain possession and to summer fallow and harvest the crop. Blanche B. Morton, the maker of said note and its security, has never, so far as the record discloses, objected to said sale on account of any irregularities occurring therein, and, while made a defendant in this action, has not appealed.

[1, 2] The plaintiff makes two main contentions upon this appeal. The first of these is that the trustee's sale was irregularly conducted because of the fact that R. G. Hudson, who appeared and assumed to act as the agent of the trustee, had no authority so to act, and that in so acting he exercised a discretion in the making of said sale, and appeared in the matter of postponing the date thereof which the trustee was alone empowered to exercise, and which it could not lawfully transfer to another. There is no merit in this contention, for, while it may be true that Hudson had not prior to said sale been constituted the agent of the trustee by any express or formal authorization to act, he was, as a member of the law firm representing such trustee, at least informally designated as its agent to conduct said sale. The deed of trust expressly provides that the sale thereunder may be conducted by the trustee or its agent, and, even if it be conceded that the appointment of Hudson to act as the agent of the trustee in the premises was informal, such informality would be cured by the subsequent ratification of the act of its said agent by the trustee, consisting in a receipt of the money which was the proceeds of said sale and the execution of the deed to the transferee of the purchaser at such sale. Pacific V. & P. Works v. Smith, 152 Cal. 507, 93 P. 85; Union Trust & Realty Co. v. Best, 160 Cal. 263, 116 P. 737.

[3] The appellant's other contention is, we think, equally without merit. It is, as alleged in her complaint, that the defendants Cox and Covell, who were present at said sale for the purpose of becoming bidders thereat, had entered into an agreement not to bid against each other; the consideration therefor being the agreement of Covell to convey the property to Cox for the amount bid thereon at the conclusion of the sale. Assuming the existence of such an agreement, it does not follow that the plaintiff would be entitled to take any advantage thereof for the purpose of having such sale avoided. The only person who would be entitled to complain of such an agreement between bidders would be the debtor, Blanche B. Morton. The plaintiff, as the junior mortgagee, had at all times the right to protect her own security by paying off or purchasing the prior incumbrance, or by being present at said sale and bidding for the property a sufficient amount to protect her own security. She did none of these things, and she makes no showing in her complaint that the aforesaid agreement between Covell and Cox in any way prevented the plaintiff from becoming a bidder at the sale or otherwise interfered with competitive bidding thereat. The action of Covell and Cox in agreeing between themselves as to the amount to be bid at the sale would be in no wise wrongful with respect to the rights and interests of each other or with respect to the rights and interests of any other person save and except the debtor herself, and could in no wise be made the basis of an attack upon the regularity of the sale in question on the part of a mere subsequent incumbrancer, whose only rights in the premises are those above set forth.

No error appearing in the record, the judgment is affirmed.

We concur: SHENK, J.; LANGDON, J.

---

205 Cal. 710

DOWLING v. SUPERIOR COURT IN AND FOR MARIN COUNTY et al. *

(S. F. 13147.)

Supreme Court of California. Dec. 12, 1928.

Rehearing Denied Jan. 10, 1929.

Exceptions, bill of ⚷53(4)—Appellants held entitled to mandamus to compel certification, notwithstanding delay, where respondent's counsel signed stipulations indicating waiver of time requirement.

Where parties, after appeal, entered into several stipulations relating to contents of proposed bill of exceptions after time for certification had expired, thus leading appellants to believe that time for preparation and engrossment of bill had been waived, appellants were entitled to mandamus to require trial judge to certify engrossed bill of exceptions after his refusal to do so because of the delay.

In Bank.

Application by J. A. Dowling for writ of mandate to be directed to the Superior Court of Marin County, Edward I. Butler, Judge, requiring respondent to certify an engrossed bill of exceptions. Writ granted.

Kirkbride & Gordon and Ernest A. Wilson, all of San Mateo, for petitioner.

L. C. Pistolesi and Franklin B. Worley, both of San Francisco, for respondents.

LANGDON, J. Petition for writ of mandate requiring the superior court in and for the county of Marin and Hon. E. I. Butler, judge thereof, to certify an engrossed bill of exceptions for use upon appeal in the case of Hannon et al. v. Madden et al., which was an action brought by forty-five owners of property within one assessment district against the city of Sausalito, its then board of trustees and its city clerk, and involving the validity of a street assessment which plaintiffs sought to have declared invalid. Judgment in said action was entered in favor of the plaintiffs on March 25, 1927. Thereafter the defendants moved for a new trial, which, on May 27, 1927, was denied. On June 25, 1927, de-

---

⚷For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

★Rehearing denied.

fendants appealed from said judgment and in due time thereafter prepared, served, and delivered a bill of exceptions upon such appeal. On November 3, 1927, the plaintiffs prepared and delivered their proposed amendments to said bill of exceptions, and the matter of the settlement thereof came on for hearing before the judge of said court on or about December 8, 1927, at which time the parties entered into a stipulation as to what, in substance, said bill of exceptions should contain. Upon the filing of the bill of exceptions, the court settled the same, and directed it to be engrossed. It was then agreed between counsel that the attorney for the defendants should prepare the necessary pages to be inserted in said bill pursuant to stipulation, and should submit same to plaintiffs' counsel for approval. Thereafter, at various times, the parties entered into a number of stipulations as to the form and contents of the bill and the matter was pending until the early part of June, 1928; the appellants, apparently in good faith, proceeded with the final preparation and engrossment of the bill, and being led to believe by the conduct of counsel for respondents that the matter of time for the completion of said engrossment would not be insisted upon, and that it had been waived.

On or about June 12, 1928, counsel for respondents, for the first time, presented to appellants their objection to the certification of the proposed bill of exceptions, whereupon counsel for the appellants immediately presented the bill to Judge Butler for certification, but the judge required a brief notice to be given of the application of appellants for certification of the engrossed bill of exceptions, and on the 14th day of June a hearing was had upon such application and the objections thereto. At the conclusion of this hearing the trial judge sustained the objections and refused to certify said engrossed bill because of the delay.

As we have stated, it is apparent from the record that the appellants acted in good faith in the preparation of the bill, and it is also apparent that they were misled by counsel for respondents into the belief that the statutory time for the completion of its engrossment and for its certification had been waived by counsel for respondents. The record contains stipulations signed by counsel for respondents, relating to the contents of the proposed bill of exceptions, as late as the latter part of February or the 1st of March, 1928, which was several months after the appellants' time had expired.

In view of this situation and of the policy of this court to determine upon the merits all appeals prosecuted in good faith, we think the writ prayed for should issue. Cases presenting a similar principle are: Title Ins., etc., Co. v. Cal. Dev. Co., 171 Cal. 173, 152 P. 542; Slye v. Hunt, 29 Cal. App. 117, 154 P. 607; Kramm v. Stockton Electric Railroad Co., 22 Cal. App. 737, 136 P. 523; Hicks v. Masten, 101 Cal. 651, 36 P. 130.

It is ordered that the writ issue as prayed.

We concur: WASTE, C. J.; RICHARDS, J.; SEAWELL, J.; SHENK, J.; CURTIS, J.; PRESTON, J.

---

205 Cal. 642

PERELLI-MINETTI et al. v. LAWSON et al.

(S. F. 12035.)

Supreme Court of California. Nov. 27, 1928.

1. Frauds, statute of 🔑56(9)—Parol agreement for partnership in lands is valid and enforceable between parties.

Partnership in lands may be formed by parol agreement, and such agreement is valid and enforceable between the parties.

2. Partnership 🔑70—Partners bear confidential relations and are trustees for each other in partnership transactions.

Partners sustain confidential relations towards each other, and each is a trustee for the other in all partnership transactions.

3. Partnership 🔑67—Whether property owned by partner before formation of partnership and used for partnership purposes became partnership property is determined by agreement and conduct.

Whether property which was owned by one of partners before formation of partnership and thereafter used for partnership purposes has become part of partnership property or remains property of the one partner is determined by partnership agreement and conduct of partners.

4. Partnership 🔑68(1)—Partnership property need not be purchased with partnership funds and, as between partners, whether land standing in names of partners as individuals is partnership property is determined by understanding and intention.

Partnership property need not be purchased with partnership funds, and true method of determining, as between partners, whether land standing in names of partners as individuals is partnership property is to ascertain understanding and intention of partners themselves from their conduct and course of dealing.

5. Partnership 🔑68(1)—Facts held to show that land in which partners had interests before formation of partnership became partnership property.

Where partners each had undivided one-third interest in land before formation of partnership and thereafter purchased remaining one-third interest, facts *held* to show that land became partnership property.

6. Husband and wife 🔑264—Evidence held not to show that partnership land was community property of one partner.

Evidence *held* not to show that partnership real estate was community property of one partner, in view of Civ. Code, § 163.

7. Husband and wife 🔑267(1)—Statute requiring wife to join in instruments conveying or incumbering community realty is inapplicable to land acquired by husband prior to year 1917 (Civ. Code, § 172a, as added by St. 1917, p. 829).

Civ. Code, § 172a, as added by St. 1917, p. 829, providing that husband has management and control of community real property, but that wife must join with him in executing instruments leasing it for longer period than one year, or selling, conveying, or incumbering it, is inapplicable to land acquired by husband prior to year 1917.

8. Appeal and error 🔑1056(4)—Excluding evidence that lands were owned by tenants in common, if error, held harmless, where court so found.

Exclusion of evidence to show that individuals owned lands as tenants in common during existence of partnership, if error, *held* harmless, where court found that they in fact did hold lands as tenants in common.

9. Partition 🔑63(3)—In partition suit by beneficiaries and executors under deceased partner's will, evidence held to sustain findings that lands constituted partnership assets to which surviving partner was entitled for liquidation purposes.

In suit for partition by beneficiaries and executors under will of deceased partner against surviving partner and others, evidence *held* sufficient to sustain findings of trial court that lands were partnership assets to which surviving partner was entitled for liquidation purposes.

10. Quieting title 🔑44(3)—In suit to quiet title by beneficiaries and executors under deceased partner's will against surviving partner and others, evidence held to sustain findings for defendants.

In suit to quiet title by beneficiaries and executors under will of deceased partner against surviving partner and others, evidence *held* sufficient to sustain findings of trial court in favor of defendants.

11. Partnership 🔑258(8)—In suit by beneficiaries and executors under deceased partner's will against surviving partner and others to enjoin selling or mortgaging growing crops, evidence held to sustain findings for defendants.

In suit by beneficiaries and executors under will of deceased partner against surviving partner and others to enjoin surviving partner from selling or mortgaging growing crops, evidence *held* sufficient to sustain findings of trial court in favor of defendants.

12. Partnership 🔑258(8)—In suit by beneficiaries and executors under deceased partner's will against surviving partner and others to cancel mortgage upon growing crops, evidence held to sustain findings for defendants.

In suit by beneficiaries and executors under will of deceased partner against surviving partner and others to cancel mortgage given by surviving partner upon growing crops, evidence *held* sufficient to sustain findings of trial court in favor of defendants, in view of Civ. Code, § 2450, subd. 3, and § 2461.

13. Partnership 🔑244—Surviving partner had right, on death of partner, to continue in possession of partnership and to settle its business (Civ. Code, § 2450, subd. 3, and § 2461; Code Civ. Proc. § 1585).

Since death of partner dissolves general partnership (Civ. Code, § 2450, subd. 3), surviving partner, by express terms of Code Civ. Proc. § 1585, and Civ. Code, § 2461, had right to continue in possession of partnership and to settle its business.

In Bank.

Appeal from Superior Court, Sonoma County; R. L. Thompson, Judge.

Action for partition of real property and other relief by Joseph V. Perelli-Minetti and others against W. H. Lawson and others. From a judgment in favor of defendants, plaintiffs appeal. Affirmed.

For opinion of the District Court of Appeal, see 264 P. 772.

Harry A. McKenzie and E. V. McKenzie, both of San Francisco, and W. F. Cowan, of Santa Rosa, for appellants.

Haven, Athearn, Chandler & Farmer, Athearn, Chandler & Farmer, and Walter Hoffman, all of San Francisco, for respondents.

PER CURIAM. Upon the very earnest insistence of appellants that the decision of this case by the District Court of Appeal, affirming the judgment of the trial court, did not correctly state the law, and had done an injustice to the appellants, a hearing was granted by this court to enable it to carefully study the record upon appeal and the contentions of the parties with reference thereto. After careful consideration, we are satisfied with the decision of the District Court of Appeal of the state of California, in and for the Third Appellate District, and hereby adopt the opinion of said court, written by Presiding Justice Finch thereof, as follows:

The plaintiffs, who are beneficiaries under the will of A. J. Perelli-Minetti, deceased, brought this action for the partition of two tracts of land, to quiet their alleged title to an undivided half interest therein, to enjoin the defendant Lawson from selling or mortgaging the crops growing on the land, and to cancel a mortgage given by him upon such crops. Judgment was entered in favor of the defendants, and the plaintiffs have appealed.

Prior to June 9, 1921, Lawson, S. Scatena and Perelli-Minetti were the owners of the lands in suit, the legal title standing in the names of those persons, without further designation. They had operated the lands as partners, growing grapes thereon and manufacturing wine and grape juice. It is uncertain whether or not the real estate was partnership property, but the court found that, at the time stated, Lawson and Perelli-Minetti each owned an undivided one-third interest in the land, and therefore it will be assumed, for the purposes of this opinion, that the lands were not then partnership property. The court found:

"In the latter part of May, and prior to June 9, 1921, A. J. Perelli-Minetti and W. H. Lawson entered into an agreement for the formation of a partnership concerning the above-described lands, and did form a partnership for the purpose of buying and selling said lands and other lands and the growing, cultivating, harvesting, and selling of the crops therefrom, and for such other purposes incident thereto and necessary therein as might be deemed proper by said copartners * * * [and] agreed that said partnership should be operated under the firm name and style of Lawson & Perelli, and that the profits and losses arising out of the operation of said lands should be divided equally between them. Pursuant to said partnership agreement, and for the purposes of said partnership, on or about June 9, 1921, A. J. Perelli-Minetti and W. H. Lawson purchased from S. Scatena the remaining one-third interest of S. Scatena in the lands. * * *

"Pursuant to said partnership agreement and partnership, A. J. Perelli-Minetti and W. H. Lawson forthwith took possession of said lands and did business thereon under the firm name and style of Lawson & Perelli, incurred obligations, offered for sale, cultivated and maintained said lands, raised crops thereon, and harvested the same therefrom, for the joint benefit of each of them, and each of them shared equally in the cost of maintenance and operation of said lands, and in the cost of operating the same, and the planting and harvesting of the crops produced on said lands, and shared equally in all profits and losses arising or accruing out of the acquisition of said lands, or the cultivating, planting, harvesting, or marketing of the crops produced on said lands.

"Pursuant to said partnership agreement, and pursuant to said partnership, and on the 9th day of June, 1921, partnership books were opened and kept under the name of Lawson & Perelli. Said lands * * * were carried on said books as assets of the partnership of Lawson & Perelli. For the years 1921, 1922, and 1923 written income tax reports were returned to the United States government on partnership form, signed 'Lawson & Perelli, by A. J. Perelli-Minetti,' listing said lands as an asset of the partnership of Lawson & Perelli, and, among other things, indicating the amount of profits and losses concerning said partnership of Lawson & Perelli arising from the operation of said lands.

"From the time of said agreement of partnership until the death of A. J. Perelli-Minetti on or about December 12, 1924, A. J. Perelli-Minetti and W. H. Lawson did business as partners, and pursuant to said partnership agreement, under the firm name and style of Lawson & Perelli, and cultivated said lands in the manner provided in said agreement of partnership.

"Upon the death of A. J. Perelli-Minetti on or about December 12, 1924, W. H. Lawson, as surviving partner of the partnership of Lawson & Perelli, took control of, and at all times thereafter remained in control of, and now is in control and possession and entitled to the possession of said lands and the crops growing thereon and the appurtenances and the whole thereof.

"A. J. Perelli-Minetti and W. H. Lawson during said partnership executed on behalf of the partnership of Lawson & Perelli a mortgage upon the lands described in parcel 1, Exhibit A, to the California Joint-Stock Land Bank, a corporation organized and existing under the laws of the state of California, as security for a promissory note in the sum of $35,000. Said mortgage is an outstanding obligation of the partnership of Lawson & Perelli.

"During said partnership A. J. Perelli-Minetti and W. H. Lawson, in behalf of said partnership of Lawson & Perelli, made and executed a mortgage to S. Scatena on the lands described in parcel 2, Exhibit A, as security for the payment of the sum of $41,000. Said mortgage is an outstanding obligation of said partnership.

"Said mortgages were carried on the partnership books of Lawson & Perelli as a liability against said partnership. For the years 1921, 1922, and 1923, written income tax reports were filed with the United States government on partnership forms. Said income tax reports were signed 'Lawson & Perelli, by A. J. Perelli-Minetti,' and said mortgages were listed on said reports as a liability against said partnership.

"W. H. Lawson, as surviving partner of said partnership of Lawson & Perelli, has, since the death of said A. J. Perelli-Minetti, at all times been and now is in the exclusive and entire control of said lands hereinbefore described, and the crops grown thereon, and all of the assets of said partnership. Said W. H. Lawson claims no interest in the assets of said partnership other than an interest as surviving partner of said partnership of Lawson & Perelli, and, as such surviving partner, the right to liquidate the affairs thereof.

"On or about the 11th day of April, 1925, W. H. Lawson, as surviving partner of Lawson & Perelli, and pursuant to his duties as such, made a chattel mortgage on growing crops on the lands described in Exhibit A to the Pacific Fruit Exchange, a corporation, duly authorized and existing under the laws of the state of California, as security for a sum of money not to exceed $15,000 advanced to said W. H. Lawson as surviving partner. Said W. H. Lawson borrowed said money in pursuance of his duties as said surviving partner and may be used only in liquidating the affairs of said partnership, and said mortgage was made, and the proceeds thereof may be used and are intended by him to be used only pursuant to his duties as such surviving partner.

"Upon the death of A. J. Perelli-Minetti, and immediately thereafter and ever since, W. H. Lawson, as such surviving partner, took possession and has maintained possession of the assets of said partnership, and has proceeded to liquidate the affairs of the same, paying bills of said partnership, collecting income accruing to said partnership, and caring for the lands, crops, and appurtenances thereto. Said W. H. Lawson has been diligent and faithful in the performance of said duty as surviving partner and in the liquidation of the affairs of said partnership.

"The assets of said partnership consist of the lands described in Exhibit A and the growing crops and personal property located on said lands, wine, machinery, trays, cooperage, and miscellaneous incidental property connected therewith.

"It is necessary for W. H. Lawson, as surviving partner of said partnership of Lawson & Perelli, to have exclusive control and possession of all of the assets of said partnership for the purpose of liquidating the affairs of said partnership.

"At the time of the death of said A. J. Perelli-Minetti on or about the 12th day of December, 1924, there were outstanding obligations existing against said partnership and bills receivable uncollected by said partnership. There are now outstanding obligations existing against said partnership and accounts receivable still uncollected. No accounting has ever been had as against any parties concerned or interested in said partnership. The affairs of said partnership are not yet wound up or liquidated."

In appellant's opening brief it is said:

> "There is only one primary issue in the case: Were the two ranches held as partnership land, or were the two owners tenants in common thereof? * * * Even if the land be deemed partnership property, still unless partnership creditors' rights intervened the land would descend to the heirs or be subject to testamentary disposition. * * * Therefore, we contend two propositions, that we are tenants in common; and if we are not tenants in common, there is no reason for any administration or handling of partnership affairs by the partner."

[1-4] The partnership agreement was not in writing. "A partnership in lands may be formed by an agreement in parol. Such parol agreement is valid and may be enforced between the parties." Musick Cons. Oil Co. v. Chandler, 158 Cal. 7, 12, 109 P. 613, 614; Koyer v. Willmon, 150 Cal. 785, 787, 90 P. 135; Scott v. Junquist, 179 Cal. 7, 9, 175 P. 412. The relations between the partners were confidential and each was a trustee for the other in all partnership transactions. Koyer v. Willmon, supra. "If property owned by one of the partners before the organization of the firm has been used for partnership purposes, it must be determined from the partnership agreement and the conduct of the parties whether it has become a part of the firm property or remains the property of the one partner. Thus a lease of premises occupied by the firm business, procured by one partner before formation of the partnership, may become firm property without formal assignment, if it is so understood and the partners regard it as such." Rowley's Modern Law of Partnership, § 277. "It is not necessary to show that the partnership property was purchased with partnership funds. Land standing in the name of an individual partner may have been contributed by him as his portion to the firm assets. The true method of determining, as between the partners themselves, whether land standing in the name of the individuals is or is not to be treated as partnership property is to ascertain from their conduct and course of dealing the understanding and intention of the partners themselves, which, when ascertained, should unquestionably control." Johnson v. Hogan, 158 Mich. 635, 123 N. W. 891, 37 L. R. A. (N. S.) 889. In McNab v. Mills, 199 Cal. 231, 248 P. 657, while they were the owners of a tract of land as tenants in common, the plaintiff and the defendant entered into an oral agreement of partnership, one of the terms of which was that the land "was to become the capital of the partnership and was to become partnership property." The land was thereafter operated by the partners as partnership property in accordance with the terms of the oral agreement. The court said:

> "While no written agreement expressing the terms and conditions of the partnership alleged to exist * * * was entered into, we are satisfied from a careful reading of the evidence that the actions, transactions, conduct, and understanding of the parties amply support the finding of the trial court that they entered into a partnership, which continued to exist. * * * In the language of the trial court: ' * * * Even though the ranch property in question may have originally come to the parties in the character of tenants in common, this character was destroyed by the parties having farmed and operated it upon joint account and as partnership property and by their acts thereby made it partnership assets.' "

[5] Appellants discuss the subject of trusts at considerable length, but the facts found by the court bring the case so clearly within the principles of law announced in the foregoing decisions that it is deemed unnecessary to pursue the subject further.

[6] Appellants contend that the interest of Perelli-Minetti in the land was community property, and that in such a case "no partnership lien can be created in land unless a wife joins in the conveyance." At the time of the organization of the partnership, section 172a of the Civil Code, enacted in the year 1917 (St. 1917, p. 829), provided:

> "The husband has the management and control of the community real property but the wife must join with him in executing any instrument by which such community real property or any interest therein is leased for a longer period than one year, or is sold, conveyed or incumbered."

[7] It need not be determined whether that section is applicable in partnership matters. The evidence does not show that the property in question was community property. Mrs. Perelli-Minetti testified that she was married 22 years ago; that at the time of their marriage Mr. Perelli-Minetti had no property; and that thereafter he acquired no property "by virtue of some one dying, any wills bequesting anything of that kind." Property acquired by gift after marriage is separate property. Civ. Code, § 163. The evidence does not show when the money with which Perelli-Minetti purchased the property was acquired. If acquired prior to the year 1917, section 172a is not applicable. Roberts v. Wehmeyer, 191 Cal. 601, 218 P. 22; Staton v. Buster (Cal. App.) 249 P. 878.

[8] It is contended that the court erred in

excluding evidence tending to prove that Scatena, Lawson, and Perelli-Minetti owned the lands in question as tenants in common during the existence of their partnership. In their closing brief appellants say that the court found "each of the individuals [Scatena, Lawson and Perelli-Minetti] owned a one-third interest in both ranches as tenants in common." This last statement is correct. Since the issue was found in appellants' favor, the exclusion of evidence tending to prove that issue was of no possible effect against them.

[9-12] Appellants specify many particulars in which they contend that "the evidence is insufficient to justify the decision and judgment." It is unnecessary to follow these specifications in detail. The tracts of land referred to in the findings were known as the Geyserville ranch and the Santa Rosa ranch. There was a winery on the Geyserville ranch. Lawson testified:

> "We agreed like this—If we buy, * * * we will then go into a partnership * * * and make wine for ourselves, or grape juice, in the Geyserville ranch. * * * We agreed to take over * * * the Santa Rosa ranch, work it on up into condition and sell it in the next year at all the profit we could get out of it. * * * We would buy the Santa Rosa ranch, * * * Perelli-Minetti and I, and sell it. We would hold on to the Geyserville ranch, where the grape juice plant was, and manufacture grape juice, and our business would be under the name of Lawson and Perelli, * * * as partners. * * * We went to Mr. Norton's office, and drew up a contract, taking over all of the property of Scatena, Lawson, and Perelli, except the wine, and we went from then on, we were under the name of Lawson & Perelli, the firm name of Lawson & Perelli, and partners."

The lands were thereafter carried as partnership property on the firm's books, entered as such in the income tax statements, and treated by the partners as partnership property in all respects as stated in the findings. The partners maintained joint bank accounts. Up to April 26, 1923, moneys deposited therein were made payable "to either, or the survivor." After that time both their signatures were required. It was stipulated that:

> "All of the checks prior to that time * * * were in the name of Lawson and Perelli-Minetti, were signed * * * by either Mr. Lawson or Mr. Perelli-Minetti, the great vast majority of them all being signed by Mr. Perelli-Minetti."

It was also stipulated that:

> "Subsequent to July, 1923, * * * it was agreed between them that all bills, as far as possible, should be paid, one half by each, and that all the receipts coming in should be divided at the time, one half going to Mr. Lawson and the other half going to Mr. Perelli, and that as far as they could consistently, they followed that out up until the time of the death of Mr. Perelli."

Other than as appears from this stipulation, the business of the partnership was conducted in the same manner after July, 1923, as before that time. Nothing was done to dissolve the partnership, and there was no accounting between the partners. Most of the objections to the sufficiency of the evidence are covered by what has already been said, and the others are deemed to be without merit. The material findings are amply supported by the evidence.

[13] A general partnership is dissolved by the death of a partner. Civ. Code, § 2450, subd. 3. Lawson, as the surviving partner, had "the right to continue in possession of the partnership, and to settle its business." Code Civ. Proc. § 1585. "A partner authorized to act in liquidation may collect, compromise, or release any debts due to the partnership, pay or compromise any claims against it, and dispose of the partnership property." Civ. Code, § 2461; Cooley v. Miller & Lux, 168 Cal. 120, 138, 142 P. 83. "The surviving partner must settle the affairs of the partnership without delay." Code Civ. Proc. § 1585. Since more than three years have elapsed since the death of Perelli-Minetti, it is probable that the affairs of the partnership in question here have been settled, but, if they have not, then the plaintiffs may compel a settlement in an appropriate proceeding for that purpose.

The judgment is affirmed.

---

205 Cal. 685

PACIFIC READY-CUT HOMES, Inc., v. LAW et al. (L. A. 9531.)★

Supreme Court of California. Nov. 28, 1928.

Hearing Denied in Bank. Dec. 27, 1928.

1. Mechanics' liens ⚷212(1)—Assignee of securities to finance construction of houses cannot foreclose liens for labor and material furnished, where it negligently intrusted securities to assignor, who embezzled them.

Assignee of securities issued to finance construction of houses *held* not entitled to foreclose mechanics' liens for materials and labor furnished in construction of such houses, where assignee's negligence in replacing securities in hands of its assignor, who embezzled them, was the cause of its resulting loss.

2. Mechanics' liens ⚷127—Filing of construction contract held unnecessary to charge assignee of contractor with knowledge of its provisions (Code Civ. Proc. § 1183).

Assignee of original contractor assuming construction contract must be deemed to have notice of provisions of construction contract, making its filing as provided by Code Civ. Proc. § 1183, as to him unnecessary; such filing being for the purpose of giving notice to persons performing work or furnishing materials of the extent of the owner's liability.

⚷For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

★Hearing denied in bank.

Department 2.

Appeal from Superior Court, Los Angeles County; J. Walter Hanby, Judge.

Consolidated actions by the Pacific Ready-Cut Homes, Inc., against L. L. Law, whose true name is Lyle Laub, and against Peter Peterson and Nora Peterson, wherein the last-named defendants filed a cross-complaint against plaintiff and the Standard Accident Insurance Company as a cross-defendant. Judgment for cross-complainants against both cross-defendants, and plaintiff appeals. Affirmed.

See, also, 272 P. 579.

Andrew J. Copp, Jr., of Los Angeles, for appellant.

L. C. Woods and Culver & Nourse, all of Los Angeles, for respondents.

SHENK, J. The plaintiff, Pacific Ready-Cut Homes, Inc., brought two actions against the defendants Peter Peterson, Nora Peterson, and L. L. Law to foreclose mechanics' liens. The defendants Peterson answered and also filed a cross-complaint, wherein they sought to recover from the plaintiff and its bondsman, Standard Accident Insurance Company, certain damages alleged to have been sustained by them by reason of the failure of the plaintiff to complete the construction of certain improvements on land owned by the Petersons, which consists of two residence lots in the city of Los Angeles. The actions were tried together. Judgment was entered in each case in favor of the Petersons on their cross-complaint and against both cross-defendants, viz. the Pacific Ready-Cut Homes, Inc., and Standard Accident Insurance Company, in the sum of $1,675 and costs. The plaintiff was denied the foreclosure of its alleged liens, and that company is the appellant in each case. The Standard Accident Insurance Company is not appealing. The record in both cases is the same except as to the description of the lots, and the facts, which are not in dispute, are substantially as follows:

On or about the 30th day of January, 1924, the Petersons, as owners, entered into a contract with one L. Law, a building contractor, whereby the latter agreed to construct on each of the described lots, in accordance with certain plans and specifications, a double bungalow and garage, for the contract price of $4,704. The total contract price was, therefore, $9,408. Under the contract, Law agreed to accept as payment of the contract price two promissory notes in the sum of $3,750 each, secured by first mortgages on said lots, and two promissory notes in the sum of $954 each, secured by trust deeds on said lots, which trust deeds should be subordinate to the mortgages. The notes, mortgages, and trust deeds were executed by the Petersons and delivered to Law before any work was done or materials were furnished in the construction of said improvements. On February 11, Law, while still holding the four promissory notes and said mortgages and trust deeds, proceeded to enter into two contracts, in writing, with the Pacific Ready-Cut Homes, Inc., whereby the latter would agree to construct the bungalows and garages on said lots in accordance with said plans and specifications for the stipulated price of $2,823 for each of the houses and $299 for each of the garages. The Petersons were requested by Law to consent to this arrangement but they refused to do so unless the Pacific Ready-Cut Homes, Inc., would provide security that it would construct said improvements in accordance with said plans and specifications. This the corporation agreed to do. Thereafter the Pacific Ready-Cut Homes, Inc., and Law entered into said contracts whereby the corporation agreed to and did accept from Law as full payment of its contract price the latter's promissory note due in 90 days and secured by the assignment to the corporation of the notes, mortgages, and trust deeds held by Law against the Petersons. On March 13, 1924, the Pacific Ready-Cut Homes, Inc., as principal, and Standard Accident Insurance Company, as surety, executed a bond binding themselves to the Petersons as obligors in the sum of $6,000, and conditioned on the faithful performance by the principal of all of the terms and conditions of the contract between the Petersons and Law. The Pacific Ready-Cut Homes, Inc., then entered upon the performance of the construction contract, and proceeded with the same until April 4, 1924, when it ceased its labor and the furnishing of any further materials. The Petersons completed the improvements as contemplated by the original contracts, and it is for the cost of such completion that they were awarded damages in these actions.

On April 23, 1924, the plaintiff filed its notices of lien on each of said lots claiming the reasonable value of the work performed and the materials furnished in the construction of said improvements and in due time commenced these actions to foreclose said liens.

It further appears that, when Law entered into his written contracts with the plaintiff, he represented to it that he would cause the securities then assigned to it to be negotiated within 90 days after February 11, 1924, so as to net the plaintiff the sum of $6,094 in cash; that prior to the 12th day of May Law went to the plaintiff and stated that he had a purchaser for the Peterson notes; that the money was in escrow with the Title Insurance & Trust Company, and he requested the plaintiff to transmit the Peterson securities and the Law note to the Title Insurance & Trust Company with its instructions. The plaintiff prepared such instructions, authorizing the Title Insurance & Trust Company to use the notes and collateral provided the sum of $6,094 be paid to the plaintiff. The instructions and other documents were placed in an envelope by the plaintiff and sealed. At the request of Law himself, he was permitted by the plaintiff to take the envelope and its contents for delivery to the Title Insurance & Trust Company. Instead of delivering the document to the Title Insurance & Trust Company intact, as he said he would do, he removed therefrom the instructions of the plaintiff and substituted instructions directing the Title Insurance & Trust Company to pay the money to himself. The money was paid to him on or about March 24, 1924. On or about the 12th day of April following, the plaintiff first discovered that it had been swindled by Law. It had him arrested for embezzlement, but, pending his preliminary hearing, he was removed from the jurisdiction under the extradition law to Indiana, where about forty counts of embezzlement were pending against him. Upon the discovery of the fraud, the plaintiff immediately served written notice of rescission on Law, the Petersons, and the Standard Accident Insurance Company, purporting to rescind all of the contracts between the plaintiff and Law and also the contract evidenced by said surety bond. The ground of the rescission was that all of said contracts with the plaintiff had been obtained through the false and fraudulent representations of Law and without any intention on his part to perform the same. The plaintiff thereafter brought an attachment suit against Law in Indiana, the efficacy of which is questionable.

The court found, among other things, that Law had assigned his contracts with the Petersons to the plaintiff; that the plaintiff accepted the assignment thereof and as a part of the same transaction executed the surety bond in favor of the Petersons; that the plaintiff took Law's 90-day collateral note secured by the Petersons' obligations as full payment of the contract price; that, in his dealing with the plaintiff, Law was not acting as the agent of the Petersons, but, on the contrary, dealt with the plaintiff wholly on his own behalf; that the first and only fraud appearing throughout the entire transaction was when Law obtained possession of the Peterson securities and his own promissory note and converted the proceeds thereof to his own use.

The plaintiff makes no claim, and there is no showing whatever, that the Petersons knew of or participated in the fraud practiced on the plaintiff by Law. The plaintiff was fully protected when it received the 90-day note of Law secured by the assignment of the Peterson notes, mortgages, and trust deeds. It was only through the plaintiff's negligence in intrusting the custody of the documents to Law that it suffered any loss.

[1] It is insisted by the plaintiff that the record shows that at the time Law entered into the contract with it he had no intention of performing the same and intended to get possession of the notes and other documents and convert them to his own use. Therefore, it is argued, said contract was properly rescinded, and there was no foundation for the execution of the surety bond. The answer to the contention is that, when Law executed and delivered his 90-day note and assigned the security for the same to the plaintiff, the contract had been fully executed and the plaintiff was fully protected. It was only because of the plaintiff's negligence in placing the documents in the hands of Law that it suffered any loss. The plaintiff was not obligated in any way to deliver the documents to Law, and, when it did so, it must be held responsible for its own negligent act.

[2] The plaintiff makes the further point that none of the construction contracts were filed for record as provided by section 1183 of the Code of Civil Procedure, and that therefore the Petersons are not entitled to insist upon the protection thereof. The purpose of the filing of a construction contract for record is to give notice to all persons performing work or furnishing materials on the job of the extent of the owner's liability. The position of the plaintiff herein is that of an original contractor, and it, of course, must be deemed to have had notice of the contract provisions. We fail to see how the requirements of section 1183 have any applicability to the facts in this case.

The judgments are affirmed.

We concur: RICHARDS, J.; LANGDON, J.

---

205 Cal. 690

PACIFIC READY-CUT HOMES, Inc., v. SEEBER et al.

EHLEN v. WILLISTON & MEYFARTH et al.

(L. A. 9538.)

Supreme Court of California. Nov. 28, 1928.

1. Principal and agent 🔑23(5)—Evidence sustained finding of ostensible agency of person embezzling money for construction of homes, requiring loss to be borne by principal (Civ. Code, § 2300, 2317, 2334).

Evidence *held* to sustain finding that party absconding with money paid to him for construction of homes was the ostensible agent of company furnishing labor and materials, with ostensible authority to bind it on contracts made by him with the various owners and materialman, under Civ. Code, §§ 2300, 2317, 2334, so that resulting loss should fall on company, precluding foreclosure of mechanics' liens for labor and material furnished.

2. Principal and agent ⚿160½—Persons intending to contract with principal could hold principal for resulting loss through agent's embezzlement where principal was disclosed when contracts were signed.

Under contract for erection of homes, signed by agent, who embezzled money paid thereon, and on which name of principal was disclosed, persons entering into contracts, who intended to enter into contract with principal and believed that they were so doing through its agent, *held* entitled to hold principal for resulting loss.

Department 2.

Appeals from Superior Court, Orange County; E. J. Marks, Judge.

Consolidated actions by the Pacific Ready-Cut Homes, Inc., against C. W. Seeber and others, and by H. O. Ehlen, etc., against Williston & Meyfarth, the Pacific Ready-Cut Homes, Inc., and others. From the judgments, the Pacific Ready-Cut Homes, Inc., appeals. Affirmed.

See, also, 272 P. 577.

Andrew J. Copp, Jr., of Los Angeles, for appellant.

Scarborough, Forgy & Reinhaus, of Santa Ana, for respondent Ehlen.

Kenneth H. Burns and C. N. Mozley, both of Santa Ana, for respondents Brown, Williston, and Meyfarth.

C. I. Sweet, of Los Angeles, for respondent Brown.

Seth B. Smith, of Los Angeles, for respondents Seeber and Cushing.

T. E. Burnham, for respondent Zumwalt.

Head, Rutan & Scovel, of Santa Ana, for respondent Crane.

SHENK, J. Pacific Ready-Cut Homes, Inc., brought five actions to foreclose mechanics' liens for lumber and materials furnished by it to the defendants C. W. Seeber, Williston & Meyfarth, Cora Zumwalt, Alice M. Brown, and C. W. Brown, as owners, respectively, in said actions. H. O. Ehlen, a plumbing contractor, was plaintiff in six actions brought to foreclose mechanics' liens for plumbing labor and materials, one against each of the persons named as defendant in the foregoing five actions and the sixth against Hattie J. Crane, all as owners. In each of the six actions brought by H. O. Ehlen, the Pacific Ready-Cut Homes, Inc., and C. O. Neese were also joined as defendants as the parties to whom and at whose request the plumbing labor and materials were furnished. C. O. Neese was also made a defendant in the five actions brought by Pacific Ready-Cut Homes, Inc., as the contractor and agent of the owners to whom the lumber and materials were furnished by it. It is undisputed that the materials furnished by appellant and the labor and materials furnished by H. O. Ehlen were so furnished and at the request and order of C. O. Neese and that C. O. Neese received from the respective owner defendants the full contract price therefor. C. O. Neese disappeared and absconded with the money paid to him by the respective parties.

The eleven actions were tried together on the issues raised by the various complaints, answers and cross-complaints and answers thereto. In the five cases brought by the Pacific Ready-Cut Homes, Inc., the trial court found that C. O. Neese was the ostensible agent of the plaintiff in the transactions involved and that he contracted with the various owner defendants as the ostensible agent of his principal; that the plaintiff therein was paid in full for the materials furnished, and rendered judgments for the defendant owners. In the six actions brought by H. O. Ehlen the trial court made a similar finding of the ostensible agency of C. O. Neese and further found that the Pacific Ready-Cut Homes, Inc., as principal, had received payment through its agent, C. O. Neese, on account of the contract price for plumbing labor and materials alleged to be due to H. O. Ehlen. The court denied the foreclosure of liens asserted on behalf of H. O. Ehlen, but rendered judgments in his favor against Pacific Ready-Cut Homes, Inc., for the amounts found to be due. The Pacific Ready-Cut Homes, Inc., has appealed from the judgments against it in each of the eleven cases. The appeals are consolidated and submitted on one set of briefs. The sole question presented for our consideration is whether the evidence sustains the finding that C. O. Neese was the ostensible agent of the Pacific Ready-Cut Homes, Inc., with ostensible authority to bind it on the contracts made by him with the various owner defendants and with H. O. Ehlen.

The plaintiff, Pacific Ready-Cut Homes, Inc., is a corporation, which has its principal office in the city of Los Angeles. It has for its declared purpose the reduction of labor costs to builders. It cuts and machines lumber materials for an entire building at its factory in accordance with plans and specifications selected by the prospective builder and delivers them at the building site ready to be placed into the structure. For the extension of its business, the officers of the corporation arranged with numerous individuals, for a specified commission on all orders sent in, to advertise its business and prevail upon prospective builders, within assigned territory, to engage the services of the corporation in supplying complete ready-cut lumber and materials. The corporation also advertised a service which included arrangements for financing the construction of buildings in its home territory of Los Angeles. It insists, however, that the individuals who undertook to extend the business of the corporation into other assigned territories were independent contractors and were engaged only to sell its product and to be responsible on their own account as contractors to the prospective builders. Mr. Baumgarten, an officer of the corporation, who concluded the arrangements with C. O. Neese for the Orange county territory, testified that there was no written contract with him, but that, pursuant to an oral understanding, Neese undertook to become what Mr. Baumgarten and the corporation insist was a "distributor" or purchaser of ready-cut building materials for Pacific Ready-Cut Homes to be erected in his exclusive territory, as distinguished from an agent who could bind Pacific Ready-Cut Homes, Inc., as a principal, on the contracts made by Neese as building contractor with the prospective builders. The contract made with each of the defendant owners in the five actions brought by Pacific Ready-Cut Homes, Inc., was in writing, and was signed by C. O. Neese, contractor, and by the owner as buyer. The contracts for plumbing work and materials to be installed in each of the structures involved in the six cases brought by H. O. Ehlen were orally made between H. O. Ehlen and C. O. Neese.

All parties to this controversy concede that it is settled law that ostensible agency cannot be created alone by the representations of the purported agent himself, but that there must be some act or conduct on the part of the principal by which he either intentionally or by want of ordinary care causes or allows a third person to believe that the agent possesses the authority to bind him as principal (Civ. Code, §§ 2300, 2317, 2334), and that, if there is in the record evidence of either intentional or negligent conduct on the part of the appellant which would lead the respondents to believe that Neese was, in fact, its agent, with authority to bind it on the contracts involved, and other contentions of appellant are answered, the findings of the trial court are sustained.

It must be concluded from a review of the evidence that the record is replete with instances of want of ordinary care, at least, as a result of which respondents could be led to believe, and in fact did believe, that Neese was the agent of the appellant, with authority to bind it as principal on the contracts involved. It was in evidence that, for a period of a number of months before and during which the contracts involved were entered into, there was displayed outside of Neese's office in Santa Ana a large sign bearing the words "Pacific Ready-Cut Homes, Inc.," and a similar small sign on the desk in the office but without the abbreviation "Inc." Mr. Baumgarten, district sales manager and the only representative of the corporation who visited Neese's office, denied that he saw the sign outside, or, if he saw it, that it bore the abbreviation "Inc.," although he admitted that, if there was a sign outside, it was the sign that was authorized by the company. Wherever Pacific Ready-Cut Homes were being constructed, it was in evidence that at least one large sign, "Built by Pacific Ready-Cut Homes, Inc.," was placed on the construction site. C. O. Neese used business cards and letterheads with the firm name "Pacific Ready-Cut Homes, Inc.," printed thereon, the cuts and copy for which, according to the testimony of Mr. Baumgarten, were furnished by the advertising department of the appellant. Mr. Baumgarten, himself by letter to Mr. Neese, approved the form of the letterheads. In that letter he stated:

> "I like your letterhead, business card and your envelope very much and I can see that you appreciate the importance of setting the name 'Pacific Ready-Cut Homes, Inc.' in the foreground."

Neese and his assistant also carried signs on their automobile bearing the name of the corporation, which were made at the paint shop of the appellant, although, Mr. Baumgarten contends, without the knowledge or consent of the officers of the company. Checks of the defendants were drawn in favor of Pacific Ready-Cut Homes, Inc., and were indorsed by C. O. Neese. The telephone directory listed "Pacific Ready-Cut Homes, Inc.," with the address and telephone number of Neese's office in Santa Ana. Nothing, with the exception of giving some ineffectual warnings or orders to Neese, was done by the appellant during this period to prevent C. O. Neese from representing that he was acting as the agent for and on behalf of Pacific Ready-Cut Homes, Inc., as principal, or to prevent others from relying on those representations. Mr. Baumgarten testified:

> "Q. You didn't follow it up to see that he carried out your orders? A. It is very evident that we were negligent in that."

There was additional evidence in some of the cases from which the conclusion could be drawn that the appellant intentionally caused certain of the respondents to deal with C. O. Neese as its authorized agent. As to all of the respondents there is sufficient in the record from which the trial court could justly reach the conclusion that the appellant had knowledge that Neese was holding himself out as its agent and allowed him to do so without attempting to take any effective measures to prevent third persons from relying on his conduct. In this the appellant was guilty of want of ordinary care.

[1] We find no merit in the contention of the appellant that the respondents were guilty of negligence in failing to make inquiries at the home office of the appellant to verify Neese's representations. The direct and the circumstantial evidence in the record was sufficient to confirm the truth of Neese's representations, and the respondents were justified in relying thereon.

[2] The appellant makes the further and final contention that, even if there be sufficient in the evidence to support a finding that an ostensible agency existed, still each written contract shows on its face that it was signed by C. O. Neese on his own behalf and not as agent; that the evidence is undisputed that the principal was disclosed at the time the contracts were signed; that the rule is that a claimant may hold either the principal or the agent on a contract signed by the agent apparently on his own behalf without disclosing his principal for whose benefit it was, in fact, made, but that such rule may not be invoked to hold the principal when the principal is disclosed, because the contract is evidence of an election to extend credit to the agent only, and extrinsic evidence cannot be introduced to vary its terms or make a different contract for the parties. The appellant cites Ferguson v. McBean, 91 Cal. 63, 27 P. 518, 14 L. R. A. 65, in support of its contention. General language in that case, unnecessary to the decision, however, would seem to support the contention. But in the later case of Geary St. R. R. Co. v. Rolph, 189 Cal. 59, 207 P. 539, the court restricted the application of the Ferguson Case to the particular circumstances there appearing, viz., where it appeared that the plaintiff deliberately chose to take the contract of one party alone instead of a contract of both. No question of principal and agent was involved. The Geary St. R. R. Co. Case states the rule which is now controlling, as follows:

> "We are also of the opinion that the better reason, as well as the weight of authority, is against the proposition that the mere fact that the principal is known to the third person at the time he contracts with the agent prevents such third person from holding the principal liable on the contract made in the name of the agent. * * * That the principal is not liable in such a case if the circumstances, or the terms of the contract, or the two combined, show an intent by the other party to take the agent as his debtor or obligor, in preference to the principal, is, as we have said, well established, and it is manifestly in accordance with reason and justice. In such a case the election takes place at the time of the making of the contract. But where no such election or intent appears, and there is nothing more than a contract made in the name of the agent, knowing him to be such and with knowledge of the identity of his principal, the case is, and should be, governed by the well-known principle that he who acts by another acts by himself, that the contract of the agent, within the scope of his authority, is in legal effect the contract of the principal. * * * An examination of the decisions of the subject shows that the idea that the principal cannot be held liable in cases where the third person, at the time of contracting, knew the principal and his relation to the transaction, arises from the unfounded assumption that, since the decisions holding the principal liable when the contract does not disclose his name or interest, refer to him as the 'undisclosed principal,' the doctrine does not prevail when he is known. But this language is used because the principal was insisting, not that he is not liable when he is known, but that he is not liable when the contract does not on its face purport to bind him, or to be for his behoof or benefit. It is this circumstance that is referred to by the word 'undisclosed.' The principal would have no standing in court to say he is not liable when his authorized agent makes a contract purporting to be for him and the party taking it had full knowledge of the fact that it was for him. The liability when he is undisclosed does not arise from his not being known, although sometimes fraud from that fact is also involved, but from the fact that the contract of his authorized agent, though not in his name, is really for his benefit and in his business. Thus Mr. Mechem says: 'The principal is also liable on all informal contracts entered into on his account and by his authority and not expressly made on the agent's responsibility rather than the principal's. * * * Where a person is known to be acting as the agent of a disclosed principal, the presumption is that the principal and not the agent is to be bound.' (2 Mechem on Agency, sec. 1710; see, also, sec. 1717.)"

The court in that case applied the doctrine and the reasoning to circumstances involving an oral contract, but no good reason appears why it should not apply as well when the contract is written. Since the decision in Geary St. R. R. Co. v. Rolph, supra, the District Court of Appeal has applied the doctrine of that case to a case wherein the parties had entered into a written contract. Marshall v. Bernheim, 64 Cal. App. 283, 221 P. 401.

It is undisputed that each of the respondents, at the time he entered into his contract with C. O. Neese, intended to enter into a contract with Pacific Ready-Cut Homes, Inc., as the principal, and believed that he was so doing through C. O. Neese as its agent. We conclude that the doctrine of Geary St. R. R. Co. v. Rolph, is applicable to these cases, and that the findings of the trial court are sustained.

The judgments are affirmed.

We concur: RICHARDS, J.; LANGDON, J.

205 Cal. 670

FORCE v. HART. (L. A. 9501.)

Supreme Court of California. Nov. 27, 1928.

1. Pleading 🔑201—Motion to discharge attachment cannot serve as demurrer, if defect in complaint is curable by amendment.

Motion to discharge an attachment cannot serve as demurrer, if defect in complaint can be cured by amendment.

2. Attachment 🔑4—Right to attachment held not defeated because cause of action sounds in damages.

That cause of action sounds in damages would not defeat right to attachment.

3. Attachment 🔑5—Attachment lies on cause of action for damages for breach of contract, where damages are readily ascertainable and basis of computing damages is reasonable and definite.

Attachment will lie on cause of action for damages for breach of contract, where damages are readily ascertainable by reference to contract and basis of computation of damages appears to be reasonable and definite.

4. Attachment 🔑8—Attachment held not defeated merely because damages for breach of contract are unliquidated.

Fact that damages for breach of contract are unliquidated will not alone defeat attachment.

5. Attachment 🔑5—For attachment to lie, contract sued on must furnish standard for clearly ascertaining amount due, and damages must be determinable by proof.

For attachment to lie on cause of action for damages for breach of contract, contract sued on must furnish standard by which amount due may be clearly ascertained, and there must exist basis on which damages can be determined by proof.

6. Attachment 🔑5—Attachment held properly allowed contractor for damages for breach of contract to employ contractor to construct building, where damages could be ascertained.

In contractor's suit for damages for defendant's breach of contract to employ contractor to construct building, where obligation of defendant to pay money in specific amount was fixed by contract, and difference between contract price and cost of building, conceded to be measure of damages, appeared, and damages were direct consequence of repudiation of contract by defendant, and cost of labor and materials for constructing building were capable of definite ascertainment, motion to discharge attachment by plaintiff on ground that sums due were not definite, liquidated, or capable of being made definite, was properly denied.

Department 2.

Appeal from Superior Court, Los Angeles County; William Hazlett, Judge.

Action by James A. Force against Mrs. Lillie Hart, in which plaintiff filed affidavit for an attachment. From an order denying defendant's motion to discharge attachment, defendant appeals. Affirmed.

H. G. Bittleston and R. G. La Noue, both of Los Angeles, for appellant.

Henry Trowbridge, of Los Angeles, for respondent.

SHENK, J. This is an appeal from an order denying the defendant's motion to discharge an attachment. Three causes of action are set forth in the complaint. The first seeks to recover the sum of $4,110 as the reasonable value of services alleged to have been rendered by the plaintiff in preparing and drafting certain plans and specifications ordered and accepted by the defendant. The second is for $71.50 for sums laid out by the plaintiff for a building permit. The third cause of action alleges that, on or about the 19th day of April, 1926, the parties entered into a contract whereby the defendant agreed to employ the plaintiff to construct a three-story brick apartment house on land belonging to the defendant in accordance with said plans and specifications and to pay to the plaintiff for such construction the sum of $68,500, that the defendant, without right, repudiated said agreement and refused to permit said building to be erected, and that, because of such repudiation and refusal, the plaintiff has been damaged in the sum of $5,700.

At the time of the issuance of the summons, the plaintiff filed an affidavit for an attachment pursuant to subdivision 1 of section 537 and section 538 of the Code of Civil Procedure, in which affidavit it was averred, among other things, that the defendant was indebted to the plaintiff "upon an implied contract for the direct payment of money" in the sum of $9,881.50, which is the aggregate of the several sums alleged to be due in the three causes of action. The affidavit specifically set forth that in the total amount sued for the sum of $5,700 was "for damages for defendant's breach of contract whereby she agreed to employ plaintiff to construct for her a certain building in accordance with said plans and specifications." The writ was issued and levied. In due time the defendant moved the court to discharge the writ on the grounds (1) that the writ was improperly issued, in that the contract alleged in the third cause of action "is not a contract, express or implied, for the direct payment of money"; and (2) that the writ was improperly issued, in that the indebtedness alleged in the affidavit to be due and owing from the defendant to the plaintiff exceeds the indebtedness set forth in the complaint. The court entered an order denying the motion, but further ordered that:

"It appearing from the affidavit on attachment of the plaintiff, that said attachment was improperly issued for all sums in excess of five thousand ($5,000) dollars all moneys held under attachment by virtue of said writ in excess of $5,000 be released and discharged from the lien of said writ."

The plaintiff has not appealed from said order or any part thereof.

[1] No dispute has arisen as to the propriety of the issuance of an attachment on the first and second causes of action. It is conceded that those counts allege causes of action in harmony with subdivision 1 of section 537 of the Code of Civil Procedure. The position of the defendant as to the third cause of action is stated generally as follows:

> "The contract which forms the basis of the third cause of action fulfills the requirements of the Code in one particular only—it is an express contract for the direct payment of money; but the requirement that the sums due thereon be certain, definite and liquidated, or capable of being made certain and definite, is lacking. The contract set forth therein is in the main executory—performance having progressed merely to the point of securing a permit for the erection of the building."

In this connection it is specifically urged that the contract as pleaded in the third cause of action leaves as matter of conjecture the cost to the plaintiff of the construction of the proposed building. It is not disputed that the measure of damages would be the difference between the cost of the building to the plaintiff and the contract price. It is apparently conceded that, if the pleading had alleged that the cost of the building to the plaintiff would have been $62,800, an affidavit under the attachment law to the effect that the defendant was indebted to the plaintiff in the sum of $5,700 on an express contract for the direct payment of money would have been justified. Assuming that a defect in the pleading existed, it is well settled that a motion to discharge an attachment cannot serve as a demurrer, if the defect in the complaint can be cured by amendment. Hathaway v. Davis, 33 Cal. 161; Hammond v. Starr, 79 Cal. 556, 21 P. 971; Kohler v. Agassiz, 99 Cal. 9, 33 P. 741.

[2-5] Notwithstanding the apparent concession of the defendant last above referred to, and assuming that counsel did not intend to go as far in his concession as indicated, still we are of the view that the attachment was properly issued in this case. The mere fact that the third cause of action sounded in damages would not defeat the right to the attachment. It is a well-recognized rule of law in this state that an attachment will lie upon a cause of action for damages for a breach of contract where the damages are readily ascertainable by reference to the contract and the basis of the computation of damages appears to be reasonable and definite. Hale Bros. v. Milliken, 142 Cal. 134, 75 P. 653; De Leonis v. Etchepare, 120 Cal. 407, 419, 52 P. 718; Hamburger v. Halperm, 28 Cal. App. 317, 152 P. 61; 3 Cal. Jur. p. 423, and cases cited. The fact that the damages are unliquidated is not determinative. Willett & Burr v. Alpert, 181 Cal. 652, 657, 185 P. 976; Hale Bros. v. Milliken, supra, at page 140. But the contract sued on must furnish a standard by which the amount due may be clearly ascertained, and there must exist a basis upon which the damages can be determined by proof. Dunn v. Mackey, 80 Cal. 104, 108, 22 P. 64. The language of the court in Greenebaum v. Smith, 51 Cal. App. 692, 694, 197 P. 675, 676, may well be applied to the present case, where it is said:

> "This being an action for damages for the breach of an executory contract defendant contends that it cannot be held to be an action on a contract for the direct payment of money. True, this is not an action for a debt in a technical sense, nor for a certain sum of money specified in the contract, but it is nevertheless an action for the breach of a contract for the direct payment of money, and merely because the amount is uncertain, consisting of damages to be proven at the trial, is no reason why an attachment may not issue where, as here, such damages are easily ascertainable according to fixed standards supplied by the contract or the law acting upon it."

[6] In the present case the obligation of the defendant to pay money in a specific amount is fixed by the contract. The breach is shown by appropriate allegations. The difference between the contract price and the cost of the building to the plaintiff appears, in effect, in the allegations of the complaint and of the affidavit. The damages alleged appear to be the direct and immediate consequences of the repudiation of the contract by the defendant. The cost of labor and materials for the construction of the building in accordance with the plans and specifications and at the time of the breach would appear to be capable of definite ascertainment, and the pecuniary value of the contract right taken from the plaintiff thus be fixed at the trial. Under such circumstances the motion to discharge the writ was properly denied.

The order is affirmed.

We concur: RICHARDS, J.; LANGDON, J.

205 Cal. 651

CITY AND COUNTY OF SAN FRANCISCO v. TILLMAN ESTATE CO. (S. F. 12617.)★

Supreme Court of California. Nov. 27, 1928.

Rehearing Denied Dec. 27, 1928.

1. Eminent domain 🔑200—Owner in condemnation action under statute had burden to show value of property (Code Civ. Proc. § 1244).

In action by city and county under Code Civ. Proc. § 1244, for condemnation of property, owner *held* to have burden of proof on issue as to value of property.

2. Appeal and error 🔑933(4)—General order granting new trial is not presumed based on insufficiency of evidence (Code Civ. Proc. § 657).

Where order granting new trial is general, it will not be presumed on appeal that such order was based on ground of insufficiency of evidence to sustain verdict, under Code Civ. Proc. § 657.

3. New trial 🔑35—Granting new trial in condemnation proceeding held not error, where regular order of proof as to value was reversed, notwithstanding instruction that defendant had burden of proof.

In condemnation proceeding, granting of plaintiff's motion for new trial *held* not error, where court permitted defendant at close of plaintiff's reopened case to introduce evidence of value, plaintiff already having introduced its rebuttal evidence, and by so doing reversed regular order of proof, notwithstanding court's attempt to correct what it deemed to be its error by instruction that burden of proving value was on defendant.

4. Appeal and error 🔑977(3)—Reviewing court should not interfere with granting of new trial, in absence of plain abuse of discretion.

Reviewing court ought not to interfere with order granting new trial, in condemnation proceeding, except in cases showing plain abuse of discretion.

5. Eminent domain 🔑201—Permitting evidence regarding sales of property in vicinity of that condemned and witness' ownership of property there held not error, where prices were not mentioned.

In condemnation proceeding, admission of evidence as to sales of other property in same region and of witness' ownership of property in immediate vicinity *held* not error, where witness did not testify with reference to prices paid for property nor to price or value set by her upon her own buildings.

Seawell, Curtis, and Preston, JJ., dissenting.

In Bank.

Appeal from Superior Court, City and County of San Francisco; E. P. Shortall, Judge.

Action by the City and County of San Francisco against the Tillman Estate Company. From an order granting a motion for new trial, defendant appeals. Affirmed.

Superseding opinion 267 P. 326.

Rehearing denied: SEAWELL, CURTIS and PRESTON, JJ., voting for a rehearing.

Henry C. McPike, of Oakland, for appellant.

John J. O'Toole and Charles J. McDonnell, both of San Francisco, for respondent.

RICHARDS, J. [1] This appeal is by the defendant from an order of the trial court granting a new trial in an action instituted by the plaintiff for the condemnation of certain property owned by the defendant and sought to be taken for a public use. The complaint was framed upon the model provided for in section 1244 of the Code of Civil Procedure, which does not require an averment in such complaint as to the value of the property sought to be condemned. The answer of the defendant consisted chiefly in the averment that the property sought to be condemned, and of which the defendant was the owner, was of the value of $75,000. The cause proceeded to trial upon the issues thus presented. The plaintiff tendered proof in support of the averments of its complaint, and, having done so, rested its case without offering any evidence touching the value of the property sought to be condemned. The defendant's counsel thereupon announced that the defendant also rested. A colloquy then occurred between the court and respective counsel, in the presence of the jury, upon the question as to which of the parties the affirmative issue as to the value of the property was imposed upon by law, the defendant insisting that under the Constitution the affirmative of that issue was laid upon the party seeking to condemn, and the plaintiff insisting that under the authorities the affirmative of that issue was to be borne by the owner of the property. The court consistently, repeatedly, and correctly ruled that the affirmative of that issue was upon the defendant, and insisted that the defendant should proceed with the production of its witnesses as to value, calling the attention of counsel for the defendant to cases wherein the rule in California touching that subject had been laid down. That the trial court was correct in so holding is fully supported by these authorities: California Street R. Co. v. Southern Pacific R. Co., 67 Cal. 63, 7 P. 123; Monterey County v. Cushing, 83 Cal. 509, 23 P. 700; San Diego v. Neale, 88 Cal. 50, 25 P. 977, 11 L. R. A. 604; Reed Orchard Co. v. Superior Court, etc., 19 Cal. App. 648, 128 P. 9, 18; Los Angeles High School District v. Schumann, 78 Cal. App. 353, 248 P. 737. While this colloquy was in progress the plaintiff's counsel indicated his willingness, in order to be fair with both parties, to call his witnesses, who were then present in court, in rebut-

---

★Rehearing denied.

tal upon the issue of value, and the trial court, in permitting plaintiff's counsel so to do, stated to counsel for the defendant:

> "You have offered no evidence, gentlemen. The burden is on you to show the value of this property. The plaintiff rested his case in chief; you offered no evidence. Now, he is calling this witness in rebuttal, unless you call evidence now. Unless you can show me to the contrary, I would hold you have submitted your case."

A further argument ensued in the presence of the jury, at the conclusion of which the trial court, while still declaring that it was "in conscience and duty bound to follow the decisions of the Supreme Court," apparently reserved its ruling as to whether the defendant would be permitted to offer evidence at the close of the plaintiff's reopened case, and in this state of the record the plaintiff proceeded with its proofs as to value, and when its witnesses had been called and testified again rested its case, whereupon the defendant began calling its witnesses as to value, to which plaintiff's counsel objected upon the ground that the defendant, having closed its case without presenting any evidence as to the value of the property sought to be condemned, was not now entitled to proffer such proof. The trial court, however, over this objection on the part of the plaintiff, permitted the defendant to proceed with the production of all of his evidence upon the issue of value; but toward the close of the defendant's evidence upon that subject the court said to the defendant's counsel that it was not satisfied with its ruling, the result of which had been a reversal of the regular order of trial in such cases, and when the testimony was closed, and after argument, proceeded to instruct the jury that—

> "In California the burden of proof as to the value of land sought to be taken by eminent domain is on the defendant."

The jury retired and presently brought in a verdict in favor of the plaintiff upon its right to condemn the property in question, but fixing, awarding, and assessing the value of such property at the sum of $50,000 as compensation to the defendant for the taking thereof for the public use. The judgment of the trial court followed the verdict of the jury, whereupon the plaintiff gave notice of intention to move for a new trial upon all the statutory grounds, upon the hearing and submission of which motion the trial court made a general order "that said motion be granted;" whereupon the defendant took and is now prosecuting this appeal.

[2-4] It is the contention of the appellant that, the order of the trial court being general, it will not be presumed that such order was based upon the ground of insufficiency of the evidence to sustain the verdict of the jury. There can be no doubt of the correctness of the appellant's contention in that regard. Code Civ. Proc. § 657.

It is the further contention of the appellant that, no errors of law having been committed by the trial court during the trial of said action, and there being no other ground urged by the plaintiff in support of its motion for a new trial, the granting of the motion by the trial court was an abuse of its discretion and reversible error. In response to this contention the respondent urges two alleged errors of law justifying the trial court in granting the motion for a new trial. The first of these consisted in the alleged error of the trial court in permitting a reversal of the order of proof upon the question of the value of the property sought to be condemned. Respondent insists that the trial court compelled it, over its objection, to proceed with the calling of its witnesses as to value as a part of its main case and after the defendant had proffered no evidence upon that issue. The record does not sustain the respondent in making this particular contention, since it appears that, notwithstanding the repeated rulings of the trial court in its favor, it voluntarily proceeded to call its witnesses as to value. The error of the trial court, if any, did not occur at this stage of the trial, nor was its action in granting the plaintiff's motion for a new trial based upon any such error. The action of the trial court, however, which gave it concern, and which doubtless produced its conclusion that the motion for new trial ought to be granted, was that wherein it permitted the defendant at the close of the plaintiff's reopened case to introduce the entire body of its evidence upon the question of value, and by so doing to reverse the regular order of proof in condemnation cases upon that issue. The trial court, realizing that such had been the effect of its ruling permitting the defendant to thus present its proof, attempted to correct what it deemed to be its error by an instruction to the jury, above quoted, to the effect that the burden of proving the value of the land was on the defendant. It seems probable, however, that the trial court, upon a further consideration of this matter upon the motion for new trial, concluded that its aforesaid instruction had not entirely effaced the effect of its former error.

The question before us in this case is not primarily as to whether appreciable injury resulted from the departure, during the trial, from the well-defined rule governing the order of proof of property values in condemnation cases. Such departure having occurred, and having been realized by the trial court to have been a fundamental error, it was primarily its right and duty, with the parties, the witnesses, and the state of the case before it, to exercise its judgment and discretion in determining whether such error of procedure was sufficiently prejudicial to justify it granting a new trial. With the very large discretion with which trial courts are invested in such cases this court ought not to interfere except in cases showing a plain abuse of such discretion. The question here is rather one of principle applicable generally to condemnation cases, viz. as to whether the rule regulating the order of proof in such cases, which we must assume to be well founded, may be violated by trial courts, and whether such violation shall be sanctioned upon appeal whenever, in the individual case, the appellate tribunal may reach the conclusion, contrary to the view and ruling of the trial court, that no appreciable damage has resulted from the breach of the rule. The question thus resolves itself into one of principle applicable to all condemnation cases and requiring the observance of the aforesaid order of proof, regardless of whether or not injury to either of the parties would result from a failure or refusal on the part of the trial court to enforce the well-founded rule in that regard.

[5] Respondent makes the further contention in support of said order that the trial court was in error in permitting a witness for the defendant, who resided and had a real estate office in the vicinity of the property sought to be condemned, to give testimony in detail with regard to sales of other property in the same region, as well as to the witness' ownership of property in the immediate vicinity of that sought to be condemned. It is to be noted, however, that counsel for the defendant in no instance sought testimony from said witness with reference to prices paid for property, to the sales of which she had testified, nor to the price or value set by her upon her own holdings. The case, therefore, does not come within the decision of this court in the earlier case of C. P. R. Co. v. Pearson, 35 Cal. 262, nor of the later cases cited by the respondent which have followed that decision, but, on the other hand, comes fully within the decision of this court in the case of Estate of Ross, 171 Cal. 66, 151 P. 1138, and which latter decision was closely followed by the examination of counsel and the rulings of the court in the instant case. In holding, therefore, that the trial court committed no error in the foregoing regard, we are doing so for the purpose of its guidance in the admission of evidence as to value upon the retrial of the cause.

The order is affirmed.

We concur: Waste, C. J.; SHENK, J.; LANGDON, J.

SEAWELL, J. I dissent. No reversible error having been committed at the trial, I can see no good reason for a second trial of the cause because of an irregularity committed as to the order of proof on the value of the property sought to be condemned. It could not have prejudiced either side. The court removed every possible ground of injury—if any existed—by its instructions. There can be no room to doubt the correctness of the trial court's view, which was not observed, as to the order of proof in fixing the value of the property sought to be taken or the damages done to property by reason of its taking or severance in condemnation proceedings. This burden is upon the owner of the property sought to be taken. It is his duty to offer the proof upon the close of the plaintiff's case showing the necessity for the taking, etc. It then becomes the right of the plaintiff to rebut the evidence offered by defendant, as the owner of the property, on the issues of value and damage. The rule has never been otherwise. However, in this case no damage appears to have resulted because of a reversal of the order of proof.

We concur: CURTIS, J.; PRESTON, J.

205 Cal. 699

ANDREWS et al. v. GLICK et al. (L. A. 8291.)

Supreme Court of California. Dec. 8, 1928.

1. Dismissal and nonsuit 🔑73—Court could dismiss action because partnership suing had not filed certificate showing names without hearing evidence, where proposition of law was shaped by pleadings (Civ. Code, § 2466).

In suit by partnership, in which defendant averred by way of affirmative defense that partnership had failed to file certificate showing names of partners, as required by Civ. Code, § 2466, court could dismiss action for failure to file such certificate without hearing evidence, since proposition of law was definitely shaped by pleadings, and introduction of evidence would not have assisted in solution of problem.

2. Partnership 🔑64—Partners doing business as Andrews-Cordano Plumbing Company could not maintain suit, where certificate showing partners' names was not filed (Civ. Code, § 2466).

Partners, doing business under name of Andrews-Cordano Plumbing Company, could not maintain action to foreclose a mechanic's lien, where certificate showing names of persons interested as partners was not filed, as required by Civ. Code, § 2466, since such name might designate either a corporation or a partnership, the names of the stockholders or members of which need not necessarily appear in its title, and therefore certificate should have been filed.

In Bank.

Appeal from Superior Court, Los Angeles County; Harry A. Hollzer, Judge.

Action to foreclose a mechanic's lien by Harry W. Andrews and another, doing business under the firm name and style of the Andrews-Cordano Plumbing Company, against Fannie Glick and others. From a judgment dismissing the action, plaintiffs appeal. Affirmed.

Superseding opinion in 268 P. 481.

Irvin C. Taplin, Louis P. Russill, and A. R. Bennison, all of Los Angeles, for appellants.

Overton, Lyman & Plumb, and Irving H. Prince, all of Los Angeles, for respondent.

WASTE, C. J. This action to foreclose a mechanics' lien terminated in the court below with the entry of a judgment of dismissal, from which the plaintiffs have appealed.

Defendant Glick in her answer admits those allegations of the complaint wherein it is set forth that the plaintiffs Harry W. Andrews and Frank Cordano have been transacting business as copartners under the name of "Andrews-Cordano Plumbing Company." However, by way of affirmative defense it is averred that said partnership had failed to file and publish the certificate required by section 2466 of the Civil Code. The interposition of this defense, coupled with a motion to dismiss for the same reason, resulted in the entry of the judgment appealed from.

[1] Plaintiffs' contention that the trial court could not, in advance of the introduction of evidence, pass upon the question of law thus presented, is wholly without merit. The introduction of evidence would not, in any manner, assist in the solution of the problem, for the proposition of law was definitely shaped by the pleadings. The object of section 2466, supra, is that public notice shall be given and a public record made of the individual members of partnerships with such definiteness and particularity that those dealing with them may at all times know who are the individuals with whom they are dealing, or to whom they are giving credit or becoming bound. Meads, etc., Co. v. Lasar, 92 Cal. 221, 226, 28 P. 935.

[2] It remains but to determine whether, within the meaning of that section, the name "Andrews-Cordano Plumbing Company" is a "fictitious name, or a designation not showing the names of the persons interested as partners." The name is not, of course, fictitious. Spreckels v. Grace Darling Hospital Ass'n, 28 Cal. App. 646, 648, 153 P. 718. It has, upon numerous occasions, been held that a name, such as "Pendleton & Williams," is neither fictitious nor one failing to designate the partners. Pendleton v. Cline, 85 Cal. 142, 144, 24 P. 659; Carlock v. Cagnacci, 88 Cal. 600, 601, 26 P. 597; McLean v. Crow, 88 Cal. 644, 647, 26 P. 596; Lamberson v. Bashore, 167 Cal. 387, 391, 139 P. 817. In other words, it is definitely settled in this state that the usual form of partnership name, consisting merely of the surnames of the partners, joined by "&" or "and," is not an assumed or fictitious name, or a designation not showing the names of the persons interested as partners. However, the name "Abrams Bros." has been held not to definitely designate the persons interested as partners. North v. Moore, 135 Cal. 621, 623, 67 P. 1037, 1038. It is there declared: "'Abrams Bros.' cannot be said to be a designation 'showing the names of the persons interested as partners.' The firm name might apply equally to a partnership composed of two or more, and might embrace all or only some of the brothers of the name of Abrams."

In our opinion, this quotation is peculiarly pertinent to the present case, for, while it so happens that the name "Andrews-Cordano Plumbing Company" designates the names of all the persons interested as partners, it might equally as well apply to a partnership composed of more than two persons. In other words, this name, in and of itself, does not necessarily inform third persons desirous of transacting business with the partnership of the exact membership thereof. This is borne out by the case of Meads, etc., Co. v. Lasar, supra, wherein it appeared that the name "Meads, Seaman & Co.," designated only two of the three members of the firm. This court, in Schwarz & Gottlieb v. Marcuse, 175 Cal. 401, 403, 165 P. 1016, disapproved the holding in Patterson v. Byers, 17 Okl. 633, 89 P. 1114, 10 Ann. Cas. 810, wherein it was declared that the name "Patterson Furniture Company" definitely disclosed the members of the partnership to be named "Patterson." In criticizing the conclusion there announced, this court stated that "evidently the learned justice who wrote that opinion overlooked the fact that commonly the title 'Patterson Furniture Company' might indicate a corporation or a copartnership in which the stockholders or members might or might not be Pattersons." So it is in the instant case. The name "Andrews-Cordano Plumbing Company" might designate either a corporation or a partnership, the names of the stockholders or members of which need not necessarily appear in its title.

We conclude, therefore, that the provisions of section 2466, supra, should have been complied with by the plaintiff partnership, and its failure in this regard is fatal to the maintenance of this suit.

For the foregoing reasons the judgment is affirmed.

We concur: PRESTON, J.; CURTIS, J.; LANGDON, J.; SHENK, J.; SEAWELL, J.; RICHARDS, J.

95 Cal. App. 186

UNITED STATES FIDELITY & GUARANTY CO. v. INDUSTRIAL ACCIDENT COMMISSION et al. (Civ. 6162.)★

District Court of Appeal, Second District, Division 2, California. Nov. 27, 1928.

Rehearing Denied Jan. 26, 1929. Hearing Denied by Supreme Court Jan. 24, 1929.

1. Master and servant ⚿417(7)—Evidence, to raise conflict precluding review of Industrial Accident Commission's finding, must present reasonable ground for difference of opinion.

Although an appellate court will not reverse a finding of the Industrial Accident Commission if there is substantial conflict in evidence, evidence, in order to raise conflict, must be such as to present fair and reasonable ground for difference of opinion.

2. Master and servant ⚿405(4)—Commission's finding that second injury was different from first injury, instead of recurrence of previous injury, held not supported by evidence.

Industrial Accident Commission's finding that second injury sustained by plasterer consisting of strain of left sacroiliac joint was different from previous injury consisting of severe strain of left lumbar muscles and sacroiliac joint of back, instead of a recurrence of previous injury, *held* not supported by evidence.

3. Master and servant ⚿417(7)—Commission's finding that subsequent accident is independent cause of injury cannot be sustained, where there is no reasonable theory evidenced by record on which it may be sustained.

Industrial Accident Commission's finding that subsequent accident should be regarded as independent, intervening cause of injury cannot be sustained by courts, where there is no reasonable theory evidenced by record on which it may be sustained.

4. Master and servant ⚿391—Where employé's second injury was recurrence of previous injury, award should have been against original insurance carrier.

Where employé's second injury was recurrence of previous injury and disability was natural and proximate cause of that injury, award should have been against original insurance carrier.

Original proceeding by writ of review by the United States Fidelity & Guaranty Company to annul an award of compensation of the Industrial Accident Commission to Umberto Menegon. Award annulled.

Edward C. Mills and Harold J. Hunter, both of Los Angeles, for petitioner.

G. C. Faulkner, of San Francisco, for defendants.

THOMPSON, J. This is an original proceeding by which it is sought through the writ of review to annul an award of the Industrial Accident Commission. On June 9, 1926, Umberto Menegon, while employed as a plasterer by Benni Damico at San Francisco, suffered an injury in the course of his employment, consisting of a broken hand, a severe strain of the left lumbar muscles and sacroiliac joint. This accident occurred as he attempted to lift a bucket of mortar while on a roof when he slipped and fell. The insurance carrier was the Ocean Accident & Guarantee Corporation. On February 17, 1927, the Commission made its findings and award wherein it found that Menegon had "sustained a severe strain of the left lumbar muscles," and awarded him for total disability from June 9, 1926, to February 8, 1927, the sum of $705.24. Between four and seven days previous to May 24, 1927, Menegon started to work as a plasterer for P. A. Belanger, and on that day, while attempting to lift a bucket of cement handed to him by another employé, he felt a severe pain and "click" in his back which again incapacitated him from working. The petitioner here was the insurance carrier, and in a second proceeding in which the Ocean Accident & Guarantee Corporation was joined, the Commission on April 27, 1928, found that the applicant had suffered an injury on June 9, 1926, "consisting of a severe strain of the left lumbar muscles and sacroiliac joint of his back." They also found that on May 24, 1927, the applicant sustained injury occurring in the course of his employment, "consisting of a strain of the left sacroiliac joint," and that "said second injury caused temporary total disability continuing from May 24, 1927, indefinitely," entitling applicant to $20.83 per week. Award was made against the petitioner here for this sum, and jurisdiction was reserved for the purpose of fixing permanent disability, if any, and also to fix amount of expenses for medical treatment. The Ocean Accident & Guarantee Company was in effect discharged from further liability. The petitioner claims that the injury suffered by the applicant on May 24, 1927, was a recurrence of the injury of June 9, 1926, and that all of the testimony establishes that the disability was the direct and proximate result of the injury sustained on the first date. It also asserts that if there be evidence to sustain the finding of a second injury the Commission was required under the law to apportion the liability between the insurance carrier at the time of the original injury and the carrier at the time of the aggravation. The respondent asserts that there is evidence sufficient to support the findings, and that there is no power resident in it to prorate disability between two separate injuries or to prorate in the case of aggravation of disability due to a prior injury as distinguished from aggravation of a pre-existing disease.

We are thus brought to the point where we must set down more of the testimony presented to the Commission. The applicant testified that his back "was bothering me awful bad, and I took a chance to start to work. Worked seven days and had the same sick-

---

★Rehearing denied. Hearing denied by Supreme Court.

ness as before," and again, that he had suffered "severe pain ever since from that injury," referring to the first one. He also said, in response to a query of whether he was able to work the few days before the second injury, "I ain't say I am able to do the work because the pain continue with me," and again replying to a similar query:

> "I had pain right along, 2 or 3 days a week, the last week not very much, but I had pain right along."

There was testimony that between the injuries he was wearing a very heavy sacroiliac belt for the support of his back, and when asked if he was doing his regular work as a plasterer for the four days prior to the injury of May 24, he said, "Yes, I was doing my regular work, I wear the belt awful tight." Dr. Pierce, who had seen the applicant 30 or 40 times, states that in his opinion the patient had never recovered from the first injury, and that his second disability was an outgrowth of the injury suffered on June 9, 1926, amplifying with the statement:

> "If I had never seen that record, I would still make my diagnosis of sacro-iliac strain, but there is absolutely no question, as it is an unbroken chain, from his old injury to the present moment."

This witness gave his opinion to the effect that, unless there is a recovery from an injury of the character suffered by the applicant within six months, there will be no recovery without an operation. No operation was performed upon the applicant. Dr. Michael Creamer, assistant medical director of the Commission, reviewed the record, and in his report states:

> "The fact that he (the applicant) has worn a belt prescribed by Dr. McChesney of San Francisco, indicates to this department, that if he had entirely recovered, he was as yet not aware of it, since normal men do not wear a sacro-iliac support. * * * To sum up, then, this applicant is at the present time disabled as the result of an accidental injury, said injury being exactly similar to a previous injury 11 months preceding, and in our opinion, he has not completely recovered from the first one."

This same doctor stated 27 days later as follows:

> "We are compelled to state positively that it is our opinion that there is a physical relation between the occurrence of June 9, 1926, and May 24, 1927, and a review of the history impresses us that this condition is a recurrence of the earlier injury."

Mr. Rodeny F. Atsatt, to whom the question was referred as a medical referee, includes in his report two very significant statements. The first, with regard to disability, is:

> "Total disability with reference to work in which patient was engaged when injured, as he would be subjected to frequently recurring attacks."

And the second reads:

> "The injury on May 24, 1927, was a recurrence of the more serious of the original injuries, namely, the sacro-iliac sprain."

So far the evidence points all in one direction. We now come to the report which the respondent claims supports its finding. Dr. Thomas M. Foley in his report first says:

> "Mr. Menegon states that on June 9, 1926, he received an injury to his back, and that he had *continuous pain and tenderness in his low back ever since that time.*" (Italics ours.)

—and then renders his opinion, a part of which is as follows:

> "This is undoubtedly a strain of the sacro-iliac joint on the left side. It is obviously a different injury from the one that he had in June, 1926, and which has been described in the letter of Dr. Campiche, *inasmuch as he had been fairly comfortable with pain only at times until the moment of this slip in the sacro-iliac joint.*" (Italics ours.)

We call attention to the fact that the promise for the opinion is that the applicant had been fairly comfortable, with pain only at times, while in his statement of the history he records the complaint of Menegon that he had continuous pain and tenderness from the time of the first injury. The report of Dr. Campiche referred to was made on January 6, 1927, and he diagnosed the trouble at that time as a "tear of the lumbar muscles." The report also contains this statement:

> "At times the man says that pressure does not hurt him at all but as soon as he attempts to bend or to lift something the pain is such that he has to give up his work after 10 or 15 minutes. When he lies flat on his back the flection of the left hip also produces some pain in the lumbar region."

It will be observed that this report was seven months, less three days, after the first injury, and that the applicant had not recovered, but was still suffering. It is also fair to assume that when Dr. Foley says, referring to the first injury, "which has been described in the letter of Dr. Campiche," he had in mind the diagnosis thereof as a "tear of the lumbar muscles" to further justify his opinion that the second injury was obviously different. This first diagnosis, as well as the finding of the Commission in the first hearing, is patently contrary to fact and contrary to the fact found by the Commission in the second hearing.

[1-3] Our thought upon this state of the record may well be expressed in the words of the court in Re Coburn, 11 Cal. App. 604, 105 P. 924, as follows:

> "There is nothing to show that appellant is incapable of taking care of himself. There is but the mere opinion of a few witnesses as to appellant being incompetent to take care of his property, and these opinions are worthless because not based upon any facts or reasons."

In the same opinion it is also recorded:

> "We are fully aware that an appellate court will not reverse a finding if there is a substantial conflict in the evidence; but the evidence, in order to raise a conflict, must be such as to present a fair and reasonable ground for a difference of opinion. The finding or verdict must have meritorious support in the evidence. A few general statements without substantial reasons is not sufficient to raise a conflict. (Smith v. Belshaw, 89 Cal. 427, 26 Pac. 834; Field v. Shorb, 99 Cal. 662, 34 Pac. 504.)"

A reading of that case will demonstrate that there was much more reason to say that the evidence was sufficient than there is in the present instance. The rule with respect to what does not constitute conflict has been phrased in different ways. In Houghton v. Loma Prieta Lumber Co., 152 Cal. 574, 93 P. 377, it is put in these words:

> "A finding against the great weight and preponderance of the evidence can be maintained on the doctrine of 'conflict' only where the alleged conflict rests upon evidence, either direct or circumstantial, which so materially contradicts the testimony on the other side, or is so radically inconsistent with it, as to leave room in a fair and reasonable mind to find the fact either way."

In White v. Greenwood, 52 Cal. App. 737, 199 P. 1095, it was stated this way:

> "While a finding will not be disturbed on appeal if there is a substantial conflict in the evidence from which it springs, 'the evidence, in order to raise a conflict, must be such as to present a fair and reasonable ground for a difference of opinion.'"

See, also, Felsenthal v. Warring, 40 Cal. App. 119, 180 P. 67.

[4] We have no hesitancy in saying that the opinion here is so unsatisfactory in itself, and so at variance with the whole current of the testimony, as to raise no conflict, and therefore entirely insufficient to give the respondent power to render the finding complained of. We are not unaware of the rule announced in Head Drilling Co. v. Industrial Accident Commission, 177 Cal. 194, 170 P. 157, that "Whether the subsequent incident or accident is such, or should be regarded as an independent, intervening cause is a question of fact for the commission, to be decided in view of all the circumstances, and its conclusion must be sustained by the courts whenever there is any reasonable theory evidenced by the record on which the conclusion can be upheld," but we are of the opinion that there is no reasonable theory evidenced by the record in this case upon which it may be sustained. With the single exception of this unsatisfactory expression of opinion the entire testimony establishes the fact that the incident of May 24, 1927, was a recurrence of the injury of June 9, 1926, and that the disability was the natural and proximate result of that injury, bringing it within the case of Head Drilling Co. v. Industrial Accident Commission, supra, under which the award should have been against the original insurance carrier.

In view of the conclusion to which we have come, it is unnecessary to discuss the question made concerning the power of the Commission to apportion the liability between the two carriers.

Award annulled.

We concur: WORKS, P. J.; CRAIG, J.

95 Cal. App. 162

PONTECORVO v. CLARK. (Civ. 3582.)

District Court of Appeal, Third District, California. Nov. 26, 1928.

1. Theaters and shows 🔑6—Where defective condition of roller coaster was sole negligence relied on for death of passenger, res ipsa loquitur doctrine applied.

Where sole negligence relied on in complaint in action for death of 13 year old girl, resulting from fall from roller coaster train, was that roller coaster was defectively constructed, without alleging particular respects in which contrivance was defectively constructed, and that such particular defectiveness was proximate cause of accident, doctrine of res ipsa loquitur applied.

2. Theaters and shows 🔑6—Whether defective condition of roller coaster or passenger's contributory negligence was proximate cause of death of 13 year old passenger falling from coaster held for jury.

In action for death of 13 year old girl resulting from fall from roller coaster train, whether death proximately resulted from defendant's negligence, due to defective condition of roller coaster, or to decedent's contributory negligence in failing to exercise care which circumstances required, *held*, under the evidence, for jury to determine.

3. Negligence 🔑85(2)—Child must exercise same degree of care ordinarily exercised by children of his age.

Though the same act which would be negligence in an adult may not be such if done by a child, the child is nevertheless required to exercise the same degree of care that would be expected of children of his age, or which children of his age ordinarily exercise.

4. Appeal and error 🔑1001(1)—Jury's verdict, sustained by sufficient evidence, is binding on appellate court.

Verdict of jury, sustained by evidence, is binding on District Court of Appeal.

5. Theaters and shows 🔑6—Evidence held not to show negligence of roller coaster owner as matter of law, in failing to provide attendants or safety appliances to prevent passengers falling out (Civ. Code, §§ 2100, 2101).

In action for death of 13 year old girl, resulting from fall from roller coaster train, evidence *held* not to show defendant's negligence as matter of law in failing to provide cars with straps or other safety appliances to hold passengers to their seats while going over dips or bumps, or to furnish attendants to ride in cars and protect passengers from being thrown out, under Civ. Code, §§ 2100, 2101, requiring common carriers to use utmost care and diligence to provide safe vehicles, even if such statutes were applicable.

6. Evidence 🔑14—It is common knowledge that it is not customary or necessary to assign attendants to cars of roller coaster to prevent passengers from falling out.

It is common knowledge, of which courts will take notice, that in the operation of roller coasters it is not the custom or necessary to assign attendants to the cars for the purpose of preventing passengers from falling from cars while train is in motion.

7. Appeal and error 🔑1057(2)—Exclusion of photographs showing that roller coaster was not completed at time of accident held not prejudicial to plaintiff, where not denied by defendant.

In action for death of 13 year old girl, resulting from fall out of roller coaster train, exclusion of photographs offered by plaintiff to show that at time of accident roller coaster was not completed, and was therefore unsafe for use, *held* not prejudicial to plaintiff, where plaintiff's testimony to same effect was in effect admitted.

8. Trial 🔑63(2)—Generally rebuttal testimony is receivable only where new matters have been developed by evidence of adverse party, if case in chief has been concluded, but trial court has discretion to permit such testimony.

General rule is that rebuttal or surrebuttal testimony, strictly speaking, is receivable only where new matters have been developed by the evidence of one of the parties after his case in chief has been made and concluded, though it is within trial court's discretion to allow a party on rebuttal or surrebuttal to introduce evidence with respect to relevant and material matters as to which his witnesses have testified in chief.

9. Trial 🔑62(3)—Exclusion of testimony as to number of times roller coaster train had made circuit at time of accident, as not being proper rebuttal, testimony held not abuse of discretion.

In action for death of 13 year old girl, resulting from fall from roller coaster train, refusal to permit plaintiff's testimony in rebuttal as to how many times train had made circuit of tramway at time of accident, on ground that it was not proper rebuttal testimony, because question had been fully gone into by plaintiff in his original case, *held* not abuse of discretion.

10. Appeal and error 🔑1048(6)—Error in excluding cross-examination of builder of roller coaster as to whether major repairs were necessary after accident held not prejudicial to plaintiff, in view of other testimony.

In action for death of 13 year old girl, resulting from fall from roller coaster train, refusal to permit cross-examination of witness who constructed roller coaster for defendant as to whether he made any major repairs after accident, though error, *held* not prejudicial, where witness had several times stated on direct and cross-examination that no major repairs were necessary, and that device was complete, except in minor particulars not affecting its safety of operation.

11. Carriers 🔑321(3)—Instruction that common carrier must exercise "highest" degree of care for safety of passengers held not erroneous, under statute requiring carriers to use "utmost" care (Civ. Code, § 2100).

Instruction that it was incumbent on common carrier to exercise the highest degree of care and caution for safety of passengers *held* not erroneous, because of use of words "highest degree," because Civ. Code, § 2100, requires carrier to use "utmost care"; adjective "utmost" meaning the greatest or highest degree, quantity, or number, and the noun being the most that can be, the greatest power, degree, or effort.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Utmost Care; Second and Third Series, Highest Degree of Care.]

12. Trial 🔑296(3)—Instruction that roller coaster operator was not insurer of passengers' safety held not erroneous, in view of other instructions (Civ. Code, § 2100).

Instruction that defendant was not the insurer of the safety of passenger on its roller coaster train when accident occurred, when read with other instruction requiring defendant to use highest degree of care to protect safety of its passengers, *held* not erroneous, even if Civ. Code, § 2100, relating to care required of common carriers, applied.

Appeal from Superior Court, Los Angeles County; Charles Monroe, Judge.

Action by Hector Pontecorvo against John N. Clark. Judgment for defendant, and plaintiff appeals. Affirmed.

Torchia & De Lorenza, and Walter H. Sprague, all of Los Angeles, for appellant.

Joe Crider, Jr., of Los Angeles, for respondent.

HART, J. The plaintiff brought this action to recover damages for the death of his minor daughter, Clelia Pontecorvo, alleged to have been directly caused by the negligence of the defendant. The issues of fact were tried by a jury, and a verdict arrived at and returned in favor of the defendant. Judgment was entered accordingly. A motion for a new trial was made by the plaintiff and denied. This appeal is by the plaintiff from the judgment.

The death of the minor child named in the complaint occurred in Lincoln Park, Los Angeles, on the 20th day of November, 1924, between the hours of 8 and 9 o'clock p. m. The defendant, John N. Clark, was, on said day, and at the place mentioned, the owner of and operating, for amusement purposes, a mechanical contrivance or device commonly known as a "Scenic Roller Coaster Railway." This device is what may briefly be described as a tramroad, with toboggan chutes, on and over which a small train of cars is, with considerable velocity, propelled. The train, leaving a level track, ascends rapidly to the apex of what is variously described by the witnesses as "the hill," "the crown," and "the hump" (to be referred to hereinafter as the "peak"), which is at an elevation of some 15 or 20, or perhaps more, feet from the point of beginning. Reaching the top of the first peak, the train then proceeds with great swiftness, as by gravity, down a steep incline to a level surface of a few feet in length, and again ascends a peak greater in elevation than the first, and, as at the first peak, and with like velocity, rounds what was described by the witnesses as a "sharp curve" on a downward slope, or with an acute "dip," and thence upwards to a third peak, and so proceeds downward and upwards, if there be other peaks, until its return to the point from which it started.

The "roller coaster," as the contrivance is commonly called, had been in process of construction for a period embracing several months preceding and down to the 20th of November, 1924, at which time it was by the defendant and his employees, who constructed it, deemed completed and ready for use or operation for business, and on that date it was for the first time opened to and offered for use by the public. The train running over the tramway consisted of three cars, in each of which six passengers could ride with convenience and comfort. On the day and at the time thereof above mentioned, the deceased, then a few months past the age of 13 years, and a girl companion named Genevieve Splitlog, who was a few months the junior of the former, entered the front car and took the front seat in that car for a trip around the tramway, each having previously purchased and received from the defendant, or one of his employees, a ticket entitling her to ride thereon. The other seats of the same car were occupied, and the other cars contained a number of passengers. As the car in which the deceased was riding reached the top of the second peak and was making the curve at that point, the deceased fell or was thrown to the ground and almost instantly killed.

The complaint alleges:

> "That at the time aforesaid the machinery, tracks, and/or cars of the defendants' Scenic Railway were negligently and imperfectly constructed, inadequate, defective and unsafe. That said imperfection, defectiveness, inadequacy and unsafeness could have been by said defendants discovered and known by the use and exercise by them of ordinary care and diligence, and were at the time aforesaid known to said defendants, but the same were unknown to the said deceased. That at the time aforesaid, and while the deceased herein was a passenger on the Scenic Roller Coaster Railway car, and by reason of the negligent operation of the same, and the imperfection, defectiveness, inadequacy and unsafeness of the defendants' machinery, cars and/or Scenic Railway, and further by reason of the fault, carelessness and negligence of the defendants in the operation and construction thereof, the deceased, Clelia Pontecorvo, was precipitated, cast, and thrown from the car and was bruised, mashed, crushed and killed, to plaintiff's damage in the sum of fifty thousand dollars ($50,000), no part of which has been paid, and the whole thereof is unpaid."

The answer consists of specific denials of the material averments of the complaint, and then alleges that the deceased was herself guilty of negligence which proximately caused or contributed to her injuries and consequent death.

The plaintiff on this appeal contends: (1) That the evidence does not support the verdict; (2) that error was committed by the trial court in rulings allowing and disallowing certain evidence; (3) that error was likewise committed in the giving and in refusing to give certain instructions. These points will be considered in the order in which they are thus set forth.

[1] It will be observed from the complaint that the negligence solely relied upon by the plaintiff is the alleged faulty or defective construction of the roller coaster. It is true that it is also alleged that the device was negligently operated, but there is no evidence that it was negligently operated, except in so far as it might be said that it was so operated because of the alleged defective construction thereof. In other words, there is no evidence showing that the operation of the contrivance was not in the usual or regular manner of operating such a mechanical device, where such device is not so defectively constructed as to subject, solely by reason thereof, persons riding in its cars to greater risk or peril than is usual to or inherent in such mechanical contraptions.

The court instructed the jury that the rule of res ipsa loquitur applied to the case, and that, therefore, the plaintiff having made a prima facie case by proof of the happening of the accident in or by which the deceased was hurt, and as a consequence killed, the burden was thereupon cast upon the defendant to show that it was not his negligence which was the proximate cause of the accident, or, more accurately expressing the proposition, to introduce evidence sufficient to overthrow the presumption that it was his negligence which was the direct cause of the accident and its deplorable consequences.

The complaint does not explain specifically how or in what particular manner the accident happened. The use of a number of adjectives therein as descriptive of the cause of the accident amounts to no more than a general allegation of negligence. Reduced to their real purport, the allegations as to the cause of the accident are merely tantamount (and nothing more) to the general statement that the device was defectively constructed, and therefore unsafe for use. To take this case out of the doctrine of res ipsa loquitur, the particular respects in which the contrivance was defectively constructed, and for that reason in no condition to be used with safety, and that such particular defectiveness was the proximate cause of the accident, should have been explained and alleged in the complaint or shown by the plaintiff's evidence. Connor v. Atchison, Topeka & Santa Fé Ry. Co., 189 Cal. 1, 5, 207 P. 378 (26 A. L. R. 1462); Marovich v. Cent. Calif. Trac. Co., 191 Cal. 295, 305, 216 P. 595. And the evidence presented by the plaintiff is not by any means satisfactory as to the specific cause which directly caused the mishap.

[2] It is not necessary to present herein the testimony of all the witnesses introduced by the plaintiff to support the presumption of negligence on the part of the defendant. There were nine of such witnesses, of whom some were riding on the train when the accident happened, and others witnessing it from a hill on which they were then standing and watching the train as it was making its circuit; the hill being approximately 150 feet from where the coaster was maintained. The testimony of all these latter witnesses was substantially the same, and in a more or less degree corroborated the testimony of those who were riding on the train at the time the deceased fell or was hurled therefrom to the ground. It is, hence, sufficient to reproduce herein, in an abbreviated form, the testimony of two of the witnesses riding on the train when the accident occurred as probably involving a more accurate description of the action of the train as it moved over the tracks than would the testimony of those witnesses not on the train.

The witness William Wheeler, a young man, testified that he was a passenger on the coaster at the time of the accident, occupying, with a "boy friend," the second seat in the front car and sitting immediately back of the deceased and Miss Splitlog. He stated that, as the passengers were entering the cars, an attendant cautioned them to "hold on tight and stay in their seats," referring to the time that the coaster was in operation. He described the movement of the train, particularly the action of the car in which he, his companion, the deceased, and Miss Splitlog were riding, as follows:

> "It [the train] started up the incline, got up to the top, around the turn. We went down the first dip. We come to the top of the second dip [or peak], and the incline was steep there and there was a sharp turn. * * * When it [the train] comes up it throws you back and then there is a sharp turn and then you go right over that. * * * Everybody in the car, when they got to the top of the dip (referring to the second peak, where the deceased was thrown or fell from the car) went forward. * * * Right at the top [of the second peak] it seems like when the first car gets started down, the third car is not quite up the incline yet. The third car seems to hold the first car back."

He stated that there was "a very bad jerk" of the train as it reached and was rounding the curve at the second peak, and that it was there that the child was thrown or fell from the car. He further testified that the deceased was sitting when precipitated from the car. At one time he stated that he could not and did not see her hands, or where she had them, and at another declared that she was holding onto the iron bar or rail maintained immediately in front of both seats in each of the cars for the purpose of enabling the passengers to hold themselves in their seats against the peril necessarily incident to the swaying and jerking movement of the train as it rounded the curves at the top of the peaks or higher points of the tramroad. He testified that the deceased was thrown head foremost from the car to the ground.

Genevieve Splitlog, the companion of the deceased on the occasion in question, and approximately of the same age of the latter, testified that she and the deceased had ridden in the coaster on the evening of November 20th, on a trip immediately preceding the trip on which the deceased was thrown or fell from the car; that on the first trip they occupied the last of the three cars constituting the train; that on the first trip she did not notice the sharp or severe jerking movement of the car in which they were riding, at the curve rounding upward and downward the second peak or hill, that she experienced or noted in the action of the car on their second trip; that the jerking and swaying movement of the car on the second trip caused her (witness) to be raised from her feet about 7 or 8 inches, and that it was then that the deceased "fell out." She testified that "we were barely able to get our hands around" the iron rail in front of them; that they were compelled to "bend over to hold onto the rail," and that their feet "could hardly touch the bottom of the floor"; that "we just put the balls of our feet on the floor, but our heels could not touch." Referring to the height of the iron railing in front of the seats of the cars, she stated that it would, when she was standing, reach as far as her hips; that, as she and the deceased were about the same height, the railing would probably reach no farther than the latter's hips. The witness stated that at the time she was thrown from the car the deceased was not standing, and that she was holding to the iron bar. She further testified that she had on previous occasions ridden on roller coasters, between which and the one concerned herein she had noticed no difference in their general construction and mechanism, or in the manner of their operation; that, so far as she knew, no part of the machinery became impaired on the trip, and that the iron rail and the seats of the car were not injured or damaged. She stated that there was a sign maintained at and near the coaster which read, "Do not stand up," and that before or as they were getting on the train "the gentleman who started the car told" the witness and the deceased "to hang on tight and keep in your seats." she testified, as did all the witnesses, that the three cars constituting the train contained passengers on the trip on which the deceased was thrown to the ground, and that all the passengers other than the deceased remained in their seats and were safely returned to the point from which the train started.

To the above it should be added that all the plaintiff's witnesses, both those riding on the train and those watching it from outside, stated that, at the second hill, where the deceased left the car, the curve or angle was sharper or more acute than were the curves or angles at any other of the higher points on the track, and that at that curve the jerking or lurching movement of the train was more positive and noticeable than at any of the other curves.

The testimony introduced by the defendant is, in substance, well and accurately set forth in the brief of the defendant, and as thus presented it may here be given:

"A. F. Pfahler, a witness called on behalf of defendant, testified that he was a police officer on the 20th day of November, 1924, the date of the accident, and that he made an investigation the morning following the accident, to wit, on the 21st; that he investigated the track; that he climbed up over all the structure on the track and examined it; that he had pointed out to him the point where the accident happened, and that he went up there; that he did not find anything broken; that he examined the track, but did not find any portion of it broken; that he examined the track from the bottom of the second dip clear up to the top, and that he did not find any irregularity in the track; and that he made a regular report to the police department. On cross-examination he stated to Mr. Sprague that he rode up over the track the day he made his investigation.

"E. W. Thomason, a witness called on behalf of defendant, testified that he was a police officer on the Los Angeles police force on the date of the accident; that he made an investigation the day following the accident. 'The Court: * * * What examination did you make? A. We went all over the structure. The Court: What examination did you make at or near this point that this accident is said to have occurred? What did you do? A. We climbed over the structure and looked it over from top to bottom. By Mr. Crider: Did you look over the track? A. Yes, sir. Q. In looking over the track, did you find any broken place? A. No, sir. Q. Did you find any plates broken at all? A. No, sir. The Court: Did you find any buckled plates? A. No, sir. Q. By Mr. Crider: In looking over that No. 2 plate, did you find any angle in that any place on it? A. I don't know just what is meant by that angle. The Court: Is there a curve there? A. There is a curve, yes. The Court: Without reference to the degree of the curve, was it just one big curve? A. It just seemed to be one big curve. Q. Did you examine the car? A. Yes, sir. Q. What did you examine about it? A. All of it, wheels, bottom, top. Q. Did you find anything broken on it? A. No, sir. Q. Did you examine all wheels? A. Yes, sir.' On redirect examination this witness testified that they walked all over the track, that they looked underneath all the way around, and that they looked at the bottom as well as the top, to see if there were any breaks anywhere. 'The Court: But you didn't look at the structure, the underpinning? A. Yes; to see if the braces were all in shape, nothing broken. Q. By Mr. Sprague: What day was that? A. The day after the accident happened.'

"W. S. Hudson, a witness called on behalf of defendant, testified that he was a police officer at the date of the accident, employed by the city of Los Angeles; that he made an investigation of this accident and that he arrived at the scene of the accident the same evening and shortly thereafter; that he made an investigation of the structure and track at the point where the accident occurred; that he went all over the top and looked for any defect in workmanship, but that he did not find any, there being no breaks or bent plates. 'Q. Did you see what was on that dip? Did you find any angle there of any kind? Just describe how that was. A. Well, it was an arch. The Court: Was it a regular curve? A. It was a regular curve; yes, sir—an arch. The Court: Was there any irregularity in the curve? A. No, sir. Q. By Mr. Crider: Did you go clear up on top? A. I did the next day. Q. Did you find anything wrong? A. No, sir. Q. Did you look at the track? A. Yes, sir. Q. All along? A. Yes, sir. Q. Did you look at the car wheels? A. I did. Q. Did you find any break or defect there? A. No, sir.'

"Fred Morf, witness called on behalf of defendant, testified that he was employed by the defendant Clark at the time of the accident; that on the day of the accident, and prior thereto, he rode on the train at least 15 or 20 times; that he did not notice anything wrong in the way the car rode; that he did not notice anything different with reference to place No. 2, there being nothing different there than at the other places he went over. This witness further testified that the track and course were tested in the morning; that they were first tested by loading the cars with weights made of iron which were sent around to see if the structure were safe in every way; that they sent the train loaded with weights around four or five times; that he had helped in the construction of other roller coasters, having worked on about

15 different ones; that the roller coaster was finished in the morning, and that they did their testing in the morning and afternoon.

"Allie F. Groff, a witness called on behalf of defendant, testified that she rode on the coaster the day that the accident happened in the afternoon, probably 10 or 12 times; that she did not notice anything unusual in the way of motion, or of that kind in the car; that she had ridden on coasters before, and did not notice any irregularities of any kind as she rode around; that she personally knew that they had sent cars loaded with weights over the track in the morning.

"Antone Balagno, a witness called on behalf of the defendant, testified that he was a carpenter employed in the construction of the railway; that he was there the day the accident happened; that he rode over the coaster earlier in the day about 12 times; that he did not notice anything unusual in the way it ran; that it did not run any different at No. 2 place than it did at any other elevation; that, on the earlier trips he made in the afternoon, a full train of about 18 made the trip.

"John N. Clark, defendant, testified in his own behalf that the cars used had been used before and thoroughly tested out, and also had been used on a different scenic railway, located at Venice, Cal.; that the cars were thoroughly inspected before they were put on the track for use, having been thoroughly gone over and oiled; that before the railway was opened for use it was absolutely finished except to put a small handrail on one side, that is, along the side of the walk where the track walker could walk to inspect the track; that he had ridden on the coaster himself before it was open to the public; that after the track was open to the public, and before the train was run on which plaintiff's daughter was riding, approximately 350 had been taken over the dip. Clark stated that there was not 'anything unusual about the way it [the coaster] rode when he rode on it'; that there was 'not any difference at hump No. 2 than at any of the others.'

"Charles Paige, a witness called in behalf of the defendant, testified that he was employed in the capacity of a builder of this particular coaster, that the coaster was entirely completed before it was put into use, except the placing of some lights and the handrail hereinbefore referred to. 'Q. By Mr. Sprague: You mean to say that when this ride was finished that night that nothing else was to be done? A. I said there were a few minor details. Q. What were those few minor details? A. The lamps were only hooked up temporarily; the handrail —a few pieces of handrail along, and the emergency brake.'"

But little reflection, upon reading the testimony given by defendant's witnesses, and of which the foregoing embraces a synoptical statement, is necessary to force the conclusion that this court cannot declare, as a matter of law, that the plaintiff's prima facie case, even as bolstered, to a certain extent, by the testimony of his witnesses, was not overcome by the defendant's proofs. The whole question was one for the jury. An elaborate analysis herein of the testimony is not required to show that we must abide by the result arrived at by the jury. We may, however, emphasize a few of the facts, which, it is to be presumed, the jury gave special attention to and found. Among these is the fact that, so far as the record advises us, the coaster was constructed exactly as all such devices are constructed and under the direct general supervision of the defendant, who had been engaged for many years in the business of operating such machines. No witness for the plaintiff testified to the contrary. Furthermore, the coaster was thoroughly tested on the day of the accident, and before it was opened to use by the public, first, by loading the cars with iron and other heavy materials; and, second, by certain of the defendant's employees, who assisted in the construction of the machine, who, on the day of the accident, rode in the cars and made some 10 or 12 trips on the train, before the public was permitted to use it, and that they found it to work as well and safely as is usual to such devices.

Again, important is the fact that several persons, shortly after the accident—one the same evening and the others the following day—subjected the coaster to a scrutinizing inspection, "from top to bottom," as one of the witnesses declared, and found it perfectly intact in all its parts; no damage or defect in the machinery having been discovered. And it is a circumstance of no little significance that, out of the 18 passengers on the train at the time of the accident, the deceased was the only one thrown from the car. It must also be kept in mind that those of the defendant's witnesses who rode on the coaster before the public was permitted to use it testified, as did the defendant, that the movement of the train when passing over and around the several peaks was uniform—that is to say, that the jerking and swaying movement of the coaster at the second peak and dip was no more acute and sudden than it was at the other peaks and dips, and that such movement was not at any of the higher points on the tramway more severe or keen than is usual to all such devices. In fact, Miss Splitlog, who, as seen, testified that the jerking movement of the car at the first peak was not as sudden and abrupt as at the second peak, stated that, on the first trip she and the deceased made, the jerking movement of the train at the latter peak and dip was not more severe and sudden or acute than it was at the first peak and dip.

[3] From the foregoing review of the evidence, it must be clear that it was for the jury to determine whether the death of the little girl was proximately caused by and through the culpable negligence of the defendant, or whether the deceased, in that she failed to exercise the amount of care to preserve her own personal safety which the circumstances and conditions by which she voluntarily surrounded herself imperatively required of her, was herself guilty of negli-

gence which proximately caused or contributed to the accident and its distressful consequences. But it is said, or at least intimated, that the fact that the deceased was a mere child imposed upon the defendant a greater amount of the degree of care than is required of an operator of such a device in the case of an adult. While it is true that the same act which would be negligence in an adult may not be such if done by a child, still it is also true that:

> "A child is required to exercise the same degree of care that would be expected from children of his age, or which children of his age ordinarily exercise. State v. Baltimore, etc., R. R. Co., 24 Md. 84, 87 Am. Dec. 600; Collins v. South Boston R. R. Co., 142 Mass. 301 [7 N. E. 856], 56 Am. Rep. 675. * * * Children, as well as adults, should use the prudence and discretion which persons of their years ordinarily have, and they cannot be permitted with impunity to indulge in conduct which they know, or ought to know, to be careless. 'The law imposes upon minors the duty of giving such attention to their surroundings and care to avoid danger as may fairly and reasonably be expected from persons of their age and capacity.' Merryman v. Chicago, etc., R. R. Co., 85 Iowa, 635 [52 N. W. 545]. In the present case the capacity and intelligence of the child are not controverted, and he must be presumed to have had all the qualities ordinarily belonging to a person of his age." Studer v. Southern Pacific Co., 121 Cal. 400, 404, 405, 53 P. 942, 943 (66 Am. St. Rep. 39).

See, also, Bolar v. Maxwell Hardware Co. (Cal. Sup.) 271 P. 97, and Moeller v. Packard (Cal. App.) 261 P. 315.

In the instant case, the minor was past the age of 13 years. She had previously and on the evening of her death ridden on the same coaster and at other times on similar devices. That she was a girl of normal intelligence, and of more than usual ambition of children of her years to develop their intellectual powers, is shown by the testimony of her father, the plaintiff herein. He testified that the deceased, before he moved to California, attended the public schools at Niagara Falls; that, on locating in California, some three or four years prior to the trial, she not only attended a public school at Los Angeles, but received instruction in the costumer's art at an art school in said city, and, further, received lessons in the costumer's art through a correspondence school; that at the time of her death she had made such progress in her art studies that she was able efficiently and skillfully to make models for costumes suitable for use by histrions in moving pictures, as well as those engaged in the real dramatic art itself. These models, testified the plaintiff, who was a tailor by occupation, were used by him to make costumes for the purpose mentioned, and without them, he said, he could not have carried on his business as a tailor, specializing, as he then was, in such costume making. A photograph of the deceased, taken a short time before her unfortunate death, is presented in the transcript, and, in so far as a photograph of a person can reflect mental character and physical condition, the picture indicates a singularly prominent degree of intelligence and sound and vigorous physical health and strength. But, regardless of this latter consideration, it is perfectly clear from her father's testimony that she was intelligent beyond the average of minors of her age.

[4] We have now pursued a sufficient discussion of the evidentiary branch of the case. The verdict, upon the evidence, is binding upon this court.

[5] It is claimed, however, that it must be held as a matter of law that the defendant was guilty of negligence which was the direct cause of the accident, "especially in the case of children," in that he failed to provide the cars "with straps or other safety appliances to hold the passengers to their seats while going over the dips and 'bumps,' or to furnish attendants to ride in the cars and protect the passengers from being thrown out of the same." This, it is contended, was a duty resting upon the defendant by virtue of the terms of sections 2100 and 2101 of the Civil Code. Those sections promulgate rules relative to the duty of common carriers, it being claimed by the plaintiff that the defendant, as the operator of such a device, was and is a common carrier within the contemplation of the Code rules (Civ. Code, §§ 2100 and 2101), establishing the degree of care and diligence required of such carriers for the safe carriage of their passengers. See Treadwell v. Whittier, 80 Cal. 574, 22 P. 266, 5 L. R. A. 498, 13 Am. St. Rep. 175; Champagne v. A. Hamburger & Sons, 169 Cal. 683, 690, 147 P. 954. At the trial the defendant's counsel conceded that in personal injury cases such devices were to be treated as such carriers, and the trial court instructed the jury upon that theory. We will therefore treat such devices in the consideration and decision of this appeal in accord with that theory, without, however, intending to hold, or deciding, that they are common carriers within the Code rules mentioned, it not being necessary herein to pass upon that question, since in either aspect of the proposition the final result arrived at herein must, according to our view, be the same.

Section 2100 of the Civil Code reads:

> "A carrier of persons for reward must use the utmost care and diligence for their safe carriage, must provide everything necessary for that purpose, and must exercise to that end a reasonable degree of skill."

Section 2101 reads:

> "A carrier of persons for reward is bound to provide vehicles safe and fit for the purposes to which they are put, and is not excused for default in this respect by any degree of care."

There is no evidence that the cars were not equipped with all the appliances or means for protecting passengers which are usually or ordinarily provided for or necessary to be employed in the operation of such conveyances or vehicles. The iron bar or rail in each car and in front of the passengers was specially designed to enable passengers to hold themselves in their seats against the "jerks" and "bumps" naturally characteristic of such a contrivance when in motion, and, so far as this record discloses, was all-sufficient for such purpose. If it be answered that the fact that the deceased was thrown from the train is evidence of an absence of sufficient safeguards against accidents to the passengers, the reply is that the deceased was the only passenger hurled to the ground, and that 17 others, including several young people, particularly her seat companion, approximately of her own age, remained in their seats and were returned safely to the starting point of the train.

[6] The same observations apply to the suggestion that it was the duty of the defendant to provide the cars with attendants while the train was in operation, to prevent the passengers from falling therefrom. As to this, it may further be said that the method of operating a "scenic railway," as such devices as the one in question are commonly called, is a matter of common knowledge, to which the courts are not required to close their eyes. "We, as a court, are not more ignorant than the general public. What is generally known we must know." Pointer v. Mountain Ry. Const. Co., 269 Mo. 104, 132, 189 S. W. 805, 813 (L. R. A. 1917B, 1091). From this common knowledge, we can say that it is not the custom or necessary to assign attendants to the cars of a device such as the one involved herein, for the purpose of preventing passengers from falling from the cars while the train is in motion.

[7] The next assignment involves the complaint that the court refused to allow in evidence certain photographs of the coaster, some of which were taken the day following the date of the accident and others at some subsequent time. The theory upon which the photographs were offered was, as stated in the brief of plaintiff, that they would show that at the time of the accident the device was not completed, and was, therefore, unsafe for use. Special emphasis is laid upon those of the rejected photographs showing men at work about the coaster the day following the accident; the claim being that they constituted competent evidence to substantiate the contention by plaintiff that the machine was not fully prepared for use at the time it was first opened to use by the public. There was no denial of the testimony introduced by the plaintiff, but, in effect, an admission of the truth thereof that, on or about the device, men were at work on the day following that of the accident. Hence no prejudice can be claimed against the ruling rejecting the photographs, even if it be assumed that it involved error. The other rejected photographs showed the character of the general mechanical construction of the device. This is true of other photographs of the machine which were received in evidence. They were a photographic reproduction of the device from different points of view, and, manifestly, could not show any defects in the machinery, if any there were. They were serviceable in the trial of the case only in so far as by means thereof the particular part of the device where it was claimed that there were defects or broken parts might be pointed out and located.

[8, 9] The plaintiff called a witness in rebuttal and asked how many times the train had made the circuit of the tramway "at the time of the accident." Objection by defendant that that question did not call for testimony properly rebuttal was sustained. That question was fully gone into by the plaintiff in his original case. It has been often held, and with obvious legal propriety, that it is improper to allow witnesses to reiterate the testimony previously given by them in the original case under the guise of rebuttal. See People v. Van Ewan, 111 Cal. 144, 149, 43 P. 520; People v. Peccole (Cal. App.) 268 P. 473, 479. And the general rule may be stated to be that rebuttal or surrebuttal testimony, strictly speaking, is receivable only where new matters have been developed by the evidence of one of the parties after his case in chief has been made and concluded, although it is within the discretion of the trial court to allow a party, on "rebuttal or surrebuttal," to introduce evidence with respect to relevant and material matters as to which his witnesses have testified in chief. In the instant case, however, as we have in effect stated, the evidence offered as "in rebuttal" was cumulative of relevant evidence to the same point received in plaintiff's case in chief, and it cannot, therefore, be held that the court, in disallowing it, transcended the limits of a sound discretion.

[10] The defendant and the latter's witness Paige, the builder of the coaster, testified that, before the device was opened for use by the public, it was completed, except "in a few minor details," viz.: The lights were not permanently attached to the machine, and the handrail around or along the board walk, on which an attendant might walk, if he so desired, or if at any time, for any reason, it was found necessary, was not completed. Paige, on cross-examination, was asked:

> "Now, you say this roller coaster was finished, Mr. Paige? A. I do, except in a few details. Q. Just a few small details? A. Yes. Q. No major repairs were necessary to be made? A. No, sir. Q. And you didn't make any major repairs after this accident took place?"

To this last question objection was interposed, on the grounds that "it is incompetent, irrelevant, and immaterial." The question constituted cross-examination, and the witness should have been permitted to answer it, but no prejudice followed from disallowing it, since the record shows that, on both direct and cross-examination, the witness in effect stated a number of times that, save in a few particulars, in no degree or manner affecting the matter of safety in operating the train, the device was finished and in proper condition for use by the public. Besides, the witness' answer to counsel for plaintiff that "no major repairs were necessary to be made," was the equivalent, practically, of the statement that he did not make any "major repairs" after the accident. And thus a sufficient foundation was laid for the impeachment of the witness on that subject, if plaintiff was prepared to pursue that line of attack upon the witness and his testimony.

There are several other assignments involving attacks upon certain rulings upon evidence. An examination of those assignments has convinced us that they are without sufficient merit to entitle them to special notice herein.

[11] Both the plaintiff and the defendant proposed a large number of instructions covering every phase of the case as it was made by the pleadings and proof. The court rejected all the instructions so proposed, and in lieu thereof sua sponte charged the jury fully and correctly upon every principle of law pertinent to the issues framed by the pleadings and introduced by the evidence which was declared in the rejected set of instructions proposed by the parties themselves. There are, however, embraced in the court's charge, two instructions which plaintiff insists misstate the rules of law thereby sought to be announced. The first of these is based upon section 2100 of the Civil Code, and states, among other things, that a railway such as the one herein involved, being "a common carrier of passengers," within the meaning of the Code section just named, it is "incumbent upon such carrier to exercise the *highest degree* of care and caution for the safety of its passengers," etc. The specific criticism of said instruction is that the "highest degree of care" which the instruction declares that it is incumbent upon a common carrier to exercise for the safety of its passengers does not square with the rule as it is stated in section 2100 upon that subject, which, as is to be noted, expresses the degree of care in such cases as the "utmost" care. There can be conceived no greater care than the "highest" care. Nothing can go beyond the highest. The adjective "utmost" can describe nothing higher or greater than the highest or the greatest. The adjective "highest" is the superlative of the adjective "high." And our dictionaries say that the adjective "utmost" means "the greatest or highest degree, quantity, or number." The noun is defined: "The most that can be; the greatest power, degree, or effort." It is well said in the cases that:

> "The expression 'highest degree of care' is no stronger than the statutory requirement 'utmost care.' The instruction in this regard was not error." Osgood v. Los Angeles, etc., Co., 137 Cal. 280, 70 P. 169, 92 Am. St. Rep. 171; McCurrie v. S. P. Co., 122 Cal. 558, 55 P. 324.

The converse of the proposition stated in the instruction (and the instruction so implies) is, necessarily, that for the slightest neglect against which "human care and foresight might have guarded," if such neglect was the proximate cause of the death of the deceased, the defendant would be in law responsible. Champagne v. A. Hamburger & Sons, 169 Cal. 683, 690, 147 P. 954.

[12] The other instruction complained of reads:

> "The defendant was not an insurer of the safety of the deceased at the time the accident in question occurred."

The case just named is cited as holding that the instruction involves an incorrect statement of the rule. The instruction in that case properly enough stated that common carriers were not "insurers of the *absolute* safety" of their passengers. The word "absolute" was, as seen, omitted from the instruction here, and that omission constitutes substantially the only difference between the two instructions, if, indeed, such omission in a juridical concept constitutes a material difference. In the Champagne v. Hamburger & Sons Case substantially the instruction hereinabove first considered and the instruction now under review were given as one instruction. The two legal propositions stated in the instruction there are here stated separately or in two distinct instructions; but, obviously, the two instructions should be viewed or considered together, or in connection with each other, and if, as so viewed, they may rationally be so construed as that they fairly and intelligently state the true rule as to the degree of responsibility which common carriers must assume in safeguarding their passengers against accident or injury, then, of course, there is no real ground for complaint. Reading the two instructions in this case together, they fairly and with sufficient clarity state the principles of law to which they are addressed in the following form, which is substantially in the form in which they are separately given in this case:

> "While common carriers are not insurers of the safety of their passengers, they are bound to exercise the highest degree of care and caution for the safety of their passengers, and *to do all that human foresight and vigilance can reasonably do,* consistent with the mode of conveyance and the practical operation of its

rule, to prevent accident to their passengers while riding on their cars."

The difference between the statement that common carriers are charged with the highest care to protect or preserve the safety of their passengers and the statement that such carriers are not insurers of the absolute safety of their passengers, is merely verbal, and involves the statement of practically the same rule of law as applicable to common carriers in an affirmative and a negative form. The slightest neglect cannot be the highest care, so, when it is said that common carriers are charged with the highest care to protect the safety of their passengers, it necessarily means that they are insurers of such safety as against the slightest neglect. We therefore think that the two instructions referred to, read together, with sufficient clearness explain the duty common carriers owe to their passengers in the matter of safeguarding them against accident or injury as such duty is set forth in section 2100 of the Civil Code.

The judgment is affirmed.

We concur: FINCH, P. J.; PLUMMER, J.

IMPERIAL LIVE STOCK & MORTGAGE CO. v. TRACY. (Civ. 3633.)★

District Court of Appeal, Third District, California. Nov. 26, 1928.

Rehearing Denied Dec. 26, 1928. Hearing Granted by Supreme Court Jan. 24, 1929.

1. Corporations 🔑92—Recovery cannot be had on renewal note, based on stock subscription agreement, where prescribed amount of purchase price was not paid in cash (Corporate Securities Act, § 12).

Recovery cannot be had on renewal notes, based on subscription agreement for purchase of stock in plaintiff corporation, where twenty-five per cent. of purchase price was not paid in cash, as prescribed by commissioner of corporations under Corporate Securities Act, § 12 (Deering's Gen. Laws 1923, Act 3814, § 12), since renewal note given in lieu of previous note based on illegal contract is unenforceable in hands of parties participating in acts which render original note invalid.

2. Corporations 🔑92—In action on note based on stock subscription agreement, evidence showed cash payment of required percentage of purchase price, rendering instruction on illegality under Corporate Securities Act erroneous (Corporate Securities Act, § 12).

In action on notes, based on subscription agreement for purchase price of plaintiff's stock, evidence *held* to show that twenty-five per cent. of purchase price of stock was paid in cash, as required by Corporate Securities Act, § 12 (Deering's Gen. Laws 1923, Act 3814, § 12), so that court erred in giving instructions bearing on legality of cause of action, in so far as Corporate Securities Act was concerned.

3. Trial 🔑330(2)—Where one of defenses submitted was contrary to evidence, general verdict will not support judgment.

Where one defense submitted to jury was not supported by evidence, and was directly contrary to evidence, judgment cannot stand, based on general verdict for defendant, since it is impossible to determine on which issue jury rendered verdict.

Appeal from Superior Court, Kern County; Erwin W. Owen, Judge.

Action by Imperial Life Stock & Mortgage Company against William Tracy. Judgment for defendant, and plaintiff appeals. Reversed in part, and affirmed in part.

Fredericks & Hanna, of Los Angeles, and C. V. Anderson, of Bakersfield, for appellant.

Dorsey & Campbell and Emmons & Aldrich, all of Bakersfield, for respondent.

PLUMMER, J. This action was brought to enforce payment of five promissory notes, set out in plaintiff's complaint in five separate causes of action. The defendant had judgment, and the plaintiff appeals.

The first cause of action is based upon a promissory note in the sum of $7,500, executed by the defendant on May 20, 1922. The second cause of action is on a promissory note in the sum of $1,875, executed by the defendant on May 20, 1922. The third cause of action is based upon a note executed by the defendant in a like sum of $1,875, dated May 20, 1922. The fourth cause of action is based upon a promissory note executed by the defendant in the sum of $7,500, dated May 20, 1921. And the fifth cause of action is based upon a promissory note executed by the defendant in the sum of $3,750, on May 20, 1921. These notes were all executed for and on account of original subscription agreements of the defendant to purchase shares in the capital stock of the plaintiff corporation. These subscriptions are dated as follows: One for 250 shares of the capital stock of said company dated February 5, 1920; one for 250 shares of the capital stock of said company, dated November 16, 1920; one for 500 shares of the capital stock of said company, dated January 27, 1921; one for 1,000 shares of the capital stock of said company dated March 16, 1921; and one for 1,000 shares of the capital stock of said company, dated April 7, 1921. The note based upon the subscription agreement for 1,000 shares of the capital stock of the plaintiff corporation, dated April 7, 1921, appears in the complaint in the form of a renewal note, for the same sum set forth in the first cause of action.

By way of defense to the plaintiff's action, the defendant set forth in his answer that the notes were obtained by fraudulent represen-

---

★Rehearing denied. For opinion of Supreme Court adopting opinion of court of appeal in part, see 281 P. 50.

tations, and also that the subscription agreements upon which the original notes were given were void under the Corporate Securities Act, and that the notes sued upon are simply renewals of the original void obligations. The subscription agreements were all in similar form, and, among other items, contained the following:

> "I hereby subscribe for, and agree to purchase ——— shares of the capital stock of the Imperial Live Stock & Mortgage Company, a corporation organized and existing under and by virtue of the laws of the state of California, and agree to pay therefor $10.00 per share, payable as follows: Not less than one-fourth cash accompanying this obligation, and the balance thereof as evidenced by a promissory note of even date herewith bearing interest at the rate of 6 per cent. per annum."

The permit issued by the commissioner of corporations permitting the plaintiff corporation to take subscriptions for shares of its capital stock, specified that not less than 25 per cent. of the par value of the stock should be paid for in cash, and that the remainder, or 75 per cent. of the amount agreed to be paid, might be evidenced by a promissory note or promissory notes bearing 6 per cent. interest.

In so far as the agreements to purchase shares of the capital stock of the appellant corporation are concerned, upon which the renewal note set forth as the second, third, fourth, and fifth causes of action in the plaintiff's complaint are based, the record shows beyond controversy that no part of the 25 per cent. of the par value of the shares of the capital stock subscribed for by the defendant was paid in cash. In each instance, so far as the agreements to purchase shares of the capital stock which lead to the giving of the renewal notes set forth in said causes of action are concerned, what are called in the transcript "myself notes" only were given; that is, the defendant, when subscribing for shares of the capital stock, instead of paying 25 per cent. in cash, drew a note payable to himself for 25 per cent. of the par value of the shares of stock subscribed for, and delivered the same to the plaintiff, and then, at the same time, and as a part of the same transaction, executed a promissory note payable at a definite time, some months after the date of the execution of the note, for 75 per cent. of the par value of the stock subscribed for. The record shows that prior to the 20th day of May, 1921, these "myself notes" had all been taken up by the defendant by the payment in cash of the 25 per cent. of the value of the shares of stock theretofore subscribed for by the defendant; that on said 20th day of May, 1921, renewal notes were given in lieu of the former notes, representing 75 per cent. of the purchase price of the shares of stock mentioned in the subscription agreements; that at said time the shares of capital stock subscribed for were issued and assigned to certain persons as trustees for the benefit of the plaintiff, to be held as security or until the 75 per cent. notes were fully paid, trust certificates representing the shares of stock called for in each subscription being delivered to the defendant, evidencing the number of shares assigned by him, and to be held in trust for the benefit of the corporation.

The court instructed the jury to find in favor of the defendant as to the second, third, fourth, and fifth causes of action alleged in plaintiff's complaint. With this summary we may proceed to consider the appellant's contentions, which are as follows:

(1) That the court erred in directing the jury to return a verdict in favor of the defendant on the second, third, fourth, and fifth causes of action.

(2) That the issue of fraud should not have been submitted as a defense to the first cause of action set forth in the plaintiff's complaint.

(3) That the defense of illegality, based on the use of "myself notes," should not have been submitted as a defense to the first cause of action.

[1] As heretofore stated, all the notes sued on by the plaintiff in the second, third, fourth, and fifth causes of action set forth are renewal notes, based upon subscription agreements for the purchase of shares of stock, under a permit from the commissioner of corporations, providing that at least 25 per cent. of the purchase price should be paid in cash, whereas in truth and in fact no cash was paid, and only "myself notes" were given for the 25 per cent. of the purchase price, which notes were subsequently taken up by the defendant.

Section 12 of the Corporate Securities Act, usually referred to as the "Blue Sky Law," reads as follows:

> "Every security issued by any company, without a permit of the commissioner authorizing the same then in effect, shall be void, and every security issued by any company, with the authorization of the commissioner but not conforming in its provisions to the provisions, if any, which it is required by the permit of the commissioner to contain, shall be void." Deering's General Laws 1923, part 1, p. 1414.

The receipts issued by the appellant corporation at the time of taking subscriptions to purchase shares in its capital stock were in the following form, one of which will suffice:

> "November 16, 1920. Received of William Tracy, of Buttonwillow, California, the sum of $2,500.00, cash, $625.00, note $1,875.00, payable to Imperial Live Stock & Mortgage Company as payment for 250 shares of the capital stock of the Imperial Live Stock & Mortgage Company, as set forth in this subscription contract, numbered the same as the receipt and bearing even date herewith.
>
> "Imperial Live Stock & Mortgage Company,
> "L. V. Moron, Special Agent."

No mention being made in the receipts that the 25 per cent. of the subscribed cost of the shares of stock was in fact evidenced by "myself notes," and not really paid in cash at the date of the subscription. Upon this state of facts the appellant contends, upon the authority of Moore v. Moffatt, 188 Cal. 1, 204 P. 220, that the renewal notes, though based upon void contracts, became valid obligations upon the date of renewal, the issuance of the certificates, and the assigning of them by the defendant to trustees for the benefit of the corporation, under the theory that the agreement was a continuing offer on the part of the corporation for the sale of its stock, and was accepted in a valid manner at the date of the issuance thereof, ratified by the defendant as evidenced by his having taken up and paid the "myself notes," and the then giving by him of notes evidencing the remaining 75 per cent. of the value of the respective purchases.

In the case of Moore v. Moffatt, supra, the action was brought by a trustee in bankruptcy to recover the difference between the sums paid on a subscription agreement for stock in a corporation, and the par value of the stock. In that case it appears that the amount agreed to be paid had all been paid. The defense to the action was based upon the fact that at the time the money was paid, the corporation had no valid permit to sell shares of its capital stock. The court, in discussing the issues involved in that case, used the following language:

> "Conceding, for the purposes of discussion and decision, as is contended in support of the judgment, that the subscription agreement was in its inception void and incapable of acceptance by the corporation because executed, in contravention of the provisions of the Investment Company's Act (Stats. 1913, p. 715), prior to the procurement of a permit from the corporation commissioner authorizing a sale of the corporation's stock, and therefore could not have been legally made the basis of an action against the defendants upon the theory that they were stockholders in the corporation, still we have the admitted fact in the plaintiff's case that no stock of the corporation was in fact issued in response to any agreement of the parties until after an admittedly regular and valid permit had been granted by the corporation commissioner. This being so, the subscription agreement, even though it may have been void and incapable of acceptance in the first instance, should, in the light of the subsequent conduct of the parties to the transaction, be considered and construed as a continuing offer to subscribe for the stock in question, pending the procurement of a permit from the corporation commissioner, which ultimately became the embodiment and expression of a new agreement to purchase the stock entered into at a time when the only legal obstacle in the way of a valid agreement had been overcome. The agreement, so considered, and having been in fact ultimately accepted by the corporation after the required permit had been procured, * * * the validity of its making and acceptance must be measured and tested by its character as revealed by the circumstances and conduct of the parties with relation thereto at the time of its ultimate acceptance rather than by the circumstances attending its mere physical making in the first instance."

The court in that case then goes on to hold that the acts of the parties were tantamount to an adoption by them of the terms and conditions of the subscription agreement as of the date of its ultimate acceptance, and that the defendants were liable for the unpaid portion of the capital stock, and reversed the judgment of nonsuit entered by the trial court. If the circumstances of the instant case were identical with the case of Moore v. Moffatt, supra, the contentions of the appellant would have to be accepted as decisive, and the ruling of the trial court reversed. As we regard the transaction, however, a different principle is involved. In the Moffatt Case the trustee was not suing upon a tainted contract affecting its validity. In the case at bar there can be no doubt that the original 75 per cent. notes, of which the notes represented in causes of action set forth in plaintiff's complaint numbered 2, 3, 4, and 5 are renewals, were invalid.

In the case of Domenigoni v. Imperial Live Stock & Mortgage Co., 189 Cal. 467, 209 P. 36, in an action to cancel certain promissory notes given to represent 75 per cent. of the purchase price of shares of the capital stock of the corporation which is the appellant in the present action, where "myself notes" were given for 25 per cent. instead of cash, just as in the case at bar, the court held as follows:

> "The entire transaction was an attempt to circumvent the law. The notes and agreements were each of them made in violation thereof and are therefore against the policy of the law, * * * and void."

No relief, however, was given for the following reason, as was there said speaking of the plaintiff:

> "He was a party to them and is equally guilty with the defendant. In such a case the court will give no relief even if the point is not raised by either party."

The contract being void, the promissory notes were held void and each party was left in the condition in which the court found him. The receipt given by the defendant, the appellant here, in the Domenigoni Case was identical in language with the receipts given to the defendant in the instant case.

In the case of Union Collection Co. v. Buckman, 150 Cal. 159, 88 P. 708, 9 L. R. A. (N. S.) 568, 119 Am. St. Rep. 164, 11 Ann. Cases, 609, a case having to do with a renewal note given in place of a prior note based upon an illegal contract, it was held as follows (we quote from the syllabus):

> "Any renewal notes given in place of the original notes based upon an illegal considera-

tion are affected with the same illegality. Merely repeating a promise based on an illegal consideration cannot give it validity."

It is further said in the opinion in that case, quoting from a former opinion of Kreamer v. Earl, 91 Cal. 112, 27 P. 735:

> "'It is not for the sake of the party who is benefited by the intervention, but for the sake of the law itself,' that a court refuses to allow the law and the machinery of the courts to be made use of for the enforcement of illegal contracts, and leaves the parties precisely where it finds them."

Quoting, also, from the case of Hill v. Kidd, 43 Cal. 615:

> "It is equally well settled that no action in affirmance of an illegal contract can be maintained."

A long list of citations supporting the rules of law just set forth may be found in 11 Ann. Cas. on page 612, following the opinion in the Buckman Case. The authorities there set forth are so numerous as to prevent repetition here, but all hold that a renewal note, given in lieu of a previous note based upon an illegal contract, partakes of the same tainted character, and is unenforceable when in the hands of the parties participating in the fraud, or in the acts which render the original note invalid. In 19 California Jurisprudence, 1006, we find the following statement supported by authorities:

> "A renewal note given in place of the original one based upon an illegal consideration, is affected with the same illegality; merely repeating a promise based on an illegal consideration cannot give it validity."

It is but trite to say that:

> "Commercial paper cannot be based on any consideration which is in violation of an express statutory provision." 8 Cal. Jur. 243.

Again:

> "If the instrument or contract is declared void by statute, it cannot be enforced; in some states, even by a bona fide holder." 8 Cal. Jur. 768.

The latter statement is not involved here, the original parties only being before the court.

In the case of Reno v. American Ice Machine Co., 72 Cal. App. 409, 237 P. 784, in an action based upon a void contract for the purchase of stock, an attempt is made to distinguish between actions where the original parties are involved, and actions where a representative of one of the parties appears, as was the case in Moore v. Moffatt, supra, where a trustee in bankruptcy was one of the parties, and in so doing, referred to the case of Moore v. Moffatt in the following language:

> "That was not an action between the parties to avoid contract, but an action by a trustee in bankruptcy of a corporation to recover the unpaid subscription price of stock for the benefit of creditors. That situation presents an exception to the rule above announced, which rule is suspended in the interests of innocent third persons who have relied upon the contract."

Although this statement is relied upon by respondent and vigorously assailed by the appellant, we do not feel called upon to either approve or disapprove the language there used, save and except to state that in the Moffatt Case the circumstances are readily distinguishable from the circumstances characterizing the transaction in the cause now before us. The contract, which really was a contract created by law to pay the unpaid portion of capital stock issued to, and accepted by the defendants in the case of Moore v. Moffatt, only, was involved, whereas in the instant case the attempt is made to give vitality and validity to tainted and void contracts by renewals thereof.

The issues presented in this cause relate to matters of public policy. If no other persons were involved, and the principle reached no farther than the respective parties to this cause, we might consider seriously the contention of the appellant that the renewal notes, instead of being considered on the same basis, should be treated as a new subscription for the shares of stock in the plaintiff corporation, and valid and enforceable obligations. To do so, however, would be to open the door to all the illegal practices condemned by the Corporate Securities Act. If a scheme or a plan to avoid the provisions of that act, and of the requirements inserted in the permit issued to the corporation by the corporation commissioner, relating to its sale of stock, can be accomplished by the subterfuge of the issuance and taking of "myself notes" for 25 per cent. of the value of the stock and ordinary notes for 75 per cent., then and in that case the requirement for the payment of a certain portion of the subscription in cash, in order that the corporation may have assets to meet its obligations, would simply be to render nugatory, not only the requirements of the corporation commissioner, but also the act itself. Public policy, which led to the enactment of the Corporate Securities Act, forbids the approval of any such transactions, and we think the trial court properly excluded from the jury consideration of the second, third, fourth, and fifth causes of action tendered by the plaintiff's complaint, by instructing the jury to find for the defendant.

[2] The record shows that the court submitted to the jury the issues tendered by plaintiff's first cause of action and the defendant's answer thereto which set up two defenses as follows: The illegality of the subscription for the shares of stock for which, in part payment, the note sued on in the first cause of action appears as a renewal note, dated April 7, 1921; and also the further defense that the defendant was induced to subscribe for the shares of stock for payment of which, in part,

said note was given, by the fraudulent representation of the plaintiff's agents. Appellant contends that neither one of these issues should have been submitted.

If the first contention of the appellant be well taken, it will be unnecessary to enter into a discussion of whether the evidence sustains the defense of fraud, or whether it shows a waiver thereof in the event that the testimony establishes the fraudulent representations as contended for by the respondent. The verdict of the jury on the first cause of action is in the words following:

> "We, the jury, find for the defendant on the first cause of action set out in plaintiff's complaint."

By finding only a general verdict, of course, it was impossible for the trial court, and is impossible for an appellate court, to determine whether the jury concluded that the defense of illegality had been made out, or whether the jury returned a verdict by reason of the alleged fraudulent representations of the plaintiff's agents at the time the defendant subscribed for the stock partly covered by the note set forth in the first cause of action.

In relation to the first cause of action the court, among other things, instructed the jury as follows:

> "You are instructed that if you find from a preponderance of the testimony that the note sued upon in plaintiff's first cause of action for $7,500.00, is a renewal of a note executed by William Tracy on April 7, 1921, and at that time he made and executed an agreement to purchase 1,000 shares of stock of the Imperial Live Stock & Mortgage Company, a corporation, and at the time of entering into such agreement executed in addition to said note for $7,500.00 a note payable to himself for $2,500.00 and that the said note for $7,500.00 together with said note for $2,500.00 was for the purchase of shares of stock mentioned in said subscription agreement and that said notes constituted the entire purchase price of said stock mentioned in said agreement, the notes issued in connection therewith are void, and you must find for the defendant on said cause of action number one of plaintiff's complaint."
>
> "You are instructed that if you believe from a preponderance of the testimony that the defendant gave to the plaintiff notes for the entire transaction in entering into the contract set out in plaintiff's first cause of action, then you must find for the defendant."
>
> "If you find from a preponderance of the evidence that the defendant, at the time of the executing of the original note, renewal of which is set out in the first cause of action of plaintiff's complaint, entered into the subscription agreement set out in the first cause of action of plaintiff's complaint, the said defendant William Tracy executed and delivered to the plaintiff, Imperial Live Stock & Mortgage Company, a corporation, notes for the entire amount of the subscription mentioned therein, you must find for the defendant on such cause of action."

The giving of this instruction is assigned by appellant as prejudicial error, and in support thereof it insists that the testimony, instead of showing a "myself note" having been given by the defendant for 25 per cent. of the value of the stock subscribed for by him on the 7th day of April, 1921, establishes without any substantial conflict that the defendant paid for the same in cash. If this is true, appellant's contention is well taken. In order to understand the testimony which we are about to set forth, it is necessary to state that on the 16th day of March, 1921, the defendant signed an agreement for the purchase of 1,000 shares of the capital stock of the plaintiff corporation; that at the time of signing such agreement he executed two notes, one a "myself note" for $2,500 and one for $7,500. This $7,500 note appears in the plaintiff's complaint as the basis of the fourth cause of action, and which was excluded from consideration of the jury by instructing the jury to find for the defendant. The "myself note" given on the 16th day of March, 1921, was paid by the defendant on the 31st day of March, 1921. Thereafter there was only one transaction between the plaintiff and the defendant now represented in the first cause of action. This statement is necessary because the testimony of the defendant does not clearly distinguish between the two transactions. We now quote the testimony of the plaintiff as to the transaction of April 7, 1921:

> "Cross-examination: Q. Now, Mr. Tracy, in reference to the subscription of April 7, 1921, what makes you think you gave a 'myself note' for $2,500.00 instead of $2,500.00 cash at that time? A. It is my remembrance that I gave a note each time.
>
> "Q. Don't you remember, Mr. Tracy, that the gentlemen came to your place and you went to the Security Trust Company Bank in Bakersfield and drew out of that bank $2,450.00 April 7, 1921? A. I don't.
>
> "Q. Have you the 'myself note' that you gave April 7, 1921? A. Oh, I paid it. I know I paid all those notes.
>
> "Q. When you paid it, did you receive the note back from the bank? A. I can't remember.
>
> "Q. Have you that note? A. No.
>
> "Q. How did you pay it? A. (No answer.)
>
> "Q. Did you pay it with a check or with cash? A. I think I paid that with a check; I didn't have that much cash.
>
> "Q. On what bank did you draw the check? A. I think I drew it on the Security Trust Bank.
>
> "Q. In Bakersfield? A. Yes.
>
> "Q. If your account at the Security Trust Company Bank in Bakersfield showed a withdrawal of $2,450.00 April 7, 1921, wouldn't that refresh your memory, so you might change your opinion as to the facts of that transaction? A. I don't know it.
>
> "Q. You had on deposit April 7, 1921, a considerable amount of money, did you not? A. I don't know just what I had; I had an account. I don't know what amount I had at that time.
>
> "Q. Now on March 16th, when you purchased the 1,000 shares of stock, you gave the 'myself note' for $2,500.00 that is in evidence as 'Defendant's Exhibit 3.' You remember that note, Mr. Tracy? A. Yes.

"Q. And you notice that note is paid March 31, 1921; stamped on the face of it, 'Paid Security Trust Company March 31, 1921'? A. Yes.

"Q. Did you pay it on that date? A. Well, I couldn't say offhand; it would indicate that I did.

"Q. What is your best recollection as to whether you paid the note on that date? A. I don't remember.

"Q. You remember you did pay that note at the bank? A. No; I don't remember. I know I paid all the notes at the bank, but I can't remember that particular note."

The defendant further testified that he did not have the canceled checks with which he paid the 25 per cent. of the subscription taken on March 16, 1921, nor did he have the canceled check for payment made on the subscription dated April 7, 1921. Upon cross-examination the defendant further testified as follows:

"Q. Well, now, I will ask you if it is not a fact that April 7, 1921, you drew a check in favor of Imperial Live Stock & Mortgage Company for $2,450.00? A. I don't remember.

"Mr. Hanna: I will ask you if, on one of the statements you received, Mr. Tracy, you saw entries such as are listed here, from March 24, 1921, to April 12, 1921, for instance, you will notice here listed March 25, a $16,000.00 deposit; do you remember making that deposit in the bank? A. I couldn't say what date; I remember the deposit.

"Q. March 25 there was a check for $8,142.32. Do you remember that check? A. No; I don't know.

"Q. Do you remember you paid out about half of the $16,000.00 immediately after depositing it, on the same day? A. No; I don't remember.

"Q. You don't remember that? A. No.

"Q. Do you remember a check March 31, 1921, for $2,450.00? A. No.

"Q. Do you remember a check, April 7, 1921, $2,450.00? A. No, sir.

"Q. You don't remember those checks, whom they were made payable to? A. No; that is too long ago. I don't remember what they were, now.

"Q. Do you remember receiving, June 15, 1920, $10,000.00 and depositing it in your account? A. No.

"Q. Do you remember paying out, June 15, 1920, $8,445.06? A. No.

"Q. Do you remember paying out, October 4, 1920, $3,000.00? A. No.

"Q. Or $1,208.00 the same day? A. No.

"Q. Do you remember receiving, October 4, 1920, $5,140.07, and depositing it in your account? A. No.

"Q. Do you remember paying out, December 6, 1920, $1,120.50? A. No, sir.

"Q. Do you remember receiving and depositing in your bank account, December 9, 1920, $7,200.00? A. No."

The record further shows that previous to the trial the defendant's deposition was taken, wherein he testified as to a "myself note" executed on April 7, 1921, as follows:

"Q. Did you execute a 'myself note' at that time, also? A. I think I did.

"Q. Are you sure you did? A. Well, I don't know that I can say I am sure of it; that certainly is my impression. I gave a 'myself note' in all those sales."

The record shows that no "myself note" was produced for the transaction of April 7, 1921. As against this statement of the defendant that he "did not know," "did not remember," and "thought he did," the record shows as follows: That on April 7, 1921, the date on which the subscription was signed by the defendant for the shares of stock involved in the first cause of action, there was charged against the account of the defendant on the books of the Security Trust Company Bank at Bakersfield, the sum of $2,450; that on the same date a draft or cashier's check was issued by the bank payable to the plaintiff, in the sum of $2,450. The record further shows that the plaintiff had no other business transaction at said bank in Bakersfield at that date; that the plaintiff received this draft or cashier's check, together with $50 in cash, as the initial payment of Tracy's subscription of April 7, 1921, and that on April 11, 1921, the plaintiff deposited this check or draft drawn by the Security Trust Company of Bakersfield for $2,450, and $50 in cash, and credited the same to the defendant's account. The testimony of the cashier of the plaintiff shows that the plaintiff received from the defendant the check or cashier's draft for $2,450, dated April 7, 1921, together with $50 in cash, and that the same was entered as a credit on the defendant's account, as herein stated, and that on the 11th day of April, 1921, the check or draft for $2,450 and $50 in cash was deposited with the National Bank of Los Angeles. The exhibit in the transcript shows the draft was drawn by the Security Trust Company of Bakersfield in favor of the Imperial Live Stock & Mortgage Company, the plaintiff in this action, on the Farmers' & Merchants' National Bank of Los Angeles, for $2,450, and bears date of April 7, 1921.

The record further shows that the books of the plaintiff exhibit the fact that there was no other transaction involving the sum of money here referred to, had by the plaintiff with any other of its customers, and that the only one with whom it had any such transaction was the defendant Tracy. The record further shows a transcript of the defendant's account with the Security Trust Company of Bakersfield, which account of the defendant with the bank shows that on March 31, 1921, the defendant withdrew from the Security Trust Company the sum of $2,450, which corresponds with the defendant's testimony that he paid the "myself note" given at the time he subscribed for 1,000 shares of the capital stock of the plaintiff on the 16th day of March, 1921. The "myself note" given on the 16th day of March, 1921, was introduced in evidence as defendant's exhibit No. 3, and shows upon its face that it was paid March

31, 1921. And then, following this, the account of the defendant with the Security Trust Company shows that on April 7, 1921, he drew a check for $2,450; that in accordance with this check the testimony shows that the cashier made out a check in favor of the plaintiff for the sum of $2,450, dated April 7, 1921. This check, together with $50, the testimony shows was transmitted to the plaintiff, and was by it deposited as hereinbefore stated, and the defendant credited with the payment of $2,500. This testimony stands in the record absolutely uncontradicted. All there is opposed to it is the statements of the defendant, to use his own language, "I don't remember." The probative value of the testimony of the defendant, that he does not remember, does not rise to the dignity or degree of weight ordinarily characterized as "scintilla" evidence.

[3] We think it is clear from the foregoing that the court erred in giving to the jury instructions bearing upon the legality of the first cause of action in so far as the Corporate Securities Act is concerned. As the verdict is general, it is impossible to determine, as heretofore stated, upon which of the two issues the jury rendered its verdict in favor of the defendant, and as one of the defenses submitted to the jury is not supported by the evidence, and is directly contrary to the evidence, as we have shown, the judgment cannot stand, based upon such a verdict. "Where it is impossible to tell whether the verdict was based on an erroneous instruction, the judgment will be reversed." Likewise, "where a cause is submitted to a jury by a principal instruction authorizing a recovery on an erroneous theory of the law, plaintiff on securing a verdict could not have it sustained on appeal and have the error declared harmless, because there was a theory which, if submitted, would have sustained a similar verdict." 4 Corp. Jur. p. 1043, and cases there cited. To the same effect are the cases of O'Meara v. Swortfiguer, 191 Cal. 12, 214 P. 975; Thompson v. L. A. Ry. Co., 165 Cal. 748, 134 P. 709; see, also, Wiseman v. McNulty, 25 Cal. 230; Lewis v. Hayes, 165 Cal. 527, 132 P. 1024, Ann. Cas. 1914D, 148. These cases are all to the effect that, where two defenses are interposed and a general verdict is rendered, if the instructions are erroneous as to one defense, the cause must be reversed.

In view of the fact that the judgment must be reversed for the reasons herein stated, it becomes unnecessary to pass upon the contention of the respondent that the defense of fraud was made out, and likewise unnecessary to pass upon the correctness of the position taken by the plaintiff that if fraud existed it was waived by the defendant, as the testimony in relation to these matters may not be the same upon another trial.

In so far as the judgment appealed from relates to the first cause of action, it is hereby reversed. Otherwise, as to all other matters, the judgment is affirmed, neither party to recover costs.

We concur: FINCH, P. J.; HART, J.

---

95 Cal. App. 71

CITY OF OAKLAND v. LYCKBERG.

(Civ. 6362.)

District Court of Appeal, First District, Division 2, California. Nov. 20, 1928.

1. Municipal corporations 🔑186(4)—Policeman is a "public officer" as regards right to recover salary while disabled.

Duly appointed, qualified, and acting policeman of city, which is a duly created, acting agency of the state, is a "public officer" as regards right to recover salary while disabled.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Officer.]

2. Municipal corporations 🔑186(4)—City policeman, being public officer, was entitled to full salary from city while disabled.

Policeman of city of Oakland, being a public officer whose salary was fixed by virtue of a statute authorizing same to be fixed, was entitled to his salary while disabled as result of injuries, since salary was an incident to title to office and not to the position and performance of duties of office.

3. Master and servant 🔑389—City, paying policeman full salary while disabled, could recover full amount paid from person injuring policeman (Workmen's Compensation Insurance and Safety Act, § 26).

Where policeman was injured by defendant's automobile and thereafter city paid policeman full amount of his salary during time he was disabled and did not report for work, city could recover full amount paid from person injuring policeman, under Workmen's Compensation, Insurance and Safety Act (Deering's Gen. Laws, 1923, p. 1711) § 26.

Appeal from Superior Court, Alameda County; James G. Quinn, Judge.

Action to recover money for medical services and salary, by the City of Oakland, against Theodore D. Lyckberg. From the judgment, plaintiff appeals. Judgment modified, and, as modified, affirmed.

Preston Higgins, City Atty., C. Stanley Wood, Asst. City Atty., and Homer W. Buckley, Deputy City Atty., all of Oakland, for appellant.

Louis V. Crowley, of San Francisco, for respondent.

Jess E. Stephens, City Atty., and Willis L. Grafton, Deputy City Atty., both of Los Angeles, amici curiæ in support of appellant.

STURTEVANT, J. On the 18th day of February, 1926, Nels G. Rosen was a duly appointed, qualified, and acting police officer of the city of Oakland; on that date at about 4:30 p. m. he was injured by being knocked down by an automobile driven by the defendant; thereafter the plaintiff paid $172.50 for medical and surgical treatment, hospital and nurse bills, drugs, X-rays, and surgical appliances, and it also paid Rosen $607.37, being the full amount of his salary during the time that he was disabled and did not report for work; thereafter it commenced this action to recover the moneys so expended; the defendant appeared and answered; the parties stipulated as to the facts; and the case was tried before the trial court sitting without a jury. The trial court made findings in favor of the plaintiff, in which it found that the plaintiff had made the expenditures above enumerated and, as conclusions of law, it ordered repaid to the plaintiff the above-mentioned item of $172.50, but on the second item only $394.79. The plaintiff has appealed and has brought up the judgment roll.

[1-3] The sole question before this court is whether the plaintiff was entitled to be reimbursed $607.37, the amount of salary paid to Officer Rosen while he was disabled and unable to work. The defendant asserts that the judgment was for the total amount which the Workmen's Compensation, Insurance and Safety Act (Deering's Gen. Laws, p. 1711) authorized, and that the judgment should be affirmed. It is assumed that the statute cited is the only statute involved. In making this assumption we think the defendant falls into error. Nels G. Rosen was, at the time of the accident, a duly appointed, qualified, and acting policeman of the city of Oakland. At that time the city of Oakland was a duly created and acting agency of a sovereign state, the state of California. Nels G. Rosen was therefore a public officer. Noble v. City of Palo Alto (Cal. App.) 264 P. 529; Patton v. Board of Health, etc., 127 Cal. 388, 393, 59 P. 702, 78 Am. St. Rep. 66. The salary of the officer was fixed by virtue of a statute authorizing the same to be fixed and that salary was an incident to the title to the office and not to the position and performance of the duties of the office. People ex rel. Dorsey v. Smyth, 28 Cal. 21, 25; Chubbuck v. Wilson, 151 Cal. 162, 165, 90 P. 524, 12 Ann. Cas. 888. It follows that a public officer having the legal title to his office is entitled to the salary whether he performs the duties thereof or does not. It also follows that, by virtue of existing laws, the city of Oakland is obliged to pay its policemen whether they are confined to their beds by reason of physical injuries or are at work. The salary paid to the officer during the time he was off duty would have been a proper item of damage in a tort action. Civ. Code, § 3333. The act cited by the defendant contains nothing contrary and was not intended to contain anything to the contrary. It was enacted for the purpose of protecting persons, including, among others, police officers. The statute, however, was not enacted to change the rights of a sovereign agency as against the wrongs of third persons. It is not controverted but what the trial court made its estimates by following the provisions of the act cited by the defendant. The question before us is, Do the provisions of that statute fix the amount which the plaintiff may claim in this action? In the Workmen's Compensation Insurance and Safety Act the particular passage which is pertinent is section 26. Omitting irrelevant parts, it is there provided:

> "* * * Any employer having paid, or having become obligated to pay, compensation, may likewise bring an action against such other person to recover said damages. * * * If the suit be prosecuted by the employer alone evidence of any expenditures which the employer has paid or become obligated to pay by reason of said injury or death shall be admissible, and such expenditures shall be deemed a part of the damages, including a reasonable attorney's fee to be fixed by the court; and if in such suit the employer shall recover more than the amount he has paid or become obligated to pay as compensation he shall pay the excess to the injured employee or other person entitled. * * *"

The defendant argues that "compensation" has a limited meaning and cites section 3, subd. 3, which is as follows:

> "The term 'compensation' means compensation under this act and includes every benefit or payment conferred by sections six to thirty-one, inclusive, of this act upon an injured employee, or in the event of his death, upon his dependents, without regard to negligence."

Conceding the fact, the argument leads nowhere, because, whatever the meaning of the word, it includes the factors enumerated in section 26, and the scope of section 26 has been the subject of several decisions. The case of Western States, etc., Co. v. Bayside L. Co., 182 Cal. 140, 187 P. 735, is quite helpful. All of the facts do not appear in the opinion. An examination of the record discloses that a pile of lumber owned by the defendant toppled over and killed J. J. Sullivan, who was employed by the plaintiff. Thereafter the plaintiff obligated itself to pay the widow of the deceased $4,500. The widow collected insurance in the sum of $3,000. Thereafter the plaintiff sued the defendant to recover damages in the sum of $50,000. The jury brought in a verdict for the sum of $20,000 and the defendant appealed. On page 148 of 182 Cal. (187 P. 738) the court said:

> "There is nothing in the point that the measure of damages is that fixed in the Workmen's Compensation Act for compensation for injuries to be paid by the employer to the dependents of the employee. This action was brought against a third person causing such death, to recover the full amount of damages suffered by the family, and plaintiff is required to pay to the family

the difference, if any, over and above the amount theretofore paid to her."

So in this case this plaintiff could have sued for a much larger sum than it did sue for. In the case of Sacramento v. Central California T. Co., 78 Cal. App. 215, 248 P. 307, the court was considering an action brought by the city of Sacramento to recover moneys paid out for injuries sustained by some of its firemen when the crew was hit by an interurban car. On page 219 of 78 Cal. App. (248 P. 308) the court used this language:

> "If, as a matter of law, the respondent paid or had become obligated to pay such compensation, the damages sustained by the respondent were necessarily the amount so paid or incurred by the terms of the act."

On a petition to have the cause transferred to the Supreme Court that court denied the petition and, on page 222 of 78 Cal. App. (248 P. 309), it used the following language:

> "The petition for a hearing in this court is denied. Such denial, however, should not be taken as an approval of what is said in the opinion indicating that the measure of damages in such cases is the amount fixed by the Workmen's Compensation Act for injuries to be paid by the employer to the employee or his dependents. (See Western States, etc., Co. v. Bayside L. Co., 182 Cal. 140, 187 P. 735). * * *"

It follows that the trial court erred in failing to award to the plaintiff the full amount of salary theretofore paid by the plaintiff to Nels G. Rosen.

The last sentence of the judgment rendered by the trial court is modified by striking out "$567.29" and inserting instead "$778.87." As so modified, the judgment is affirmed. The plaintiff will recover its costs on appeal.

We concur: KOFORD, P. J.; NOURSE, J.

---

95 Cal. App. 140

PEOPLE v. RAMIREZ. (Cr. 1733.)

District Court of Appeal, Second District, Division 1, California. Nov. 26, 1928.

1. Criminal law 🔑569—Evidence of purchase of marihuana from defendant with marked money furnished by officers did not show entrapment justifying reversal (State Poison Act, § 8, as amended by St. 1927, p. 105, § 1).

In prosecution for violation of the State Poison Act (St. 1907, p. 124), § 8, as amended by St. 1927, p. 105, § 1 (Deering's Gen. Laws Consol. Supp. 1927, Act 5994, § 8), evidence that prosecuting witness informed officers that she suspected defendant of selling marihuana, that officers arranged to have her obtain plant and pay defendant with marked money, and that prosecuting witness purchased plant from defendant without any element of persuasion outside of ordinary elements of purchase and sale between willing purchaser and willing seller, showed defendant was not induced to make unlawful sale and did not make case of entrapment such as would justify reversal of judgment.

2. Criminal law 🔑830—Requested instruction which was erroneous held properly refused.

Refusal of requested instruction which was itself erroneous *held* proper.

3. Criminal law 🔑757(3)—Requested instruction that testimony of officers using complaining witness to entrap defendant was entitled to little weight would have invaded province of jury.

Requested instruction, after stating that case was one of entrapment, that testimony of officers who used complaining witness to entrap defendant into committing crime was entitled to very little, if any, weight whatsoever, would have been invasion by court of proper functions of jury whose duty it was to weigh evidence and find facts.

Appeal from Superior Court, Los Angeles County; Elliot Craig, Judge.

Jose Ramirez was convicted of violation of the State Poison Act, and he appeals. Affirmed.

John F. Groene, of Los Angeles, for appellant.

U. S. Webb, Atty. Gen., John W. Maltman, Deputy Atty. Gen., and John D. Richer, of Los Angeles, for the People.

CONREY, P. J. By information duly filed, the defendant was convicted of the crime of violation of the State Poison Act, a felony, committed as follows:

> "That the said Jose Ramirez on or about the 26th day of July, 1928, at and in the County of Los Angeles, State of California, did wilfully, unlawfully and feloniously sell, furnish and give away flowering tops and leaves of Indian Hemp containing more than four grains of Indian Hemp to the avoirdupois ounce, in violation of an Act entitled, 'An Act to regulate the Sale and Use of Poisons in the State of California, and providing a penalty for the violation thereof.'"

[1] Defendant appeals from the judgment, and from an order denying his motion for a new trial. The so-called State Poison Act is a statute enacted in the year 1907 and amended at subsequent legislative sessions. The particular act alleged to have been committed by the defendant is forbidden by section 8 of that statute as amended in the year 1927. Stats. 1907, p. 124; Stats. 1927, p. 106. The statute is also contained, as Act 5994, in Deering's General Laws, 1923 Edition. See Deering's Consolidated Supplement of 1927, p. 1724, for said section 8, as now in force. Section 8 reads in part as follows: "It shall be unlawful for any person * * * to sell, furnish, or give away * * * flowering tops and leaves * * * of * * * In-

dian Hemp * * *" excepting upon the written order and prescription of a physician, etc. The fact that defendant made a sale of the prohibited article as charged in the information, was established by the evidence. The article in question is known by the common name of marihuana. The principal ground of appeal is that the evidence of the prosecution itself shows "that a trap was being laid by the colored woman Alice Joiner and the officers of the law to induce and persuade him to commit a crime"; and that, where the commission of acts constituting such crime is solely the result of such inducement and persuasion, a conviction will not be sustained. Numerous authorities on this question are cited in the brief for appellant. It appears, however, that the rule invoked by appellant has been carefully considered and the limitations under which it will be applied have been stated in recent decisions of our own state. In People v. Heusers, 58 Cal. App. 103, 207 P. 908, the court said:

> "It is urged that the defendant was entrapped into the commission of the offense. The defendant was in no wise induced to make the unlawful sale except by the mere request for the liquor and payment of the price thereof. This court has decided adversely to appellant's contention in People v. Barkdoll, 36 Cal. App. 25, 171 P. 440, and People v. Tomasovich, 56 Cal. App. 520, 206 P. 119."

In the Heusers Case the defendant was convicted of unlawfully selling intoxicating liquor in no-license territory. Certain detectives, acting at the request of the sheriff and district attorney of Glenn county, sought to purchase liquor from the defendant, who agreed to and at an appointed place did deliver the liquor.

An examination of the evidence in the case at bar shows a similarity to the Heusers Case on the essential point that the defendant was not induced to make the unlawful sale, except by the mere request for the marihuana and the payment of the price thereof. It appears that the witness Joiner had become acquainted with circumstances which led her to believe that defendant had been selling marihuana, and thereupon she informed the officers of her suspicion, and they made arrangements with her under which she obtained marihuana from the defendant and paid him marked money therefor. This money was furnished by the officers. She went to the place where she expected to find defendant and did find him there, sitting in his car. She addressed him thus:

> "I asked him if he knew where I could get some marihuana and he asked me how many did I want. I asked him how much they were and he said 50 cents apiece, and I said, 'Well, I can't get but two because I haven't but a dollar.'"

Thereupon defendant went away for a few minutes. On his return, the woman asked him "if he had it," and he said, "Yes." They then walked down the street a short distance to a place where he gave her the marihuana and she gave him the dollar bill. The authorities seem to be clear that under these circumstances the case is not one of entrapment such as would justify a reversal of the judgment. There was no element of persuasion outside of the ordinary elements of purchase and sale between a willing purchaser and a willing vendor, where the offer is made by the purchaser and accepted by the vendor.

[2, 3] Appellant claims that the court erred in its refusal to give the jury a requested instruction on the subject of entrapment. As the instruction itself is erroneous, the refusal was correct. In the offered instruction the court was requested (after stating that "this is a case known as entrapment," etc.) to instruct the jury that—

> "The testimony of the officers who used and had said complaining witness to entrap defendant into committing said crime is entitled to very little, if any, weight whatsoever."

Such instruction would have been an invasion by the court upon the proper functions of the jury, whose duty it was to weigh the evidence and find the facts.

The judgment and order are affirmed.

We concur: HOUSER, J.; YORK, J.

95 Cal. App. 144

BROOKS v. NELSON et al. (Civ. 3564.)

District Court of Appeal, Third District, California. Nov. 26, 1928.

1. Judgment 🔑153(2)—"Six months" for application from relief from default begins with clerk's entry thereof (Code Civ. Proc. § 473).

The six months within which defendants personally served with summons must, under Code Civ. Proc. § 473, apply for relief from default taken against them, begins with the clerk's entry of default, and not from the entry of judgment by the court.

2. Judgment 🔑153(1)—To set aside default judgment, where application is too late to set aside default, would be idle act (Code Civ. Proc. § 473).

Where application under Code Civ. Proc. § 473, to set aside default and default judgment is too late as regards the default, it would be an idle act to set aside the judgment; as, the default being in force, defendant could take no further steps affecting plaintiff's right of action, and it would be the court's duty immediately to render another judgment of like effect.

3. Appeal and error 🔑957(1)—Order on motion to set aside default will not be disturbed on appeal unless it clearly appears trial court abused its discretion.

Granting or denying motion to set aside default is so largely a matter of discretion with the trial court that, unless it is clearly made to appear that there has been an abuse of this discretion, appellate court will decline to set aside trial court's order.

4. Judgment 🔑143(2)—Defendant seeking relief from default must show good cause for delay and meritorious defense (Code Civ. Proc. § 473).

Before court can be called on to exercise a discretion to relieve a defendant from a default under Code Civ. Proc. § 473, defendant must show a reasonable statutory excuse for not appearing in time, and a meritorious defense.

5. Pleading 🔑121(1)—Denial merely for lack of sufficient information on which to base a belief is insufficient (Code Civ. Proc. § 437).

Under Code Civ. Proc. § 437, providing that, if defendant has no information or belief sufficient to enable him to answer an allegation, he may so state, and place his denial on that ground, denial must be predicated on lack of information and belief, and denial merely for lack of sufficient information on which to base a belief is insufficient.

6. Pleading 🔑121(3)—Matters within or presumptively within defendant's knowledge, or ascertainable from public records, may not be denied for lack of information and belief.

Defendant may not deny, for lack of information and belief, matters as to which he has knowledge or which are presumptively within his knowledge, or which may be ascertained from inspection of a public record.

7. Pleading 🔑121(1)—Answer denying, for lack of information and belief, fact which defendant ought to know, should state investigation and inability to learn fact.

Relative to right of defendant to make a denial for lack of information and belief, if when served with complaint he was actually ignorant of a fact which he ought to know, it was his duty to make investigation before answering, and, if he made investigation and for some unusual reason was unable to learn the fact, he should so state in his answer.

8. Appeal and error 🔑1036(1)—Any defect in designation of party plaintiff as executor of payee of note sued held harmless to defendants; plaintiff being the father and guardian of distributee of estate and owner of note.

Where plaintiff, who, in action on note executed to K., sued as executor of K., was father and guardian of the distributee of the estate and owner of the note, any defect in designation of party plaintiff was harmless to defendants.

9. Judgment 🔑153(1)—Right to have default set aside is not extended by length of time subsequent to entry of default that judgment is entered.

That default judgment was not entered till long after entry of the default does not extend rights of defendants to have default set aside.

Appeal from Superior Court, Los Angeles County; Harry A. Hollzer and William D. Dehy, Judges.

Action by Guy Brooks, as executor of W. J. Knapp, deceased, against Belle Ott Nelson and husband. From an adverse judgment and order, defendants appeal. Affirmed.

Henry P. Goodwin and Burton B. Crane, both of Los Angeles, for appellants.

J. R. Wilder and Barker & Keithly, all of Los Angeles, for respondent.

PRESTON, Justice pro tem. This is an appeal by defendants from an order of the trial court refusing to vacate a default judgment and also an appeal from the judgment.

On October 29, 1919, the defendants, for value received, made, executed, and delivered to one W. J. Knapp their promissory note for the sum of $25,000, due one year after date, with interest at the rate of 12 per cent. per annum, and secured by an assignment of whatever interest defendant had "as heir at law or legatee in the estate of Adam Ott, deceased." The note was not paid, and on October 29, 1924, the plaintiff, as executor of the last will and testament of W. J. Knapp, deceased, commenced this action in the superior court of Los Angeles county to collect all sums due under and by virtue of said note. The summons was issued and personally served upon both defendants in Los Angeles county on November 6, 1924. Neither of the defendants appeared in the action within the time allowed by law, and their default was regularly entered by the clerk on the 29th of November, 1924. On February 5, 1925, the defendants made a motion to vacate the default. This motion was denied by the court on February 11, 1925. The record before us does not contain the grounds upon which this motion was made, or what showing, if any, was made in support thereof. The transcript merely shows a copy of the minute order of February 11, 1925, denying the motion.

On June 19, 1925, judgment by default was rendered by the court, and the same was duly entered on June 24, 1925. On July 14, 1925, defendants made a motion, under section 473 of the Code of Civil Procedure, to vacate and set aside the judgment, but no further motion was made to vacate the default entered on November 29, 1924. On August 8, 1925, this motion was denied.

This appeal is from the judgment, and also from the order of August 8, 1925.

[1] Respondent contends that, when the order of August 8, 1925, was made, denying defendants' motion to vacate the judgment, the trial court had no jurisdiction to vacate either the default or the judgment. We think this contention must be sustained. It must be remembered that the default of defendants was entered by the clerk on November 29, 1924, and the motion to vacate the judgment was not filed until July 14, 1925. Therefore, the default of defendants had been entered for a period of seven months and fifteen days when the motion to vacate the judgment was made.

The application was made under section 473 of the Code of Civil Procedure, which provides that an application for relief from a judgment, order, or other proceedings taken against the applicant through his mistake, inadvertence, surprise, or excusable neglect, *must be made* "within a reasonable time, but in no case exceeding six months after such judgment, order, or proceedings was taken." In construing this provision of the Code, where personal service was had upon the defendant, as was the case here, both the Supreme Court and this court have held *that the clerk's entry of a default, and not the entry of the judgment by the court, fixes the beginning of the six months within which the application must be made.* Title Insurance Co. v. King Land Co., 162 Cal. 44, 120 P. 1066; McLain v. Llewellyn Iron Works, 56 Cal. App. 58, 204 P. 869; Mader v. Christie, 52 Cal. App. 138, 198 P. 45; Hinds v. Superior Court, 65 Cal. App. 223, 223 P. 422. Therefore, if the motion made on July 14, 1925, be considered a motion to vacate the default, as well as the judgment, it is clear that it was made too late.

[2] The setting aside and vacating the judgment alone, which was all the relief sought in said motion, would have been an idle act, because the default, entered on November 29, 1924, would have stood undisturbed. The default cut off defendants from making any further opposition or objection to the relief which plaintiff's complaint shows he is entitled to demand.

A defendant against whom a default has been entered is out of court, and is not entitled to take any further steps in the cause affecting plaintiff's right of action; he cannot thereafter, until such default is set aside in a proper proceeding, file pleadings or move for a new trial or demand notice of subsequent proceedings. Title Insurance Co. v. King Land Co., supra; Christerson v. French, 180 Cal. 523, 182 P. 27; Lunnun v. Morris, 7 Cal. App. 710, 95 P. 907; Green v. Rogers, 18 Cal. App. 572, 123 P. 974. If the judgment were vacated, it would be the duty of the court immediately to render another judgment of like effect, and the defendants, still being in default, could not be heard in opposition thereto. Title Insurance Co. v. King Land Co., supra.

However, if it be considered that the application of July 14, 1925, was the first application made, and that it was timely made under section 473, Code of Civil Procedure, and included a motion to vacate the default as well as the judgment, still we think the court's order denying relief to defendants was correct.

[3, 4] The granting or denying of a motion of this character is so largely a matter of discretion with the trial court that, unless it is clearly made to appear that there has been an abuse of this discretion, this court will decline to set aside the trial court's order. Nicoll v. Weldon, 130 Cal. 666, 63 P. 63; Staley v. O'Day, 22 Cal. App. 149, 133 P. 620; Jones v. Southern Pacific Co., 71 Cal. App. 773, 236 P. 336; Jergins v. Schenck, 162 Cal. 747, 124 P. 426; Savage v. Smith, 170 Cal. 472, 150 P. 353; Waite v. Southern Pacific Co., 192 Cal. 467, 221 P. 204; Brasher v. White, 53 Cal. App. 545, 200 P. 657; Toon v. Pickwick Stages, 66 Cal. App. 450, 226 P. 628; Rahn v. Peterson, 63 Cal. App. 199, 218 P. 464; Park v. Hillman, 67 Cal. App. 92, 224 P. 100; Sofuye v. Pieters-Wheeler Seed Co., 62 Cal. App. 198, 216 P. 990. But before the court can be called upon to exercise a discretion to relieve a defendant from a default under section 473, Code of Civil Procedure, at least two things must be made to appear, to wit: (1) The defendant must present to the court a reasonable excuse, based upon one of the statutory grounds of mistake, inadvertence, surprise, or excusable neglect, why he did not appear within the time provided by law; (2) that, if permitted to appear, he has a meritorious defense to plaintiff's cause of action upon the merits—or, in other words, the party in default must show both good cause for the delay and a meritorious defense before he can call upon a court for relief. Neither of these essential elements was shown to the trial court in this case. An examination of the record, including the affidavits and the proposed answer, shows that the only matters

upon which defendants rely in support of either phase of this twofold showing are: (1) The denial in the proposed answer for lack of "sufficient knowledge or information upon which to base a belief" of the nonpayment of the note, upon the theory that possibly the executor of the Ott will may have made payments on the note without defendants' knowledge; (2) the entry of the decree of distribution in the Knapp estate two days before the commencement of this action, distributing the note in question to the ward and minor son of plaintiff, coupled with the averment in defendants' affidavits to the effect that they did not know of the entry of the decree of distribution in the Knapp estate until after their default had been entered.

[5] Section 437 of the Code of Civil Procedure does not permit such a traverse of a positive allegation in a verified complaint. Under this section, the only time when such an allegation may be denied, other than positively, is when a defendant has no "information *or belief* upon the subject sufficient to enable him to answer," in which case he may so state in his answer and base his denial upon that ground. It is clear that the denial in the proposed answer is insufficient. The answer does not state that defendants have "*no belief*" upon the subject of payment.

In the case of Turner v. Watkins, 36 Cal. App. 503, 172 P. 620, the court said:

> "It will be observed that the denials in the answer in this action were predicated upon a lack of information only and not upon a lack of information and belief. A denial in that form is insufficient, for section 437 *permits a denial only upon the want of both information and belief and not upon a want of information alone.*"

[6, 7] Furthermore, a defendant may not deny, for lack of information and belief, matters as to which he has knowledge or which are presumptively within his knowledge. The rule is also well established that, when the existence of an alleged fact may be ascertained from an inspection of a public record, its existence cannot be put in issue by a denial based solely upon information and belief. Wm. Wilson Co. v. Trainor, 27 Cal. App. 43, 148 P. 954; Art Metal Const. Co. v. Anderson Co., 182 Cal. 33, 186 P. 776. In this case it is not even stated whether or not any moneys ever became due to either of the defendants from the Ott estate, and, if so, whether or not they have tried to ascertain if any payments were made by the executor on the obligation in question. The proof shows that defendants never, until the time of the filing of the proposed answer, questioned the balance claimed to be due on the note. Defendants knew of the filing of the action as early as November 6, 1924, when summons was served upon them, and they were then apprised of the exact amount of the demand; they knew of the entry of the default, according to the affidavit of Belle Ott Nelson, as early as February 1, 1925, yet five months after that time, and on July 14, 1925, they verified the proposed answer containing this evasive and frivolous denial. If there was money available for payment, and the remotest possibility that any such payment had been made, they had ample time within which to investigate and acquaint themselves with the facts. If they made such an investigation and for some unusual reason they were unable to learn the facts, they should have so stated in their answer.

In Zany v. Rawhide Gold Mining Co., 15 Cal. App. 373, 114 P. 1026, the court used this language, which is particularly appropriate in the case at bar:

> "The assumption that defendant had no positive knowledge as to all these matters is opposed to common observation and experience. If a defendant does know the facts, and lacks the courage or the candor to declare them, he can not expect any consideration from a court of justice. If, when he is served with the complaint, he is actually ignorant of any material fact which he ought to know, it is his duty to become informed before he files his answer. Mendocino County v. Peters, 2 Cal. App. 28, 82 P. 1122."

It is readily apparent that defendants have no defense whatever to plaintiff's cause of action, and have made no showing of mistake, inadvertence, surprise, or excusable neglect, as contemplated by section 473, Code of Civil Procedure.

[8] The plaintiff is the father and also the guardian of Guy Haarer Brooks, the distributee of the Knapp estate, and the owner of the note in question, and, if there was any defect in the designation of the party plaintiff, it was certainly harmless as far as defendants were concerned.

If the entire matter be considered as within the discretion of the trial court, we are of the opinion that the court's discretion was properly exercised in denying relief to defendants.

[9] The appellants lay great stress upon the fact that the judgment was not entered until June 19, 1925, when the default was entered November 29, 1924. This delay in no way prejudiced the rights of the plaintiff, and conferred no rights upon the defendants, whose default had been regularly entered and had not been vacated. Christerson v. French, supra.

Other contentions made by defendants are without merit, and do not require discussion. We think that there is no merit whatever in the appeal.

The order and judgment should be affirmed, and it is so ordered.

We concur: FINCH, P. J.; PLUMMER, J.

95 Cal. App. 297

PLATT v. OKAMOTO. (Civ. No. 5541.)

District Court of Appeal, Second District, Division 1, California. Dec. 5, 1928.

1. Appeal and error 🔑1008(1)—Whether evidence conclusively showed plaintiff was contributorily negligent held for trial court from all evidence before it.

In action for damages to plaintiff's automobile caused by collision with defendant's truck, question whether testimony conclusively showed plaintiff was guilty of contributory negligence *held* for trial court to determine from all evidence in case before it.

2. Appeal and error 🔑1071(6)—Defendant introducing no evidence of plaintiff's contributory negligence could not complain of trial court's failure to find on issue when finding, if made, would have been adverse.

Where defendant sued for injuries resulting from collision between plaintiff's automobile with defendant's truck did not introduce any evidence to show contributory negligence by plaintiff, and there was not sufficient evidence in record before Court of Appeal to show such contributory negligence, defendant could not complain on appeal that trial court failed to render finding against him on such issue, when it is apparent that such finding, if made, would have been against defendant.

Appeal from Superior Court, Los Angeles County; Ruben S. Schmidt, Judge pro tem.

Action by Lawrence T. Platt against C. Okamoto. Judgment for plaintiff, and defendant appeals. Affirmed.

Randall & Bartlett and A. P. G. Steffes, all of Los Angeles, for appellant.

Voltaire Perkins, of Los Angeles, for respondent.

YORK, J. The appellant asked for a reversal of a judgment rendered for damages to the automobile of plaintiff, caused by a collision with the rear end of the truck of the appellant, on three grounds:

First. That the evidence was insufficient to show that any negligence on the part of the defendant was the proximate cause of the accident in question, but that, on the contrary, the testimony of plaintiff, by which he is bound, conclusively proved that there was no causal relation between the negligence of defendant and the collision.

Second. That the testimony of plaintiff and his own witness conclusively showed that the former was guilty of contributory negligence, which was the proximate cause of the accident in question.

Third. That the court erred in omitting to make a finding of fact upon the question of contributory negligence.

As to the first proposition, there was sufficient evidence in the record to justify the judgment of the trial court.

[1] As to the second, we cannot find wherein the testimony of the plaintiff and his own witness conclusively showed the plaintiff was guilty of contributory negligence. That was a question for the trial court to determine from all of the evidence in the case before it.

[2] As to the third proposition, there was not sufficient evidence in the record for the court to make a finding that the plaintiff was guilty of contributory negligence which proximately contributed to the injury. No evidence was introduced by the appellant to show such contributory negligence, and there is not sufficient evidence in the record before this court to show such contributory negligence, and therefore the appellant cannot be heard here to complain that the trial court failed to render a finding against him upon such issue, when it is apparent that such finding, if made, would have been against the appellant. Spinks v. Clark, 147 Cal. 439, 82 P. 45; Arnaz v. Forbes, 51 Cal. App. 665, at 666, 197 P. 364; Winslow v. Gohransen, 88 Cal. 450, at 451, 26 P. 504.

Upon examination of the entire record, we cannot say that the failure to find upon such an issue has resulted in any miscarriage of justice.

The judgment is therefore affirmed.

We concur: HOUSER, Acting P. J.; CRAIL, Justice pro tem.

---

95 Cal. App. 336

NORMAN v. DE BOTILLER. (Civ. No. 5420.)

District Court of Appeal, Second District, Division 1, California. Dec. 6, 1928.

1. Bills and notes 🔑517—Defendant's denial to signing note sued on created conflict constituting sufficient answer to contention that evidence did not justify finding for defendant.

Where defendant sued on note testified that she did not sign notes, conflict in evidence was presented constituting sufficient answer to plaintiff's contention that evidence was insufficient to justify findings for defendant.

2. New trial 🔑99—New trial held properly denied, where new evidence was cumulative and plaintiff did not exercise diligence in discovering new evidence nor present affidavit of new witness.

In action on notes defended on ground that notes were not signed by defendant, order denying plaintiff's motion for new trial, for new evidence of letters signed by defendant which would establish defendant's signatures to notes, *held* properly denied, and could not be disturbed on appeal, where it appeared that plaintiff did not exercise diligence in discovering new evidence, that no affidavit was presented by any person by whom facts constituting new evidence were proposed to be established, and that evidence was merely cumulative.

3. Appeal and error 🔑977(1)—New trial 🔑6—Grant or refusal of new trial is within court's discretion, not reversible unless abused.

Grant or refusal of new trial is within trial court's discretion, not to be disturbed unless abused.

Appeal from Superior Court, Los Angeles County; Walter Guerin, Judge.

Action by Mary Norman against Ynes B. De Botiller. Judgment for defendant, and plaintiff appeals. Affirmed.

George W. Wright, of Los Angeles (Hugh Foster, of Los Angeles, of counsel), for appellant.

Edw. F. Wehrle, of Los Angeles, for respondent.

HOUSER, J. Action brought by distributee of an estate on two promissory notes alleged to have been executed by defendant. The answer denied the allegations of the complaint, particularly with reference to the execution by defendant of either of the notes in question. From a judgment in favor of defendant, plaintiff appeals.

[1] On the trial defendant testified that she did not sign either of the notes, thereby presenting a conflict in the evidence—which fact under the well-known rule relating to appeals, constitutes a sufficient answer to appellant's contention that the evidence was insufficient to justify the findings and the judgment.

Appellant also urges the point that the trial court erred in denying plaintiff's motion for a new trial. The said motion was based upon alleged facts contained within affidavits made respectively by plaintiff and a witness who was present and testified at the trial of the action. By such affidavits it was made to appear that if a new trial were granted, by the use of certain letters purporting to have been signed by defendant, plaintiff would be able to establish the signature of defendant to the notes upon which the action was brought. However, no affidavit was presented to the court by any witness by whom such fact was proposed to be established. Other than the bare statement that after the trial of the action the so-called "new evidence" had come to the knowledge of plaintiff, "which ordinary prudence, care and diligence could not have discovered prior to the trial of the action," neither of the affidavits contained any showing of diligence to produce such evidence at the time the trial occurred.

The counter affidavit of defendant showed that, in addition to the denials of the allegations of the plaintiff, contained in the answer of defendant, plaintiff had actual notice in ample time prior to the trial that defendant denied that she signed either of the promissory notes in question; also, that in all probability the evidence by which plaintiff expected to establish the fact that the signature to the notes was that of defendant was just as available to plaintiff before the trial occurred as it was after that event.

[2, 3] Without reference to other apparently good reasons therefor, it satisfactorily appearing that plaintiff did not exercise due care and diligence in discovering the "new evidence" to which attention has been directed; that no affidavit was presented by any person by whom the facts constituting such "new evidence" were proposed to be established; that at most such "new evidence" would have been cumulative in character and effect; that, considering the grounds of the motion, the decision thereof rested within the sound discretion of the court; and that no abuse of discretion of the court is shown—it follows that the order denying such motion cannot be disturbed on appeal.

The judgment is affirmed.

We concur: YORK, J.; CRAIL, Justice pro tem.

---

95 Cal. App. 117

BROWN v. SWEET. (Civ. 4825.)

District Court of Appeal, Second District, Division 2, California. Nov. 22, 1928.

1. Pleading 🔑18—Material matters in pleadings must be distinctly stated in ordinary and concise language.

It is a general rule of pleading that material matters must be distinctly stated in ordinary and concise language, and may not be left to inference.

2. Vendor and purchaser 🔑341(2)—Defendant's proof that he conveyed undivided shares in land, under answer alleging that he had conveyed "other and different lands," held inadmissible as constituting "material variance;" "land;" "title in fee" (Code Civ. Proc. § 471).

In action to recover money had and received, based on defendant's failure to convey real estate as agreed, defendant under answer alleging that he had conveyed "other and different lands" was not entitled to prove that he had conveyed to plaintiff an undivided interest or shares in land, since such proof amounted to a material variance, under Code Civ. Proc. § 471; "land" being distinguished from an estate or undivided interest therein; "title in fee" carrying with it absolute dominion and disposal of property.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Material Variance; Second Series, Title in Fee; First, Second and Third Series, Land.]

3. Judgment 🔑251(2)—Defendant's recovery, as well as plaintiff's, is dependent on case made by his pleadings.

Defendant's recovery, as well as plaintiff's, must be on case made by his pleadings and not on the case which may be developed by the proofs.

4. **Pleading 🔑127(2)—Answer admitting that defendant agreed to convey, and did convey, certain real property, admitted allegation of complaint that defendant agreed to convey particular 10-acre tract.**

Where complaint alleged that defendant agreed to convey 10 acres of land, answer which admitted agreement to convey certain real property, and that property had been conveyed, did not deny that defendant had agreed to convey the 10 acres mentioned in the complaint, and allegation of complaint was therefore admitted.

5. **Vendor and purchaser 🔑341(3)—Defendant, sued for failure to convey land, failed to prove conveyance of land as alleged, where land conveyed was not described and deed covering undivided interest was introduced without evidence of plaintiff's acceptance (Code Civ. Proc. § 471).**

In action to recover money received by defendant under promise to convey lands, in which defendant admitted agreement to convey, but alleged that he had conveyed all the lands covered by the agreement, *held*, that there was a failure of proof on defendant's part, under Code Civ. Proc. § 471, where the land covered by the agreement was not described and there was no evidence of plaintiff's agreement to accept an undivided interest in lands which was described in deed introduced by defendant.

6. **Trial 🔑396(7)—Finding, contrary to admission of defendant's answer, that defendant never agreed to convey property, held error.**

In action to recover moneys received by defendant under his agreement to convey real estate, in which defendant in his answer admitted the agreement which plaintiff claimed had been broken, court's finding that there was no agreement between the parties for the conveyance of the property in question *held* error.

7. **Evidence 🔑23(2)—Court takes judicial notice of location of land conveyed with reference to town in which it was to be located under agreement.**

Court takes judicial notice of location of land described by township and range, with reference to town in which land conveyed was to be situated under agreement.

8. **Appeal and error 🔑1010(2)—Findings in favor of party as to whom there has been total failure of proof must be disregarded (Code Civ. Proc. § 471).**

Where there has been total failure of proof within the meaning of Code Civ. Proc. § 471, findings in favor of party whose proof failed must be disregarded.

9. **Vendor and purchaser 🔑341(3)—In action to recover moneys paid under promise to convey, deeds in defendant's possession at time of trial, received by plaintiff after commencement of suit, were inadmissible for want of delivery and acceptance.**

In purchaser's action to recover moneys received by vendor under promise to convey, deeds introduced in evidence by defendant covering undivided interest in land were inadmissible for want of delivery, or acceptance, where they were in possession of defendant at the time of the trial, and where defendant sent them to plaintiff only after commencement of suit.

10. **Specific performance 🔑29(2)—Contract to convey certain town lots not described with reference to location by testimony was void for uncertainty, as regards specific performance.**

Contract to convey town lots concerning location of which testimony was indefinite was void for uncertainty, as regards any right of plaintiff to specific performance.

11. **Vendor and purchaser 🔑148, 152—Purchaser could reject deeds on ground that they covered different property from that contemplated, and that they were tendered after action had been instituted.**

Where deeds were given purchaser covering land other than that which was agreed to be conveyed, purchaser was entitled to refuse acceptance on ground that deeds did not comply with the agreement and also on ground that they were tendered after action had been instituted.

12. **Deeds 🔑59(1)—Mere recordation of deed by grantor does not constitute "delivery" (Civ. Code, § 1059).**

Mere recordation of deed by grantor does not constitute "delivery"; grantee's assent and acceptance being essential, under Civ. Code, § 1059.

[Ed. Note.—For other definitions, see Words and Phrases, First, Second and Third Series, Deliver; Delivery.]

13. **Deeds 🔑54, 64—Deed is void where there is no delivery or acceptance (Civ. Code, § 1059).**

Where there is no delivery and acceptance, deed is void, under Civ. Code, § 1059.

14. **Deeds 🔑56(7)—Deeds sent grantee covering different property were void for want of delivery and acceptance, where grantee returned them, notwithstanding their recordation at instance of grantor (Civ. Code, § 1059).**

Deeds covering different property from that agreed on which were tendered after institution of grantee's action were void for want of delivery and acceptance, under Civ. Code, § 1059, where deeds were returned to grantor, notwithstanding fact that deeds had been recorded at instance of grantor.

Appeal from Superior Court, Los Angeles County; William C. Doran, Judge.

Action by Annie Brown against Homer E. Sweet. Judgment for defendant, and from the judgment, and an order denying a new trial, plaintiff appeals. Reversed.

Lander W. Butterfield, of Pasadena, for appellant.

Turnbull, Heffron & Kelley, of Los Angeles, for respondent.

KEETCH, Justice pro tem. In this case the plaintiff and appellant sought to recover the sum of $1,215, money had and received by the defendant, following his alleged failure to convey certain real estate. The trial court gave judgment for the defendant, and the appeal is from the judgment and order denying a motion for a new trial.

It is first urged by appellant that the evidence admitted over his objection was so different in its general scope and meaning from the admissions and allegations of the answer as to amount to a failure of proof within the meaning of section 471, Code of Civil Procedure.

The complaint alleges: (1) That on or about the 24th day of July, 1921, defendant had received from the plaintiff the sum of $550, for which he agreed to convey 60 acres of land, situated in the Antelope Valley, Los Angeles county; (2) that on or about the 22d day of December, 1922, the defendant received the sum of $350, for which he agreed to convey to George Brown, the son of plaintiff, 10 acres of land in the Antelope Valley; (3) that on or about the 18th day of January, 1923, the defendant received a Ford automobile of the value of $300, for which the latter agreed to convey to plaintiff six lots in the town of Lancaster, in the Antelope Valley, and to pay plaintiff the sum of $50 in cash. The complaint further alleges a total failure and refusal to convey the property. The answer admits the receipt of the $550, alleged in the first cause of action, but alleges that at the request of plaintiff defendant conveyed "other and different *lands*" to her in lieu of the 60 acres; that he received only $220, instead of the $350, as alleged in the second cause of action, and that "he conveyed all the *land* agreed to be conveyed"; and that as to the third cause of action he admits the receipt of the Ford automobile of the value of $300, but alleges the payment of the $50 in cash to the plaintiff and the conveyance to the plaintiff "of six *lots* in the town of Lancaster." (Italics ours.)

Appellant, for the purposes of the appeal, waives the question as to the difference between the $350 paid, as alleged in her complaint, and the $220 alleged to have been received by the defendant. She also admits the payment of the $50 cash to her, the plaintiff. It is asserted, therefore, that the only issue under the pleadings when the case went to trial was whether or not the defendant had conveyed the land as alleged by him.

It appears from the evidence of Mrs. Brown that she was a nurse by profession and first met the defendant while nursing a relative of his. She became friendly with him and his family and as the result of his representations to her was induced to pay him the various admitted sums of money for the property in question. These transactions covered a period of more than three years, beginning in 1919. She never saw the property. "He was to show it to me often, but he never did," she testified. As to the character of the land, Mrs. Brown stated it was farming land "then," but that the defendant told her "there would be oil in it in a short time; they were expecting to get oil in it." In reference to taking "other land," as alleged in defendant's answer, in lieu of the 60 acres, she testified that she was to get fifteen *lots*. She said: "He [defendant] showed me a paper where there was an oil stack on it, and a man standing on it, and he said the land was to be right there and that was sure to be oil, sure." At the request of the defendant, Mrs. Brown said she sold "forty *lots*" among her friends, for which she was to get a commission. In connection with the transfer of the automobile the plaintiff testified:

> "He wanted to give me land for the whole, but you see I needed some money as he had got it all from me.
>
> "Q. Did he give you any land for it? A. What he told me was, he had ten acres in Lancaster that belonged to himself, and that he would give me six acres. I says: 'I need the money; you have to give me some money.' He says, 'I will give you this six acres of land and $50.'
>
> "Q. That was for the automobile? A. For the automobile; and he says, 'I am going to put down a well on that land and there will be nothing but you and I on half shares.'"

The plaintiff testified that she frequently requested the defendant to give her a deed to the property, but that she received only promises. In a letter received in evidence the defendant, under date of January 9, 1920, wrote to the plaintiff:

> "I am going to get your deed this month or just as soon as I can get papers made out, which will be right away. I am in hopes oil will be struck then you will be rich—here's hoping—if you can send me $50 for a short time it will be appreciated."

In January, 1923, at the time she transferred the automobile to defendant, Mrs. Brown said she again asked him for deeds to the property and he said he would send them. Regarding that conversation, she testified:

> "He wanted the receipts back for all the money that I had paid as he could not give me the deeds until I would give him the receipts. * * * I says, 'Why?' He says: 'I have to show them you have the land paid before I can get the deeds.'"

Plaintiff had no further communication or dealings with the defendant except through her attorneys. Throughout the direct testimony of the plaintiff, and as far as is evidenced by the pleadings, the property to be conveyed was referred to as "land," "acres," or "lots," but upon cross-examination of plaintiff counsel for defendant revealed for the first time his contention that by the allegation in the answer that plaintiff agreed to take "certain other lands" was meant "an undivided interest" in other lands. Counsel for the plaintiff objected to the introduction of any such evidence upon the ground that it was not within the issues as framed by the pleadings. It was urged that the answer, while asserting the agreement to take certain other lands in lieu of the 60 acres, expressly admitted the obligation to convey ten lots under the second cause of action and six lots in exchange for the automobile. The court overruled the objection and admitted the evidence. Both parties to this appeal set out at some length the testimony of the plaintiff covering this point, and certain categorical questions and answers thereto give support to respondent's contention that an "undivided interest" was the basis of the agreement, while on the other hand, when taken on redirect examination, the plaintiff reiterated the statement that she was to receive fifteen "lots." Counsel for Mrs. Brown insists that her testimony, taken as a whole, indicates that she was confused over the term "undivided interest," and that the evidence was insufficient, aside from its inadmissibility. As to its insufficiency, however, we can only regard it as a conflict of testimony, which is peculiarly within the province of the trial court to decide and cannot be reviewed here. The fact that the court admitted this testimony and apparently based its findings upon it is the point presented by appellant that it was not within the issues as framed by the pleadings, and that "respondent's evidence was so different in its general scope and meaning from the allegations of his defense as to amount to a failure of proof within the meaning of section 471 of the Code of Civil Procedure." That section reads as follows:

> "What not deemed to be a variance. Where, however, the allegation of the claim *or defense* to which the proof is directed, is unproved, not in some particular or particulars only, but in its general scope and meaning, it is not to be deemed a case of variance, within the last two sections [469 and 470], but a failure of proof." (Italics ours.)

Upon the first cause of action the court found that the original agreement between the parties for the 60 acres had been canceled and in lieu thereof "the defendant Homer E. Sweet should and would convey to Annie Brown a 15/400 interest in and to said 40-acre tract of prospective oil land," and agreed with the defendant that said conveyance should be made at such time as Homer E. Sweet was in a position to obtain title to the said 40-acre tract. The court also found that prior to the commencement of the action the defendant made, executed, and delivered to the plaintiff a deed covering the 15/400 interest in said tract of land, and that the consideration for the $550 had been fully paid for by the conveyance of the property.

No testimony was given nor is any description of the land referred to in the finding of the court to be discovered anywhere in the record, except in the deed referred to as having been delivered by the defendant to the plaintiff and about which we shall have more to say later.

[1, 2] It is urged by appellant that respondent's sole defense to the first cause of action stated in the complaint was that he had conveyed "other and different lands" to plaintiff (referring to the substitution of other land for the 60 acres), whereas the proof offered by defendant went to show a conveyance of "an undivided interest," or shares in land. This calls for a definition of what is ordinarily meant by the word "land."

It may be regarded as elementary that the word "land" may and does include an estate or interest in the land. Indeed, as stated in Fish v. Fowlie, 58 Cal. 373, it "embraces all titles, legal or equitable, perfect or imperfect (Leese v. Clark, 20 Cal. 387), including such rights as lie in contract—those which are executory as well as those which are executed." But it has various meanings in the law as applied to the subject-matter involved, and for this reason the use of the word should be interpreted in the light of its ordinary meaning as so employed. This is particularly true, it seems to us, in the matter of pleading, when the matters at issue are required to be set forth in "ordinary and concise language." It is a general rule that material matters must be distinctly stated, and may not be left to inference to be drawn from doubtful or obscure language. 21 Cal. Jur. 42, citing Campbell v. Jones, 38 Cal. 507; Moore v. Besse, 30 Cal. 570, and Stringer v. Davis, 30 Cal. 318. In the case of Wood v. Anderson et al., 199 Cal. 440, 249 P. 862, the court said:

> "Viewing the evidence in the light most favorable to the appellant, as we must do on an appeal from a judgment of nonsuit, we are nevertheless confronted by the well-established rule that a contract, particularly one for the conveyance of real property, will not be enforced by a court of equity unless it contains all the material terms and also expresses each in a *sufficiently definite manner* [citing authorities]." (Italics ours.)

In view of this the question arises: Did the pleadings in the instant case, taken as a whole, indicate to the plaintiff the defense which she would be required to meet as one of the material issues, namely, an undivided interest in certain lands instead of the whole interest, as represented by the allegations of the complaint in terms of "lots," "acres," and "land"? We do not think so.

Title in fee to a lot, acre, or parcel of land carries with it the absolute dominion over it and the disposal of it. It is obvious that an undivided interest or limited estate in the land is a very different thing. "The land is one thing," says Plowden, "and the estate in the land is another thing, for an estate in the land is a time in the land, or land for a time." In the case of Hillyard v. Banchor, 85 Kan. 516, 118 P. 67, the court said:

> "The word 'interest' when applied to property has a variable meaning to be determined in any case by the context, intention and circumstances. It may be used as synonymous with 'estate' or 'title' or it may be used to denote something less than an estate or title."

The meaning of this word as used in an insurance policy was determined in Garner v.

Milwaukee Mechanics' Insurance Co., 73 Kan. 127, 84 P. 717, 4 L. R. A. (N. S.) 654, 117 Am. St. Rep. 460, 9 Ann. Cas. 459. A clause in the policy provided for forfeiture in case of change (with some exceptions) in "the interest, title or possession" of the property insured. It was said:

> "The word 'interest' as used in the policy is not synonymous with title. It means some right different from title. It cannot mean a greater estate than title, since 'title' as there used was intended to mean the entire estate. It must therefore have been used with the meaning generally attached to it, when used in contradistinction to title—as 'any right, in the nature of property, less than title.'"

In McDonald v. Bayard Sav. Bank, 123 Iowa, 413, 98 N. W. 1025, it is said:

> "'An interest' in land is the legal concern of a person in the thing or property, or in the right to some of the benefits or uses from which the property is inseparable."

Applying these definitions to the instant case, it would seem that the plaintiff, having pleaded that she bargained for the whole of a lot or parcel of land, and defendant's only answer thereto being that the agreement was to convey "certain other lands," counsel for plaintiff was entitled to assume, as he did, that according to the ordinary meaning of the language as thus used the only issue presented was as to certain other "lots," "acres," or "land," and the whole thereof, and not a part or undivided interest therein or something less than title to the whole. In other words, the pleadings presented one thing as an issue for trial and the defendant tendered proof of another thing.

[3] In Gillin v. Hopkins, 28 Cal. App. 582, 153 P. 725, where the defendant was sued for a specific amount of money and it appeared from the proof that he was to receive certain shares of stock by way of commission or the value of them, the court said:

> "The differences between the contract as alleged in the complaint and the proofs adduced by plaintiffs are so pronounced as to bring the case within the rule announced in section 471 of the Code of Civil Procedure."

Nor can the admissions of the plaintiff avail the defendant when such admissions are outside the pleadings as framed between the parties. As was said in Hicks v. Murray, 43 Cal. 515, 522:

> "It has so often been determined that unless the facts essential to the support of the case be alleged upon the record, evidence upon such omitted facts cannot be heard or considered, that a citation of authority upon the point is unnecessary. Evidence of facts, or stipulations as to the facts of a case, cannot make the case broader than it appears by allegation, nor can a party by mere force of facts admitted or proven become entitled to relief to which he would not have been entitled had his case been resisted only by general demurrer interposed to the pleadings upon which he relies."

If it were a fact that the plaintiff here agreed to accept an undivided interest instead of an absolute ownership in 60 acres, a plain allegation to that effect in the answer would have presented a plain issue and a valid defense. In McCord v. Martin, 47 Cal. App. 717, 723, 191 P. 89, 91, it was said that—

> "It is well settled by a long line of decisions in this state that 'the plaintiff must recover, if at all, upon the case made by the pleadings, and not upon a case which may be developed by the proofs'"—citing Kredo v. Phelps, 145 Cal. 526, 78 P. 1044.

We do not understand the rule to be any different when applied to a defendant.

[4, 5] In reference to the second cause of action the court finds that the defendant had received the sum of $220 "as part of the purchase price of 20/100 part, to wit, an undivided one-fifth interest in the Northwest quarter of the Southwest quarter of the Southwest quarter of Sect. Eighteen, Township Eight North, Range Eleven West, S. B. M., County of Los Angeles, State of California." It also finds that the sum of $220, "together with the price of the automobile, less $50 cash," was the consideration for the one-fifth interest, and that the defendant executed and delivered a deed to the plaintiff, "but through an error the real description of the property was not correctly inserted in the deed, and that a new deed *has now* been executed by the defendant." (Our italics.) The complaint as to this cause of action alleges that "the defendant agreed to convey to plaintiff's son, George Brown, ten acres of land in the said Antelope Valley." The defendant answered as follows:

> "This defendant admits that for the sum of $220 he was to convey and agreed to convey to the plaintiff certain real property, which property has been by him conveyed to the plaintiff. The defendant denies that he has refused to convey *the land*, or any land to the plaintiff, and alleges that all of *the land* agreed to be conveyed by the defendant to the plaintiff has been by him so conveyed." (Italics ours.)

This is not a specific denial, or any denial, that he, the defendant, had agreed to convey 10 acres of land, and failure to deny admits the allegation. Furthermore, we do not find any evidence whatever of any agreement on the part of Mrs. Brown or her son to purchase or accept "a 20/100 part, to wit, an undivided one-fifth interest in" the land, as set forth in the finding of the court. Neither in the pleadings nor in the testimony admitted is there to be found any legal description of whatever property might have been the subject of the agreements between the parties, except as stated in the deeds in the possession of defendant himself and offered by him at the trial. Incidentally we may also say that we can find no evidence whatever in the record to justify the finding that the automobile was a part of the consideration for the alleged interest. The automobile transaction is covered by the third cause of action, and the plaintiff testified that she was to receive 6 acres of land for it. As far as we can ascertain from the record, the only basis for the finding of the court as to any of the undivided interests specifically mentioned in the findings comes from the deeds referred to and received in evidence over objection. The pleading was as to 10 acres, in this cause of action. It would seem unnecessary to say that the deed, even assuming it admissible for any purpose, would not of itself be evidence of the agreement between the parties. As we see it, therefore, there was an entire failure of proof as contended for by the plaintiff under section 471, Code of Civil Procedure, and the finding was, as plaintiff contends, inconsistent with the admissions of the answer and the defense alleged.

[6, 7] In the third cause of action the plaintiff alleged that the defendant received from plaintiff "one Ford automobile of the value of $300 for which the defendant agreed to convey to plaintiff *six lots* of land in the town of Lancaster, County of Los Angeles," etc. In answer to this the defendant alleged that "he received of and from the plaintiff the Ford automobile referred to in plaintiff's complaint, for which he agreed to convey *six lots* in the town of Lancaster * * * and said lands have been conveyed to the plaintiff." In the face of these pleadings—after finding that the value of the automobile, namely, was part of the consideration for the alleged conveyance of the one-fifth interest described in the second cause of action, for which, as stated, we find no evidence in support—the court further finds:

> "That there was no agreement between the plaintiff and the defendant by which the defendant agreed to convey to plaintiff said lots of land in the town of Lancaster, to wit, six lots of land, or any other agreement other than as herein found."

Again we find the record entirely silent in support of any such conclusion. But even assuming there was something in the testimony of the parties to give support to that finding, it would be entirely contrary to and outside of the pleadings. If the conclusions we have reached in reference to the other causes of action are open to question, there can be none here. The agreement to convey six lots in the town of Lancaster is specifically pleaded, and the answer specifically admits the agreement to convey six lots in the town of Lancaster, and, furthermore, that he had so conveyed. There was here no allegation of any other agreement in the pleadings as was suggested in the other causes of action. That the court found something entirely foreign to and outside the pleadings is here beyond question. "It was error for the court to find in favor of defendant" referred to "upon an allegation of the complaint which he did not deny." Tracy v. Craig, 55 Cal. 91. The only issue raised was whether or not the defendant had conveyed the six lots in the town of Lancaster, and the only evidence we find touching that issue—assuming for the moment its admissibility—is found in another deed offered by the defendant and received in evidence. This deed purports to convey to the plaintiff the following described property:

> "The twenty one-hundredths (20/100 part, share, interest or quarter of the Northwest quarter 1/4 of the Southwest (1/4) of the Southwest Quarter, Twn. Eight (8) North Range 11, West, S. B. M. All in said County of Los Angeles," etc.

It becomes apparent that this description was lacking in an important particular, namely, the number of the section, and the court allowed it to be amended to read "section 18." In this particular it is pointed out by appellant that this court may take judicial cognizance of the fact that the land so described is not in the town of Lancaster. Faekler v. Wright, 86 Cal. 210, 24 P. 996. We take judicial notice, therefore, after consultation of maps, that the description as corrected places the land about three miles south and east of the town of Lancaster.

[8] We have found it necessary to go into these matters at some length because of the record before us. We are of the opinion that the contention of appellant that there has been a total failure of proof within the general scope and meaning of section 471 must be sustained. It follows, therefore, that the findings must be disregarded. Hicks v. Murray, supra; Ortega v. Cordero, 88 Cal. 224, 26 P. 80; Burnett v. Stearns, 33 Cal. 469; Gregory v. Nelson, 41 Cal. 279. In the case of Schirmer v. Drexler, 134 Cal. 134, 66 P. 180, cited by appellant, the court said:

> "The decree attempts to enforce the specific performance of a contract which is not only not set up in the complaint, but to which no reference is made anywhere in the pleadings. * * * Here the issues as made by the pleadings sustain no degree of kinship whatever to the findings and decree, and are, besides, in direct conflict with the allegations of the complaint. * * * If this kind of a judgment can be upheld on this kind of a record, then written pleadings are no longer necessary, and may well be dispensed with altogether."

[9] Aside from the inadmissibility of the evidence under the pleadings, appellant contends that there was neither a delivery to nor an acceptance by the plaintiff of the deeds already referred to and which, as far as the record shows, afford the only evidence of the legal descriptions of the undivided interests set out by the court in its findings. That they were not accepted is evidenced by the fact that at the time of the trial they were in the possession of the defendant and offered by him. According to the testimony of Mrs. Brown, already referred to, it was in January, 1923, when she last requested the defendant to send her the deeds, but that he failed to do so, and suit for the return of the money was filed May 23, 1923. There is some testimony given by the defendant on cross-examination, in answer to the question why he did not deliver the deed as promised, that "there were installments or monthly payments being made [presumably by him] which had to be completed before the deed could be executed," and that Mrs. Brown so understood it. Even assuming there is a conflict of evidence on this point as to the time of delivery, the fact remains that there was no acceptance by the plaintiff, the reasons for which would sufficiently appear from all the facts and circumstances to which we have called attention. It appears from the record that one of the deeds was recorded May 18, 1923, or five days before the filing of the action, and that the other was filed for record on June 1, 1923. These deeds were received by Mrs. Brown either through the mail or through her attorneys after they were recorded. Mr. Butterfield, counsel for Mrs. Brown, took the witness stand and testified that one of the deeds was brought to him in August or September following the filing of suit, and that the other, recorded on the same day the answer was filed, June 1, was received through the mails from the recorder's office several weeks after the answer had been filed.

[10] We already have had occasion to point out that one of the deeds when presented in court was found to be defective in the legal description of the property, and the court ruled that another deed with the correct description should be delivered to plaintiff. We have also noted that there is no evidence of the character, quantity, or location of the land ascertainable from the pleadings or from the testimony of the parties, outside of the deeds themselves. The testimony of Mrs. Brown as to the location of the land she was to receive is decidedly hazy, with the exception of that with reference to the six lots, which she definitely stated were described to her as being in the town of Lancaster. The deed offered by the defendant to cover this transaction apparently gives the description of a piece of property which, as we have pointed out, is not within three miles of Lancaster. Upon this state of facts it is evident that there are none of the essential elements of definiteness and certainty as to the subject matter upon which a contract could be based, and it is therefore void for uncertainty. In Wood v. Anderson, supra, the court said:

> "Viewing the evidence in this light the alleged contract falls far short of that degree of certainty which is essential to justify a court of equity in decreeing its specific performance. It is indefinite as to the land to be conveyed, the time, place and conditions of payment of the purchase price, and, in fact, as to the amount of the purchase price itself. The question is not one of conflict between the testimony of the appellant and that of the respondent, but it is one of such uncertainty and indefiniteness in appellant's testimony concerning the terms and conditions of the alleged contract as would require the court to indulge in mere conjecture and speculation in order to arrive at the intent of the parties."

This language is peculiarly applicable to the instant case.

[11-14] If the contentions of the plaintiff are correct, she was justified in refusing to accept the deeds, first, upon the ground that they conveyed to her something entirely different from what she had agreed to take, and, second, that they were tendered after the action had been instituted. In Wilcox v. Lattin, 93 Cal. 595, 29 P. 228, it was held that—

> "The tender of a deed by the defendant to the plaintiffs subsequent to the commencement of the action, even if such deed had been sufficient to transfer the title, did not revive the contract."

Again, the mere recordation of the deed by the defendant and respondent was not a delivery. In a case in the Supreme Court of the United States (Parmelee v. Simpson, 5 Wall. 81, 86, 18 L. Ed. 542), where it was held that the placing of a deed on record, the grantee being ignorant of its execution and not having authorized or given his assent to the record, did not operate as a delivery so as to give the grantee precedence over a mortgage executed between registration and a formal subsequent delivery, Mr. Justice Davis said:

> "The placing of the deed on record was Bovey's own act, and done without the assent of Simpson. Under this state of facts there was manifestly no delivery. The execution and registration of a deed, and delivery of it to the register for that purpose, does not vest the title in the grantee." Devlin, Deeds, vol. 1, § 291, p. 497.

Nor does the recording of a deed to such person constitute delivery without acceptance. In Hibberd v. Smith, 67 Cal. 547, 4 P. 473, 8 P. 46, 56 Am. Rep. 726, it was held that the delivery of a deed to a stranger for the benefit of the grantee is deemed to be a constructive delivery only when his assent thereto or facts which authorize a presumption of such assent are shown. On page 557 (4 P. 479) the court said:

> "The statute (Civ. Code, § 1059) does not recognize a delivery as perfected until an assent is proved either by act or by presumption. And when reliance is placed on a presumptive assent, how can such presumptive assent be found to the delivery of a paper, until all the facts are known to the grantee?"

In the instant case the deeds were returned to the defendant upon the advice of plaintiff's counsel. In Rasmussen v. Stanfield, 49 S. D. 120, 206 N. W. 475, the grantee named in the deed was advised by his attorney not to accept it. The deed was returned to the grantor. It was held that there had been no delivery and no acceptance. "A deed must be delivered before it becomes valid, and the court should hold, as matter of law, that there was no deed, when facts show no delivery. * * * Acceptance is necessary to the validity of a deed." Brandenburg et al. v. Botner et al., 221 Ky. 7, 297 S. W. 702.

Other grounds of appeal are presented by appellant, but in view of the conclusions we have reached it is not necessary to discuss them here. The motion for a new trial should have been granted.

Judgment reversed.

We concur: CRAIG, Acting P. J.; THOMPSON, J.

205 Cal. 733

PETROLEUM MIDWAY CO., Limited, v. MOYNIER et al.★

MOYNIER et ux. v. MOYNIER et al.

(L. A. 9513.)

Supreme Court of California. Dec. 17, 1928.

Hearing Denied in Bank Jan. 14, 1929.

1. Mines and minerals 🔑79(7)—Evidence sustained finding that separate lot owners, executing oil lease, were each entitled only to royalties from oil produced on his own lots.

Evidence *held* to sustain finding that owners in severalty of particular lots in tract, who together executed oil lease thereon, were each entitled only to royalties from his own lots under original lease, silent as to distribution of royalties, as modified by extension agreement limiting owners to royalties from wells on their own lots and supplemental agreement which superseded and canceled previous extension and amendments.

2. Evidence 🔑450(4)—Parol evidence held admissible to explain distribution of royalties under oil lease executed by several lot owners, as modified by extension and supplemental agreements (Civ. Code, § 1431; Code Civ. Proc. § 1860).

Oil lease covering entire tract, executed by owners in severalty of lots, and silent as to distribution of royalties among the owners, which was modified by extension agreements limiting owner of each lot to royalties from wells produced thereon, and permitting sale of part of leased premises, and by subsequent supplemental agreement superseding and canceling previous extensions and amendments, *held* so uncertain as to disposition of royalties as to render admissible parol evidence to show parties' intention as to participation therein, under Code Civ. Proc. § 1860, though lease as originally drawn might be strictly joint lease, under Civ. Code, § 1431.

3. Contracts 🔑169—Contract should be construed with respect to situation of parties at time it was made.

Contract should be construed in light of surrounding circumstances and with respect to situation of parties at time contract was entered into.

4. Appeal and error 🔑1050(1)—Admission of parol evidence to show intention of parties under original lease was not prejudicial, where such intention was demonstrated by subsequent modifications thereof.

Where original oil lease was modified by subsequent agreement of parties, so that lessors, as owners of separate lots, were entitled only to royalties from wells on their respective lots, admission of parol evidence to show that such was the intention of the parties under the original lease, if error, was not prejudicial.

Department 1.

Appeal from Superior Court, Los Angeles County; Frank C. Collier, Judge.

Interpleader action by the Petroleum Midway Company, Limited, against Marius Moynier and others, in which certain defendants filed a cross-complaint. From an adverse judgment, certain other defendants appeal. Affirmed.

Milton M. Cohen and Jerome H. Kann, both of Los Angeles, for appellants.

J. Wiseman Macdonald, of Los Angeles, for cross-complainants respondents.

Morgrage, Stanley & O'Brien, of Los Angeles, for plaintiff respondent.

CURTIS, J. This proceeding was instituted to require the respondents Marius and Adrienne Moynier, husband and wife, and appellants Emile and Marie Moynier, husband and wife, and Abel and Jerondine Moynier, husband and wife, to interplead as to their respective rights in certain royalties received from the operation of oil wells drilled upon lands belonging to said respondent Marius Moynier. Both the appellants and respondents appeared in said action, and by proper and appropriate pleadings set forth their respective claims to said royalties. Respondents contended that they were the owners of and entitled to receive all of said royalties from plaintiff, while the appellants contended that said royalties belonged to both appellants and respondents in the proportion of one-third to respondents, one-third to appellants Abel Moynier and his wife, Jerondine Moynier, and one-third to Emile Moynier and his wife, Marie Moynier.

The respondent Marius Moynier and the appellants Abel and Emile Moynier are brothers, and were the owners in common of a certain tract of land containing something over 100 acres of land. While such owners they subdivided said land, under the name of the Moynier tract, into 10 lots, and by conveyances executed among themselves they became the owners in severalty of the lots in said tract as follows: Marius became the owner of lots 2, 9, and 10, containing 34.73 acres; Emile became the owner of lots 1, 5, and 6, containing 34.73 acres; and Abel became the owner of lots 3, 4, 7, and 8, containing 34.73. While they were the owners in severalty of the respective lots in said tract, as just set forth, they, with their respective wives, entered into a lease of the whole of said property with A. M. Parsons on the 9th day of May, 1921. Said lease is what is known as an "oil lease," and by the terms thereof said Parsons was given the right to drill and prospect for oil and other mineral products upon said tract, in consideration whereof Parsons agreed to pay to the lessors the sum of $2 per acre per month until drilling operations thereon were begun, and upon the discovery and production of oil from said land a royalty of one-sixth of the oil produced thereon. By the terms of this lease Parsons was to commence the actual work of constructing and erecting a drilling rig upon

---

★Hearing denied in bank.

said land within one year from the time title to the land upon which the first oil well was to be drilled had been satisfactorily shown to be in said lessors. It was provided in this lease that "all rent and royalties hereunder shall be made to the credit of lessors at the office of Sentous Realty Company in the city of Los Angeles, California, and such payments shall constitute full compliance with the terms hereof, and relieve the lessee of obligation to see to distribution of such rent and royalties." The time within which work should be commenced under said lease was on May 19, 1922, by a written agreement, executed by all of the parties thereto, extended, and in said agreement of extension it was agreed that lots 5 and 7, which had been sold by their respective owners since the execution of the original lease, should be excluded from the operation of the lease. It was further provided in this extension agreement that the clause of the original lease allowing a well to be drilled on the division line of any two lots in said tract should be abrogated, and that each well should be drilled wholly on one lot, and the owner of that lot should be the only participant in the royalty from such well. A second agreement, extending further the time in which said lessee was to begin work under said lease, was executed by all of the parties thereto on March 31, 1923. In this second extension agreement it was agreed that the monthly rental should be $500 per month, instead of $2 per acre per month, and it was further provided therein that the lessors were authorized to sell any portion of the leased land, except for oil development, and in case of any such sale or sales the land so sold should be excluded from the terms of the lease.

On April 24, 1924, the appellants and respondents entered into a supplemental agreement, the terms of which were substantially the same as those contained in the agreement granting the second extension as hereinbefore set out, except that the supplemental agreement contained a paragraph, numbered 4 therein, which was not contained in the second extension agreement. This paragraph reads as follows: "Except as above, the said lease shall remain unchanged, and all previous extensions and amendments of said lease are superseded and canceled hereby."

On the 11th day of June, 1924, the appellants and respondents joined in a letter to the Associated Oil Company, which company had become the owner of said lease. In this letter said parties directed that the payment of said monthly rental should be made direct to the respective owners of said lots, as follows: To Marius Moynier, $247.18; to Abel Moynier, $120.82; and to Emile Moynier, $132. Said letter closed with the statement that, "except as herein modified, all the terms, covenants and conditions of said lease and said supplemental agreement shall remain in full force and effect."

Said lease was thereafter assigned to the plaintiff herein, and the royalties which are made the subject of this controversy are those arising from oil produced by plaintiff from wells drilled in pursuance of said lease upon lot 9 of said Moynier tract, the owner of which is Marius Moynier, one of the respondents herein. The trial court held that respondent Marius Moynier was the owner of said lots 2, 9, and 10 of said tract, and that appellants had no interest in said lots; that respondents were entitled to receive all royalties to be paid to the lessors under said original lease, in so far as said lease applied to or affected said lots 2, 9, and 10; and that appellants were not entitled to any of said royalties and had no interest therein. From the judgment awarding said royalties to respondents, the appellants have appealed.

[1] It is appellants' contention that the lease of the premises involved herein is a joint undertaking, and that the rights of the parties to said lease are joint, and not several, and therefore that each of the lessors is the owner and entitled to receive an equal part or portion of all royalties which may accrue under said lease. On the other hand, it is the contention of respondents that, as the several lots which were the subject of said lease were owned in severalty by the respective lessors, each owner was to receive exclusively all royalties from his own lands. The trial court held that the lease, as finally modified by the parties thereto, was uncertain, in that it did not specify the amounts or proportions in which the royalties were to be distributed and paid to the several lessors, and over the objections of appellants admitted parol evidence to show the intention of the parties in respect to the distribution and payment of said royalties.

Without going into any extended review of the evidence thus admitted by the court, we are satisfied that, if said evidence was properly admitted, it shows beyond question that it was the intention of the parties to said lease, at least after the execution of the first extension agreement already referred to, that each owner of lots embraced within said lease should be entitled to receive all of the royalties from his particular lot or lots. In the original lease the only provision regarding the payment of the royalty was that directing that all rent and royalties were to be paid to the credit of the lessors at the office of the Sentous Realty Company, and such payment should constitute full compliance with the terms of said lease. In the first extension agreement, which was dated May 19, 1922, the provision in the original agreement providing that a well might be drilled on the division line dividing the property of two of the owners was changed as follows: "Each well shall be drilled wholly on one lot and the owner of that lot shall be the only participant in the royalty from such well, be it oil, gas or both, and the balance of lots included in this extension shall receive ground rental monthly in advance at the rate of two ($2.00) dollars per acre per month until drilling shall start thereon." In the second extension agreement, which was dated March 31, 1923, this rental was increased to $500 per month, but the above-quoted provision contained in the first extension agreement was in no way changed or altered. In the agreement of date April 24, 1924, as already noted, the terms of the second extension agreement were substantially restated, with a new paragraph added, designated as number four, which provided that, "except as above, the said lease shall remain unchanged and all previous extensions and amendments of said lease are superseded and canceled hereby."

It is by virtue of this paragraph 4 of the agreement of April 24, 1924, that appellants claim that the first extension agreement, of date May 19, 1922, and particularly that portion thereof which we have quoted above, and which provides that each well shall be drilled wholly on one lot, and the owner of said lot shall be the only participant in the royalty from such well, was canceled and superseded by the agreement of April 24, 1924. This provision that the owner of the lot upon which a well is drilled shall be entitled to all royalties on oil produced by said well, as we have already seen, while set out in full in the first extension agreement, was not mentioned or referred to in the second extension agreement. Appellants therefore claim that the first extension agreement and all its terms and provisions were abrogated and canceled by the agreement of April 24, 1924. Appellants also contend that their position in this regard is further fortified by the letter of June 11, 1924, above referred to, which was signed by the appellants and respondents and directed to the Associated Oil Company, and which, after referring to the original lease and the agreement of April 24, 1924, directed the proportions in which said monthly rental of $500 should be paid to the three owners of said lots, and closed with the following statement: "Except as herein modified, all the terms, covenants and conditions of said lease and said supplemental agreement shall remain in full force and effect."

It appears, from the testimony of those who prepared the supplemental agreement of April 24, 1924, that at the time of its preparation the Associated Oil Company was contemplating the purchase of the Moynier lease, and the supplemental agreement was drawn, and the Moyniers asked to sign the same, simply for the purpose of protecting the company, in case it purchased the lease, against any unrecorded agreement, or any agreement of which the company had no notice or knowledge, and which might affect its rights under the lease. The division of the royalties between the lessors was not discussed at the time of the preparation and execution of the supplemental agreement, and it was not drawn for the purpose of canceling or abrogating any agreement between the lessors as to the division of the royalties. The letter of June 11, 1924, was prepared and signed under much the same conditions and circumstances, and without any intention of disturbing the agreement between the lessors as to the payment of the royalties under the lease.

We might at this time explain a little more in detail the letter of June 11, 1924, and particularly that portion thereof which directs the payment of the monthly rental of $500 to the Moyniers in the following proportions: To Marius Moynier, $247.18; to Abel Moynier, $120.82; and to Emile Moynier, $132. At the time the Moynier tract was subdivided into lots, and these lots conveyed in severalty to the three brothers, and at the date of the lease in question, each of these brothers was the owner of 34.73 acres of land in said tract. After the execution of said lease, and before the first extension thereof on May 19, 1922, Emile Moynier had sold lot 5, containing 16.19 acres, which left him only 18.54 acres, and Abel Moynier had sold lot 7, containing 17.76 acres, which left him only 16.97 acres. Lots 5 and 7, therefore, long prior to the execution of the supplemental agreement and the signing of the letter of June 11, 1924, had been entirely eliminated from the lease. The revenue stamps attached to the deeds conveying these lots indicate that Emile Moynier received $16,000 for lot 5, and that Abel Moynier received $18,000 for lot 7, and that they each retained these respective amounts of money so received as their own individual property. Therefore, when the supplemental agreement of April 24, 1924, was executed, and the letter of June 11, 1924, was signed, the lots subject to the lease were owned as follows: Lots 2, 9, and 10, containing 34.73 acres, by Marius Moynier; lots 3, 4, and 8, containing 16.97 acres, by Abel Moynier; and lots 1 and 6, containing 18.54 acres, by Emile Moynier. The monthly rental of $500, by the letter of June 11, 1924, was made payable to the owners of said lots in proportion to their respective ownership in the lands leased, so that by the agreement between the three owners and their wives, as set forth in said letter, Marius Moynier received a monthly rental for his lands in the sum of $247.18, Abel Moynier for his lands the sum of $120.82, and Emile Moynier for his lands the sum of $132.

The agreement, as embodied in the letter of June 11, 1924, clearly indicated that the original lease of the lands, if it were ever intended by the parties thereto that it should be a joint lease, in which the lessors should share equally in the rent and royalties thereunder, had become modified, at least to the extent of the rent, so that the owners of the leased land participated in said rent, not equally and jointly, but unequally and in the proportion in which the lands which each lessor owned in severalty bore to the whole amount of the land embraced in the lease at the date of the letter of June 11, 1924. Nothing was said in this letter as to the disposition of the royalties which might accrue to the parties under the lease, but in the first extension agreement, being the agreement of date May 19, 1922, it was expressly provided that each well should be drilled wholly on one lot, and the owner of said lot should be the only participant in oil from such well. The testimony of those who prepared the supplemental agreement of April 24, 1924, under which appellants claim that all prior extensions and amendments to the original lease, including the first extension agreement, were canceled, although not without conflict, was sufficient to support the finding of the court that appellants and respondents had entered into an agreement whereby it was agreed that respondents should receive all the royalties from said lot 9. There was other evidence in support of this finding in addition to that which we have already referred to, but we deem a detailed reference thereto to be unnecessary. It is sufficient to hold that there was substantial evidence before the trial court in support of the finding just mentioned to justify said finding.

[2] This brings us to the consideration of the question as to whether the agreement between the parties was so uncertain upon the question of the payment of the royalties as to warrant the introduction of parol evidence to show how said royalties were to be participated in by the appellants and respondents. The original lease was silent as to the extent and as to the manner the lessors under the lease were to share in the royalties which might accrue to them thereunder. It did provide, however, that the lessee should continue drilling, in case oil was secured in paying quantities, until a total of ten wells were drilled; that lessee shall have the privilege of drilling one well on each respective property owned by the lessors, but that, if a well were drilled on the division line of two of the owners, it should be considered a community well, and should constitute a fulfillment of the drilling obligation on both such parcels. The lease as originally drawn might be construed as a strictly joint lease. Civ. Code, § 1431; Higgins v. California P. & A. Co., 109 Cal. 304, 41 P. 1087. But in the first extension agreement the original lease was so modified as to provide that "each well shall be drilled wholly on one lot, and the owner of that lot shall be the only participant in the royalty from such well." Just why this change was made in the terms of the original lease is not shown in the record. It does appear, however, that at that time Emile Moynier had sold lot 5 and Abel Moynier had sold lot 7, and thus reduced their ownership in the lands under the lease substantially to one-half of that which they each originally owned. The terms of the lease in this regard remained the same until the supplemental agreement of April 24, 1924, was executed. This was followed in a short time by the letter of June 11, 1924, wherein the appellants and respondents agreed among themselves that the rental should be divided between them in proportion to their ownership in the lands leased. No agreement, however, was made at this time regarding the royalty.

Should the parties under the supplemental agreement to go back to the original lease, under the terms of which, as contended by appellants, the royalties were to be divided equally between the three owners, or were they to continue under the lease as modified by the first extension agreement, or were they to participate in the royalties in the same proportion in which they had agreed to share the rent? The answer to this question must rest upon the proper construction of the various agreements entered into by the parties. In the first place, it will be noted that the original lease had been expressly modified in two material respects, aside from that contained in the first extension agreement, which appellants contend was superseded and canceled by the supplemental agreement. Since its execution the appellants, Emile and Abel Moynier, had each sold one of his lots covered by the lease, thereby reducing the amount of leased land which each of them owned to about one-half of that still owned by Marius Moynier. These lots so sold had been, by all of the parties to the lease, released from all of the terms thereof. Under these conditions, were Emile and Abel still to share equally in all royalties received under the lease with Marius, who owned almost as much of the leased land as Emile and Abel together owned?

The other modification of the lease was made by the second extension agreement, and confirmed by the supplemental agreement of April 24, 1924. As confirmed by the latter agreement it gave to the owners of the leased land the right to sell any portion of the leased land, except for oil development, prior to the completion of a certain test well, which was known as the Casserini test well, and which was then being drilled in the near vicinity of the leased lands of the parties hereto, or prior to the commencement of drilling operations upon any of the leased lands. The supplemental agreement further provided: "If any land covered by this lease is so sold, then this lease, as to the portion so sold, shall become canceled and void, and a quitclaim shall be given the lessor, releasing same from the operation of this lease, and the balance of the land shall still remain under the lease until sold or the Casserini test well be completed as above mentioned." Under this provision of the lease as it stood after the execution of the supplemental agreement, the appellants could have sold any or all of the remaining portions of the leased land then belonging to them, and upon such sale the land so sold would, under the terms of the modified agreement, have been released from the terms of said lease, and the balance of the land would have still remained subject to the terms of the lease. Had the appellants exercised this right, and sold all their said lands, would they still be entitled, under the terms of the lease, to participate in the royalties which might thereafter have accrued under the lease equally with respondent, who would have owned all of the land then covered by the lease?

The lease nowhere, either in its original or modified form or forms, furnished any answer to either of these two questions, without we accept appellants' contention that by the terms of the original lease the royalties were to be divided equally between the three Moyniers, and that in that respect the terms of the lease had never been changed, and therefore the appellants, notwithstanding the sale by them of all their lands covered by the lease, would still be entitled to participate in the royalties under the terms of the original lease, which they contend gave to each of the three owners of the land originally leased an equal share in the royalties. Such reasoning would lead to the most absurd results, and it is inconceivable that the parties to said agreement ever intended that any of them should share equally or at all in the royalties after having disposed of all his lands covered by the lease.

[3] The lease, as modified by the supplemental agreement of April 24, 1924, is clearly uncertain as to the disposition of the royalties to accrue thereunder. This uncertainty was caused entirely by the provisions of said supplemental agreement. Prior to its execution the terms of the agreement between the parties expressly provided that the owner of the lot upon which a well was drilled "shall be the only participant in the royalty from such well." Parol evidence was therefore admissible to explain this uncertainty, at least to the extent of showing the circumstances under which this supplemental agreement was made and entered into by the parties thereto. Code Civ. Proc. § 1860. "A court is not only to take a contract by all its corners, but is to be placed in the seats of the parties when it is made. In other words, a contract is to be construed in the light and with the knowledge of surrounding circumstances." 6 Cal. Jur. p. 294. "The contract should, of course, be construed with respect to the situation in which the parties were at the time it was made." Burrows v. Petroleum Dev. Co., 181 Cal. 253, 256, 184 P. 5, 7.

The action of the court in admitting parol evidence to explain the circumstances under which the supplemental agreement of April 24, 1924, was executed, was not erroneous. We have already considered this evidence, and held that such evidence, considered with all the other evidence in the case, was sufficient to support the findings of the court in respondents' favor.

[4] The court also admitted parol evidence to show that it was the intention of the parties under the original lease that the owner of the lot upon which a well was drilled should be the only one to participate in the royalty from said well. Appellants claim that the admission of such evidence was error. If so, the error was not prejudicial to any rights of the appellants, as the evidence which we have above referred to and reviewed shows without question that the original lease was modified by the subsequent agreements of the parties, so that it finally provided, if it did not do so in its original form, that each owner of a lot upon which a well was drilled should be entitled to all the royalty from said well.

For the reasons herein expressed the judgment is affirmed.

We concur: PRESTON, J.; SEAWELL, J.

205 Cal. 751

UNIVERSAL MILK CO. v. WOOD.

(Sac. 4108.)

Supreme Court of California. Dec. 19, 1928.

1. Quieting title 🔑14—Lessor, suing lessee to quiet title after giving notice of default required by lease, could recover possession without three-day notice (Code Civ. Proc. §§ 380, 1161, 1162; Civ. Code, §§ 791, 793).

Lessor, in suit against lessee to quiet title to property, after giving notice of default provided by lease as condition to forfeiture, *held* entitled to recover possession of property, under Code Civ. Proc. § 380, and Civ. Code, § 793, without necessity of giving three-day notice required in case of unlawful detainer proceedings, under Civ. Code, § 791, and Code Civ. Proc. §§ 1161, 1162.

2. Quieting title 🔑43—Lessor's suit to quiet title, in which lessee cross-complained in ejectment and lessor answered alleging default and re-entry, raised issue of lessor's right of possession (Code Civ. Proc. § 380; Civ. Code, § 793).

Lessor's suit to quiet title, in which lessee cross-complained in action in ejectment, and plaintiff answered, asserting defendant's default and that plaintiff had given written notice thereof as required by lease, and repossessed premises in accordance with lease, raised issue of plaintiff's right to possession of the premises, equivalent to action for possession of property under Code Civ. Proc. § 380, and Civ. Code, § 793; right to recover possession existing independently of unlawful detainer proceedings and three-day notice under Civ. Code, § 791.

3. Equity 🔑65(2)—Re-entry after lessee's default and apparent abandonment did not preclude lessor's quieting title, under doctrine of unclean hands.

Lessor *held* not precluded from having title quieted to property as against lessee who defaulted, under doctrine of unclean hands, where lessor re-entered the property, on finding it practically unoccupied, under belief that lessee had abandoned it and did not object to re-entry.

Department 1.

Appeal from Superior Court, Tulare County; F. H. Lamberson, Judge.

Action by the Universal Milk Company against Dale E. Wood, in which defendant asserted a cross-complaint. Judgment for plaintiff, and defendant appeals. Affirmed.

Feemster & Cleary, of Visalia, for appellant.

Goodfellow, Eells & Orrick, R. W. Palmer, M. T. Neff, Eells & Orrick, and Orrick, Palmer & Dahlquist, all of San Francisco, for respondent.

PRESTON, J. Plaintiff corporation sued defendant to quiet title to certain real property upon which is situated a plant to manufacture the by-products of milk. Ownership, possession, and right of possession were alleged, to which the defendant replied by admitting ownership and possession but denying the right of possession in plaintiff and setting up a written indenture of lease between the parties as the basis of his claim to the right of possession. Defendant also cross-complained in an action in ejectment, again setting up said lease and alleging that plaintiff wrongfully ejected him from the premises on the 28th day of December, 1925, and praying for restoration of the premises to him, together with damages at the rate of $500 per month for the time said premises had been withheld from him. Plaintiff answered said cross-complaint, admitting that it resumed possession of said property on the said date; denying that it forcibly or unlawfully ejected cross-complainant; denying the claim for damages; and alleging that on the 13th day of November, 1925, cross-complainant was in default with respect to the obligations undertaken to be performed under said lease in the sum of $155.50, this item relating to earthquake insurance on said plant as provided in said lease, that on said day said cross-defendant gave cross-complainant written notice of said default and made demand for the payment of said amount, that same was not paid or any part thereof and thereafter and on the 22d day of December, 1925, notice was given the cross-complainant of the cancellation and termination of said lease, and thereafter and on the 28th day of December, 1925, cross-defendant repossessed said premises in accordance with the terms of said lease; and praying that cross-complainant take nothing by the action. Cross-defendant, also as a part of its said answer, alleged a counterclaim against said cross-complainant for the sum of $182.34, which amount included said item of $155.50 above referred to, and for the further sum of $659.75 on account of taxes which said cross-complainant had agreed to pay by the terms of said lease, making a total claim of $842.09. The prayer of cross-defendant was that cross-complainant take nothing by the answer and that it have judgment upon its counterclaim for the said sum of $842.09.

The court below, after a trial of the action, made its findings of fact, conclusions of law, and gave its judgment, all of which were in favor of plaintiff, both as to its title and right of possession and as to said counterclaim. The court found, among other things, that on the 13th day of November, 1925, cross-complainant was in default as to said item of $155.50; that written notice was on that day given of said default; that thereafter, said default continuing, plaintiff did on the 22d day of December, 1925, give written notice of the cancellation and termination of said lease; that thereafter, and on the 28th day of December, 1925, plaintiff repossessed said property in accordance with the consent of defendant and cross-complainant, and after said resumption of possession on said day, plaintiff occupied and still occupies said premises and the whole thereof. The court made a special finding to the effect that said re-entry was by consent, and as a result defendant suffered no damages, and that said re-entry was not made with malicious intent. From said judgment defendant has appealed. The complaint was filed on June 26, 1926, and the cross-complaint on September 27, 1926.

The appeal is determined by a proper construction of certain provisions of said lease of July 30, 1925, the material portions of which provided that the term of lease was to be for a period of ten years beginning August 1, 1925, and ending July 31, 1935; that the rental for the first year was to be only payment by the lessee of what are called "carrying charges," this term including all taxes, insurance, water rates, repairs on buildings and machinery, improvements and all upkeep of the properties; that, as rental for the second year, said carrying charges were to be paid and in addition the sum of $2,400, and for the succeeding years, other amounts of money were to be paid in addition to said carrying charges. Said lease then contained the following provision: "Time is hereby made of the essence and if default should be made with regard to any of the covenants, terms, conditions or agreements provided to be kept, performed and observed by the Lessee, then and from thenceforth it shall be lawful for the Lessor to re-enter the said leased premises and to remove all persons therefrom and to repossess and enjoy the said premises as in its former estate, after giving said Lessee thirty days written notice of said default."

The record discloses the further facts to be that defendant resided at Los Angeles, that he was a dealer in leases and was not familiar with the operation of a plant such as the one here involved, and he evidently had in mind a sale of the lease without any intention on his part of operating the plant. In other words, it was as to him a pure speculation. Between August 1, 1925, and December 22d following, he made no effort to operate the plant, and visited it only about five times during that period. He hired a caretaker, who was a witness in the case, at $75 per month; he then reduced his salary to $25 per month; then he refused to pay him anything, offering him as compensation the use of the house on the property as a residence, saying that, if that was not satisfactory, he was to surrender the keys and move from the place. Defendant in reality did not pay the caretaker all the sums due him; he failed to keep the water tanks for fire protection in proper condition, and also failed to keep the standby power on, as required by the lease, same being shut off at times because of his failure to pay the necessary charges therefor. Moreover, defendant has never paid or offered to pay any of said carrying charges called for by said lease. Neither in his answer nor in his cross-complaint does he make reference to this failure on his part, nor did he at any time or place offer, nor does he now offer, to pay any of said charges. He wrote, admitting his inability to perform his covenants under the lease, and admitted a practical abandonment of effort to do so. As a part of his plea in his cross-complaint, however, he prays for the sum of $500 per month, without so much as giving credit on the amount so claimed for the charges due from him by the terms of said lease during the time he was in possession of the property. In short, he has done nothing entitling him from a moral standpoint to any consideration whatsoever. He nevertheless asserts his technical eviction and his consequent claim to restoration of possession, even though it is but to admit him to the back door that he may be expelled through the front gate.

[1, 2] The contention offered is that the right to possession could only be terminated by supplementing the other notices with the three-day notice found in section 791 of the Civil Code, incorporating the provisions of sections 1161 and 1162 of the Code of Civil Procedure; that a failure to give this notice left the lease still subsisting and the measure of the rights of the parties. This assumption is based upon a misconception of the lease and a consequent misapplication of legal principles. The lease itself, by the above-quoted provision, provides a forfeiture of the rights of the lessee upon failure to pay the charges stipulated. The notice of default, the lapse of thirty days, and notice of forfeiture completed the process. The rights of the lessee under said lease became extinct, and nothing he could do would restore vitality to the instrument. Neither a further three-day notice nor any other notice would be of advantage to him, for at best it would but lay the foundation to hasten his departure from the premises. When this forfeiture became effective, an election of remedies was open to respondent. It could proceed in unlawful detainer under the summary provisions of the Code of Civil Procedure or else it could seek one of the general remedies offered by law. If it had chosen the former, then only would it be concerned with the provisions of section 791 of the Civil Code as to further notice. But, as it appealed only to the general remedy afforded by the law, it was not required to concern itself with further notice. The essence of the issue made by the pleadings is the right of possession of the premises. Respondent asserted his right and appellant by both answer and cross-complaint asserted its right. The issue is the equivalent of an action for possession of the property. Code Civ. Proc., § 380. This right is especially reserved by section 793 of the Civil Code, and would exist anyway, independent of the procedure contemplated under section 791 of the Civil Code. There is therefore no need for a full discussion of the somewhat complex state of the decisions on the applicability or

nonapplicability of the three-day notice in unlawful detainer actions. This is no such action. Abundant authority exists for the distinction we have here drawn. See McCarthy v. Yale, 39 Cal. 585, 587; Martin v. Splivalo, 56 Cal. 128; Joy v. McKay, 70 Cal. 445, 11 P. 763; McKissick v. Ashby, 98 Cal. 422, 425, 33 P. 729; Sauer v. Meyer, 87 Cal. 34, 36, 25 P. 153; Mossi v. Fairbanks, 19 Cal. App. 355, 358, 125 P. 1071; Wickstrom v. McGrath (Cal. App.) 261 P. 326; Williams v. Edge, 192 Cal. 254, 219 P. 747; Andrews v. Russell (Cal. App.) 259 P. 113; Allen v. Houn, 30 Wyo. 186, 219 P. 581; 36 C. J. 617; 16 R. C. L. § 663, p. 1143. This is not a case where the lease does not provide a forfeiture and the provisions of sections 1161 and 1162 of the Code of Civil Procedure must be resorted to to work a forfeiture for failure to pay the rental provided. Standard Livestock Co. v. Pentz (Cal. Sup.) 269 P. 645.

[3] The intimation that respondent comes into a court of equity with unclean hands is not worthy of consideration. It found the property practically unoccupied and in addition thereto it had every right to believe that appellant had abandoned or was about to abandon the premises and that there would be no objection to re-entry thereupon. This is borne out by appellant's failure to pay and by his conduct with reference to the premises and by his admission in a letter dated December 21, 1925, where he states: "* * * I have been unable to take care of the insurance and taxes, and cannot see my way clear at this time to do so. I just returned from San Diego, where I had it out with my brother, and we cannot get together. I feel that the way I have been drawn into this affair and put in over $300.00, that I should be reimbursed by you to this extent. I do not care to stand in the way of any further prospects you may have in this matter. * * *"

Further discussion of this case seems unnecessary. Judgment affirmed.

We concur: CURTIS, J.; SEAWELL, J.

---

205 Cal. 713

GOULARTE v. GOULARTE. (Sac. 4089.)

Supreme Court of California. Dec. 13, 1928.

1. Divorce ⚷79—Decree held not void as against contention trial court could not order service of summons by publication after it had been returned and filed.

Divorce decree *held* not void as against contention that, summons having been returned and filed because defendant could not be found, trial court was without authority to order service of it by publication.

2. Divorce ⚷160—Divorce decree held not void because defendant's default was not entered, where interlocutory decree recited that defendant did not appear, but made default (Code Civ. Proc. § 670).

Divorce decree *held* not void as against contention that it did not appear that default of defendant was duly entered by the clerk, as provided in Code Civ. Proc. § 670, where interlocutory decree recited that defendant had not appeared either by counsel or in person, but made default.

Department 2.

Appeal from Superior Court, San Joaquin County; D. M. Young, Judge.

Action by Manuel L. Goularte against Anna Goularte. From an order denying motion to set aside an interlocutory decree of divorce, defendant appeals. Affirmed.

Elmer S. Leslie and E. H. Christian, both of Oakland, for appellant.

H. W. Coale, of Stockton, for respondent.

LANGDON, J. This is an appeal from an order denying a motion to set aside an interlocutory and final decree of divorce on the ground that the trial court never acquired jurisdiction of the defendant. The appeal is upon the judgment roll alone, which shows that summons was issued on April 1, 1920. It was delivered to the sheriff on April 3, 1920, and, on the same day, he made return that defendant could not be found in San Joaquin county. On April 5, 1920, the summons and return were filed with the county clerk. On April 12, 1920, plaintiff made affidavit for publication of summons, and on April 15, 1920, the court ordered service by publication; the original summons being used for publication.

[1] One of the contentions of the appellant is that the judgment is void because summons having been returned and filed, it became functus officio for all purposes, and the trial court had no authority to order service of it by publication. This contention is without merit. The case of Rue v. Quinn, 137 Cal. 651, at page 657, 66 P. 216, 70 P. 732, directly passes upon the point raised.

[2] The other point urged on the appeal is that the judgment is void upon its face because it does not appear from the judgment roll that the default of the defendant was duly entered by the clerk. The clerk's transcript herein contains a copy of a "Demand for Default" and a copy of the "Clerk's Default," showing the entry of the default, but appellant contends that these are not to be considered by us, as they constitute no part of the judgment roll. The complaint has no memorandum indorsed thereon that the default of the defendant in not answering was entered, as provided for in section 670, Code of Civil Procedure. Also, the interlocutory decree does not contain the usual recital that

the default of the defendant has been duly entered. While the decree herein does not present the best form of decree, we think its lack of formality does not demand a reversal of the order of the trial court made herein, for the reason that the interlocutory decree does contain a recital as follows: "And the defendant not appearing either by counsel or in person, but making default," etc. While the words, "making default" lack the precision which would be desirable, nevertheless the word "default" is often used loosely to cover a variety of shades of meaning. 18 C. J. 455. This court is bound to indulge in any presumptions which it may in support of the judgment under attack and in support of the order of the trial court refusing to set the same aside. We therefore consider the language used as indicating an entry of the defendant's default. The trial court had before it its own records, and, knowing that the default had actually been entered, it doubtless used the words "making default" in the judgment to indicate that fact, and, being aware of its own records, had this in mind in denying the motion to set aside the decrees.

Thus considered, the judgment is not void upon its face, nor subject to the attacks made upon it by the appellant.

The order appealed from is affirmed.

We concur: SHENK, J.; RICHARDS, J.

---

205 Cal. 744

MITCHELL v. WHITTIER COLLEGE.
(L. A. 10575.) ★

Supreme Court of California. Dec. 18, 1928.

Rehearing Denied Jan. 17, 1929.

Wills ⚿656—Long Beach Junior College held "college," within will directing Whittier College, as trustee, to pay legacies to particular persons while in college (St. 1921, p. 761, § 9).

Long Beach Junior College, organized for high school graduates to provide courses of instruction to prepare for higher institutions, and to prepare persons for vocations and civic and liberal education, under St. 1921, p. 761, § 9, *held* "college," within scope of will directing trustee to pay specified legacies to particular persons while in college, to assist them in defraying their college expenses, though Whittier College was made trustee, and testatrix expressed preference for persons attending that college; object of University being to provide instruction in science, literature, art, industrial and professional pursuits, and general education, under St. 1867–68, p. 248.

[Ed. Note.—For other definitions, see Words and Phrases, First, Second, and Third Series, College.]

In Bank.

Appeal from Superior Court, Los Angeles County; Leon R. Yankwich, Judge.

Action by Joseph Andrew Mitchell against Whittier College, of Whittier, Cal., as trustee. Judgment for plaintiff, and defendant appeals. Affirmed.

R. T. Walters and Arthur G. Wray, both of Whittier, for appellant.

Miller & Casady and E. J. Miller, all of Los Angeles, for respondent.

PRESTON, J. Is Long Beach Junior College a "college," within the meaning of paragraph 8 of the last will of Amanda T. Whitson, deceased? This is the sole question presented by this appeal.

In 1921 (Stats. 1921, pp. 756, 761) the Legislature of California provided for the organization, management, control and financing of institutions to be known as junior colleges, by a statute reading in part as follows:

"The junior college board may prescribe junior college courses of study, including not more than two years of work, and admit thereto the graduates of any high school of California, the graduates of other high schools and such other candidates over eighteen years of age as may be recommended for admission by the principal of the junior college; * * * junior colleges may provide courses of instruction designed to prepare for higher institutions of learning; courses of instruction designed to prepare persons for agricultural, industrial, commercial, homemaking, and other vocations; and such courses of instruction as may be deemed necessary to provide for the civic and liberal education of the citizens of the community.

"The junior college board shall adopt regulations governing the organization of such courses of study and shall prescribe requirements for graduation from such courses; provided, that the minimum requirement for graduation from junior college courses of study shall be at least sixty credit hours of work. A credit hour is hereby defined as approximately three hours of recitation, study and laboratory work per week carried through one-half year."

This was done as a part of the public school system and was designed to admit students, graduates of high schools and others of similar scholarship over the age of 18 years, for the purpose of receiving 2 years' training in preparation for entrance into higher institutions of learning, or for courses of instruction in agricultural, industrial, commercial, homemaking or other vocations, and for such courses of instruction as might be deemed necessary to provide for the civic and liberal education of the citizens of the community, and to provide for the organization of such courses of study and to prescribe the requirements for graduation therefrom, and finally to prescribe the minimum requirement of work for such graduation.

★Rehearing denied.

Admittedly, Long Beach Junior College meets all these requirements. Subsequent to the effective date of the law, Amanda T. Whitson, a woman of means and culture, interested in higher education and with a particular interest in Whittier College, Whittier, Cal., an institution maintained by the Friends' Church, did, in March, 1925, sign and publish her last will, in which, after providing for specific bequests, by paragraph 8 thereof she proclaimed, as far as here material, the following:

"Eight The rest, residue and remainder of my estate I give and devise and bequeath to Whittier College, Whittier, California, in trust for the following purposes: 1st. Said trust fund shall be known * * * as the Amanda T. Whitson Educational fund. 2d. I direct that said Whittier College shall pay annually out of the said trust fund * * * $400 for a term of four years, to each of the following named persons, while in college to assist them in defraying their college expenses (listing said persons, among whom plaintiff is included). * * * In the event any of the above named persons have completed their education before my death, or in case any of them are not living, or if living do not desire for any reason to accept such assistance, then in that case the amount willed to the person * * * shall remain in the general trust fund. * * * After such of the above named persons as desire assistance in their education * * * has been provided for, * * * I give and devise and bequeath the rest, residue and remainder in full to Whittier College * * * to establish a perpetual fund, the interest and earnings of which shall be loaned by said Whittier College to any needy and worthy young person requiring assistance in securing a college education in sums not to exceed * * * $400 to one person per annum for a term of four years, the sum loaned to bear a reasonable rate of interest per annum. It is my preference that all of the persons assisted as herein provided for shall attend Whittier College. * * *"

Plaintiff, a minor of school age, mentioned specifically in said will, after matriculating at the Long Beach Junior College, applied for the benefits of this provision of the will, claiming to be entitled to $400 a year to pay his expenses while in said junior college. Defendant, trustee of the fund, doubted the validity of plaintiff's claim and refused the request. This suit followed; the complaint setting out the foregoing facts, together with the allegation that said Long Beach Junior College was a college within the meaning of the terms of said will. The answer admitted all of the facts alleged, except the conclusion that said junior college met the requirements of said will, and affirmatively set up the allegation that said college, so being attended by plaintiff, was not a college within the meaning of that word as used in said provision of the will. The court below gave judgment on the pleadings for plaintiff. Defendant has appealed, and, as stated, the sole question presented is to define the scope of the word "college" as used in said last will and testament.

Appellant insists that the proper definition is as follows: "A 'college' is primarily an institution of higher learning, generally incorporated, not supported by public taxation or open to all free of charge, offering instruction in the liberal arts, having but a single faculty and curriculum, and usually leading to the degree of bachelor of arts." See Black's Law Dictionary, p. 215; 11 C. J. 972–980.

Admittedly, early authority in this country gives more or less support to this definition, but it is at once evident that progress has been made in the science of education as well as in all other fields, and a definition sufficient in one day and age might not apply in its entirety to the same institution at a later date. It cannot be expected that new developments made in science, arts, literature, language and invention have not been accompanied by developments in the institutions which foster and nourish this growth. It has well been said: "A college [as an institution] means, or ought to mean, growth; the elimination of the false; the fostering of the true. As it is expected to be perpetual in its service, it must conform to the changed condition of each new generation, possessing an elasticity of scope and work commensurate with the changing requirements of the times which it serves." Central Univ. v. Walters, 122 Ky. 65, 83, 90 S. W. 1066, 1070.

To insist that a college is not such if supported in whole or in part by public taxation, or that a college may not be open to all free of charge, or may not be an extension of high school courses, or must be incorporated, or must have only a single faculty and curriculum, or may confer only a single degree, is to deny progress in the development and efficiency of institutions of learning. We think this deduction may be made from the definition upon which appellant relies, given by Mr. Webster of the word "college," which definition reads in part: "In the United States a college is primarily an institution of higher learning having but a single faculty and curriculum, usually leading to the degree of bachelor of arts; there is, however, no clear line of demarcation, as institutions have retained the name college while extending their instruction to university scope." Webster's International Dictionary. Suppose this young man had enrolled in the University of California, an institution supported in part by the state, and which has for its object "to provide instruction and complete education in all the departments of science, literature, art, industrial, and professional pursuits and general education" (Stats. 1867–68, p. 248).

would it for a moment be said that he was not in "college"? A university is usually in reality but an aggregation of colleges. The test seems to be found largely in the course of study and the requirements of graduation; whether it is confined to teaching the liberal arts, whether it confers more than one degree, or whether it is supported by public taxation, or is open to all free of charge, seem not to be valid tests of its status as a college.

Search as we may, it would indeed be difficult to find a more accurate present-day definition of the scope of the word than that found in the statute above quoted. Courses of study for high school graduates and those of similar attainment, their admission to higher institutions of learning, courses in agriculture, industry, commerce, homemaking and other vocations, and other courses of instruction necessary to provide for the civic and liberal education of the citizens of the community, seem to be of the very essence of a present-day college. It is true that no degree may be conferred, but that is because these institutions only purport to give instruction in the first two years of the college or university courses, but it is evident that a graduate of a junior college may receive from these two years in the institution the same benefits as would be received through spending that time in the higher institution of learning itself.

The definition found in the Ohio statutes (section 7650, Page's Gen. Code Ohio 1926; R. S. § 4007—3) is also a fairly modern statement of the scope of the word "college." It follows: "A college is a school of a higher grade than a high school, in which instruction in the high school branches is carried beyond the scope of the high school and other advanced studies are pursued, or a school in which special, technical or professional studies are pursued, and which, when legally organized, may have the right to confer degrees in agreement with the terms of the law regulating its practices or its charter; or in the absence of legislative direction, in agreement with the practices of the better institutions of learning of their respective kinds in the United States."

Coming now specifically to the provision of the will before us, it may be said that higher education and courses above those of the high schools were certainly the dominant idea in the mind of the testatrix. The framework of the institution, so long as it meets this test, seems not to have been of the essence of the bequest. The fund is made an "educational fund." In two other places decedent uses the word "educational" in a sense which shows that she had in mind education in the higher institutions of learning, institutions graduation from which would be said to "complete" the education of the student as that word is used in the provision before us.

It is urged that, inasmuch as Whittier College may answer to the definition put forth by appellant and quoted above, coupled with the fact that the testatrix was a trustee of that college, and the further fact that in said provision she expressed a preference that all persons assisted by her attend said college, we must thereby conclude that she used the word in the narrow sense, or in the sense of a single curriculum, faculty, and degree in an institution not supported by public taxation. In our opinion this is too narrow a view of her intent. The predominant note of the provision is aid to students seeking higher education, education on the road to a complete scholarship attainment. There is nothing to indicate that she required the institution to conform exactly in every respect to Whittier College. It is a reflection upon decedent's foresight and a stricture upon her benevolence to say that in Whittier College alone she thought this higher education might be obtained, especially when some of her beneficiaries reside without the state of California. The utmost that could be said is that in that respect Whittier College was the institution she personally preferred among the list of colleges, but this is far from saying that she intended to make matriculation in that institution a condition precedent to the right to receive this bounty from her estate. Such a preference so expressed is not compulsory upon the legatee. Estate of Marti, 132 Cal. 666, 61 P. 964, 64 P. 1071.

What we have here said is by no means intended to reflect upon the defendant Whittier College, which happens to be the trustee for the administration of this fund. We realize that it is its sole desire to have this question settled, in order that it may the better perform its duty under said testament. Our answer is that Long Beach Junior College is a college, within the meaning of this provision of said will, and that the plaintiff is entitled to all or so much of said fund specified as may be necessary to defray such legitimate college expense as he may incur while attending Long Beach Junior College.

The judgment is affirmed.

We concur: WASTE, C. J.; CURTIS, J.; RICHARDS, J.; SHENK, J.; SEAWELL, J.; LANGDON, J.

206 Cal. 1

HOWE v. HOWE. (Sac. 4128.)

Supreme Court of California. Dec. 20, 1928.

1. Divorce 🔑303(3)—At hearing on application to amend divorce decree to require father to support children, previous agreement on matter never approved by court held properly excluded.

At hearing on application for order to amend final decree of divorce so as to award custody of children to mother and to provide that father pay for support of children, written agreement previously entered into between parties regarding custody and support of children, which was not offered in evidence at divorce trial and which was never approved by court, *held* properly excluded.

2. Divorce 🔑303(1)—Court properly amended divorce decree not mentioning the two children by awarding custody to mother and requiring father to pay $40 per month (Civ. Code, § 138).

Where interlocutory decree of divorce granted in 1912 and final decree entered in 1923 did not mention custody or support of children, and mother in 1927 made application, court did not abuse discretion under Civ. Code, § 138, in awarding custody of the two children to mother and requiring that father pay $40 per month for their support.

3. Divorce 🔑306—That children were in part self-supporting did not relieve divorced father of duty to contribute to support.

Fact that boys were in part self-supporting at time of order requiring divorced father to pay $40 per month for their support did not relieve father of his duty to contribute towards their support.

Department 2.

Appeal from Superior Court, San Joaquin County; C. W. Miller, Judge.

Divorce suit by Henry R. Howe against Clara Howe. Plaintiff was granted a decree of divorce, and, from an order directing the plaintiff to pay for the support of the minor children, he appeals. Affirmed.

A. H. Carpenter, of Stockton, for appellant.

Stahlman & Bennett, of Stockton, for respondent.

SHENK, J. This is an appeal from an order directing the plaintiff, as father of his two minor sons, to pay $40 per month for their support.

On October 7, 1912, the plaintiff was granted an interlocutory decree of divorce from the defendant on the ground of extreme cruelty. At that time the sons were about 2 and 3 years of age, respectively. No provision was made in the decree for the custody of the children or for their support. The final decree of divorce was entered in February, 1923. Likewise in the final decree no mention was made of the custody or support of the children. In 1924 the defendant remarried. In September, 1927, the defendant, on notice to the plaintiff, made application to the court for an order to amend the final decree of divorce so as to award to the defendant the custody of the children and to provide that the plaintiff pay a suitable monthly sum for the support of the minors and for reimbursement for some $4,000 theretofore expended by her for their support. The relief prayed for was granted to the extent of awarding the custody of the sons to the defendant and requiring the plaintiff to pay the sum of $40 per month for their support. From that order the appeal is prosecuted.

[1-3] On October 30, 1912, the parties hereto entered into a written agreement as to the custody of the children and the payment by the plaintiff of $10 per month for the support of one of them. This agreement was offered in evidence at the trial, and on objection of the defendant was refused admission. The ruling of the court on the offer is urged as one of the principal grounds of the appeal. We find no error in the ruling. The agreement was not offered in evidence at the trial of the divorce action and was never approved by the court. The order here complained of was discretionary with the court under section 138 of the Civil Code and no abuse of discretion is shown. The fact that the boys were in part self-supporting at the time the order was made would not relieve the father of his duty to contribute toward their support.

No other points require discussion. The order is affirmed.

We concur: RICHARDS, J.; LANGDON, J.

206 Cal. 8

CYR v. CYR. (L. A. 8996.)

Supreme Court of California. Dec. 22, 1928.

1. Judgment 🔑938—Allegation that foreign judgment, and no part thereof, had been paid, sufficiently showed nonpayment as against demurrer.

In action to establish foreign judgment for alimony, allegation "that said judgment and no part thereof has been paid," and that specified amount was due and owing, sufficiently showed nonpayment of the judgment as against demurrer.

2. Divorce 🔑331—Action could be maintained to establish foreign judgment for alimony, where it did not appear that it was not a finality.

An action might be maintained to establish a foreign judgment for alimony, where there was nothing on the face of the record to show that it had not become a finality.

In Bank.

Appeal from Superior Court, Los Angeles County; Elliot Craig, Judge.

Action by Elizabeth H. Cyr against P. S. Cyr to establish a judgment for alimony. From a judgment for plaintiff, defendant appeals. Affirmed.

Griffith Jones and John J. Craig, both of Los Angeles, for appellant.

Milligan & Ryzek, of Los Angeles, for respondent.

PER CURIAM. This appeal was submitted upon an order to show cause, no respondent's brief having been filed. The action was one for the establishment in this state of a judgment for alimony in an action for divorce in the superior court of the county of Okanogan, state of Washington. The defendant filed a general demurrer, which was overruled, and, upon his failure to further answer, judgment in the plaintiff's favor was entered by default. The appeal from such judgment is upon the judgment roll.

[1] The appellant makes two points upon the appeal. The first is that the complaint does not state facts sufficient to constitute a cause of action, and is based upon the following averment in plaintiff's complaint, namely: "That said judgment and no part thereof has been paid by said defendant and that there is now due and owing said plaintiff from said defendant the sum of $50.00 per month from the 18th day of December, 1918." It is the contention of the appellant that the foregoing averment fails to state that the judgment in question had not been paid. There is no merit in this contention. The foregoing averment, while inartificial in form, sufficiently shows the intendment of the plaintiff to be that no part of said judgment had been paid and was good as against the general demurrer.

[2] The appellant's second contention is that the complaint did not state facts to give the court jurisdiction of the person of the defendant or the subject of the action. This contention is based upon the rather novel proposition that, where a judgment is not a final award and is subject to modification by the court which granted it in one state, it cannot be enforced in an action for its establishment in another state. The authorities cited by the appellant do not support this contention. From all that appears on the face of this record the judgment of the Washington court as to the amount payable to the plaintiff thereunder had become a finality long prior to the commencement of the present action in this state. It was therefore like any other money judgment enforceable in this state through an action for its establishment herein. The superior court had jurisdiction to entertain such action. The defendant was duly served with process. He appeared herein and filed a general demurrer, and thus submitted himself to the jurisdiction of the court. There is no merit in either of his contentions, which, as we have seen, are made upon the appeal upon the judgment roll alone.

The judgment is affirmed.

---

95 Cal. App. 304

BURDICK v. BURDICK. (Civ. 5047.)

District Court of Appeal, Second District, Division 2, California. Dec. 5, 1928.

1. Divorce ⚷225—Allowance of attorney's fees in interlocutory divorce decree held unauthorized, where no motion for attorney's fees was made, and wife failed to show personal service could not be had on defendant.

Where wife, suing for divorce, failed to move for alimony or counsel fees, or allege that it was impossible to obtain personal service of process on defendant, so that defendant was given no opportunity to be heard, allowance in interlocutory decree of sum of money to wife for attorney's fees was unauthorized.

2. Divorce ⚷221—Wife may not recover attorney's fees for past services in divorce suit.

Court is not authorized to allow wife attorney's fees for past services in divorce suit.

Appeal from Superior Court, Riverside County; Wm. H. Ellis, Judge.

Action for divorce by Nettie M. Burdick against Charles M. Burdick, in which defendant interposed a cross-complaint. From an interlocutory decree of divorce, defendant appeals. Affirmed in part, and reversed in part, with directions.

Walter O. Davison, of Riverside, for appellant.

Loyal C. Kelley, of Riverside, for respondent.

CRAIG, J. A suit for divorce was instituted by the respondent herein, the appellant served and filed an answer and cross-complaint, and respondent answered the pleading last mentioned. The complaint alleged nonsupport and desertion, the existence of community property in Riverside county, California, and that $250 was a reasonable fee for an attorney whom the plaintiff was compelled to employ in order to present her action. She prayed judgment dissolving the bonds of matrimony, all of the realty constituting the community property, attorney's fees in said amount, and temporary alimony and permanent maintenance, together with costs incurred. The answer denied all of the material allegations of the complaint, except the marriage, alleging desertion upon the part of the plaintiff, and in the cross-complaint alleged desertion and adultery of the cross-de-

---

⚷For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

fendant, and prayed a dissolution of the marital bonds.

It appears from the pleadings of the parties that they were married in the state of Kansas. It is alleged by the plaintiff and respondent that they separated in the county of Riverside more than 12 years previously to her suit for divorce, and that she was at the time of filing her complaint employed. The defendant and appellant admits the time and place of marriage, but denies that they separated in California, averring that he came to California and attempted to persuade his wife to return to Kansas with him, which she refused to do, and that he had sent her money from that state. The trial court found that the plaintiff was a resident of California, and that the defendant resided in the state of Kansas; that they intermarried in 1901, and separated on July 29, 1921, at Riverside, Cal.; that the defendant had deserted the plaintiff, and that she was without means to prosecute the action, and had employed an attorney, the reasonable fees of whom were $250; that the plaintiff was not guilty of desertion nor adultery. It was also found that the plaintiff and defendant had acquired community property, consisting of certain described realty in Riverside county. An interlocutory decree was granted the plaintiff, and she was therein awarded all of the community property, $250 attorney's fees, and costs; but the defendant was by the conclusions of law and judgment adjudged entitled to and given judgment for the sum of $425 as a condition to vesting in the plaintiff title to the real property. The defendant and cross-complainant appealed from the whole judgment upon the judgment roll, by a bill of exceptions, and filed an opening brief, to which the respondent made no response.

[1, 2] As already observed, although the trial court found that there was community property, it awarded the whole to the plaintiff, conditioned upon the payment by her to the defendant of the sum of $425, and allowed her attorney's fees. But it does not appear that the plaintiff and respondent at any time made a motion for alimony or attorney's fees, or that the defendant was afforded an opportunity to be heard, nor did the plaintiff allege the defendant's then place of residence, or that it was impossible to obtain personal service of process upon him within the jurisdiction of the Riverside superior court. In Stampfli v. Stampfli, 53 Cal. App. 126, 199 P. 829, it was said: "The interlocutory decree awarded the plaintiff $150 as attorney's fees. The court is not authorized to allow attorney's fees for past services. Loveren v. Loveren, 100 Cal. 494, 35 P. 87; Lacey v. Lacey, 108 Cal. 46, 40 P. 1056; Wickland v. Wickland, 19 Cal. App. 562, 126 P. 507; Sheppard v. Sheppard, 15 Cal. App. 619, 115 P. 751. The judgment is modified, by striking therefrom the allowance of $150 attorney's fees, and, as so modified, is affirmed, neither party to recover costs of appeal." That the allowance in controversy was unauthorized, is too well settled to warrant further discussion or citation of authority.

Section 146, subdivision 2, of the Civil Code, provides that, "if the decree be rendered on any other ground than that of adultery or extreme cruelty, the community property shall be equally divided between the parties." The decree in the instant case was not rendered upon either of these grounds, nor was adultery or extreme cruelty charged in the respondent's complaint. Section 148 of the Civil Code authorizes a revision, without reversal of the whole judgment, of the part of a decree which disposes of the community property, upon appeal. In Reid v. Reid, 112 Cal. 274, 44 P. 564, and numerous other cases, such procedure was followed.

It is therefore ordered that all of the judgment appealed from, granting a decree of divorce, commencing with the first word thereof, to and including the words "permitting either of them to remarry after such entry of final judgment," be and the same is hereby affirmed. It is further ordered that all of said judgment which disposes of the community property and property rights of the parties, and awards attorney's fees, and orders, adjudges, and decrees that respondent pay to the appellant the sum of $425, which includes all of said judgment from the words herein quoted down to and including the amount of $425, be and the same is hereby reversed, and the trial court is directed to enter a decree equally dividing the community property between the parties.

We concur: WORKS, P. J.; THOMPSON, J.

95 Cal. App. 258

PEOPLE v. BEACH et al. (Cr. 1056.)

District Court of Appeal, Third District, California. Dec. 4, 1928.

Criminal law ⚷1182—No briefs having been filed nor appearance made for defendants when case was called for hearing on appeal, convictions will be affirmed (Pen. Code, § 1253).

Where transcript on appeal was filed in appellate court September 12, 1928, and no brief was filed for appellants, and no appearance was made for them when case was called for hearing and oral argument on December 4, 1928, judgments of conviction for felony will be affirmed under Pen. Code, § 1253.

Appeal from Superior Court, Trinity County; James W. Bartlett, Judge.

E. A. Beach and another were convicted of burglary, second degree, and they appeal. Affirmed.

John S. Reid, of Weaverville, for appellants.

U. S. Webb, Atty. Gen., and J Chas. Jones, Deputy Atty. Gen., for the People.

PER CURIAM. The defendants were convicted in the superior court of Trinity county of a felony, to wit, the crime of burglary of the second degree.

The transcript on appeal was filed in this court September 12, 1928. No brief has been filed in behalf of appellants. The cause was regularly placed on the calendar for oral argument on December 4, 1928. No appearance was made for appellants at the time the case was called for hearing.

Pursuant to the provisions of section 1253 of the Penal Code, the judgments and the order are affirmed.

---

95 Cal. App. 202

PEOPLE v. LIND. (Cr. 1680.)

District Court of Appeal, Second District, Division 2, California. Nov. 30, 1928.

Embezzlement ⚷44(1)—Larceny ⚷65—Evidence held sufficient to sustain conviction for embezzlement and grand theft.

Evidence *held* to sustain conviction of employee for embezzlement and grant theft as to moneys received from employer's customers for which he failed to account.

Appeal from Superior Court, Los Angeles County; Carlos S. Hardy, Judge.

Frank O. Lind was convicted of embezzlement and grand theft, and he appeals. Affirmed.

Grant B. Cooper and Cooper & Collings, of Los Angeles, for appellant.

U. S. Webb, Atty. Gen., and W. Augustine, of San Francisco, for the People.

CRAIG, J. The appellant was charged by information filed by the district attorney of Los Angeles county with grand larceny, embezzlement, and grand theft. He was convicted upon counts charging the two last-named offenses, and appeals from the judgment and order denying a motion for new trial. It was contended in a motion for an instructed verdict and motion for a new trial, and is here insisted, that the evidence conclusively shows that the alleged embezzled and stolen moneys were received by his employers, and that there is therefore no evidence to support the verdict and judgment.

It appears that appellant was employed by a furniture company in the city of Los Angeles during the year of 1927, and that he received a salary of $60 per week; that it was his duty to receive, enter upon the proper books, and deposit in bank, moneys and checks paid to him by customers, for the company's account. An auditor testified that over a period of about 8½ months customers paid in $14,818.71 in divers amounts, for which their accounts were not credited, and which had been withdrawn from the bank. Another witness testified that, when appellant was arrested, he was asked what he had done with the missing funds, and that he replied, "I bought my house, and I paid on my automobiles and my furniture," and admitted having about $400 in the bank; that he was asked, "Mr. Lind, if I understand you correctly, the girl handed you the cash, and you took out what you desired and deposited the rest," to which appellant answered "Yes." Without detailing all of the transactions wherein, according to testimony offered by the prosecution, defalcations occurred, we may observe the principal ones. It was testified that of $500.61 in cash and $126 in checks paid in on July 2, 1927, there was a shortage of $500; that on April 22, 1927, the difference between amounts received and deposited or accounted for was $900; and that on August 3, 1927, the discrepancy was $300. The defendant during cross-examination swore that, while receiving a salary of but $60 per week, he purchased in the year 1927 an Overland and three Stutz automobiles, and that, although he maintained a home for himself and wife, he had "two or three" other places of residence which he visited but did not occupy continuously.

By isolating certain items, appellant attempts through illustration to advance the theory that from the face of the firm's records upon which the prosecution relied, it appeared that the shortages could not have existed, and that the embezzlements could not have occurred. To state his principal argument most favorably to appellant, it is said that "defendant was supposed to have manipulated the books and stolen the money, according to the prosecution," but that some customers paid in checks and other customers paid in cash, which the defendant did not deposit at that time, but that the amounts offsetting them were deposited thereafter, so that the books balanced. However, quoting from direct evidence which the court and jury had before them, it was averred by an accountant who twice examined the books: "Certainly the books balanced. The missing moneys were not credited to any place. * * * They were not credited anywhere. If you eliminate from your bank account moneys which are not deposited, you certainly cannot give respective accounts credit for it. * * * Therefore, in the beginning you have eliminated a credit of $300 to this accounts-receivable control or to your individual account. It shows he still owes $300 which he has paid. It shows he still owes $300. It is accounts receivable, but by circularizing the accounts, he says he does not owe that much money." It is argued that, since the books do not show the discrepancies, there could be no shortage, and that appellant was therefore convicted upon circumstantial evidence of shortages which did not exist. However, from the foregoing positive evidence of the receipt of moneys which appellant neither charged to himself nor credited to the customers, it is obvious that there was a shortage, notwithstanding the fact that his books were ingeniously and perfectly balanced. Upon such evidence, but a small portion of which is set out herein, we are not compelled to invoke the provisions of article 6, § 4½, of the Constitution, discussed by appellant.

The judgment and order appealed from are affirmed.

We concur: WORKS, P. J.; THOMPSON, J.

---

95 Cal. App. 225

PEOPLE v. ANDERSON. (Cr. 1731.)

District Court of Appeal, Second District, Division 1, California. Dec. 3, 1928.

1. Larceny 🔑55—Evidence, in prosecution for theft by fraud, justified finding that person for whom defendant represented he was purchasing property did not exist.

In prosecution for theft committed by fraudulent representations inducing owner of property to deliver possession to defendant without payment therefor, defended on ground that there was no actual fraud inducing plaintiff to part with property, evidence justified finding that person for whom plaintiff pretended he was purchasing property did not actually exist.

2. Criminal law 🔑371(2)—In prosecution for theft by fraud, evidence of transactions committed about same time, showing attempts to commit such crime, was properly admitted (Pen. Code, § 664).

In prosecution for theft committed by fraudulent representations, inducing owner to deliver possession of property to defendant without payment therefor, evidence of other transactions taking place about same time, and showing attempts to commit such crime, *held* properly admitted to show intent of defendant, in view of Pen. Code, § 664.

3. Criminal law 🔑20, 371(1)—Intent must be shown, where fraud is essential to crime, and is provable by evidence of like offenses committed about same time.

Where fraud is an essential element of a crime, it is necessary to prove intent with which actions of defendant were done, and, in proving intent, it is permissible to introduce evidence of like offenses, especially when committed at or about same time.

Appeal from Superior Court, Imperial County; V. N. Thompson, Judge.

John M. Anderson was convicted of grand theft, and he appeals. Affirmed.

Ault & MacKinnon, of Calexico, for appellant.

U. S. Webb, Atty. Gen., John L. Flynn, Deputy Atty. Gen., and John D. Richer, of Los Angeles, for the People.

CONREY, P. J. From the evidence it appears that the offense was committed by means of fraudulent representations, which induced the owner of the property to deliver possession thereof to the defendant without payment therefor. The defendant, using a false name, purchased from the complaining witness, Washington, 15 tons of hay at an agreed price of $18 per ton, and made said purchase as pretended agent of F. T. Fuller. The evidence indicates that there was no F. T. Fuller, and the address of Fuller in the city of San Diego, as given to Washington by the defendant, was not Fuller's address. Defendant, after hauling the hay away from the premises of Washington, sent it to an address of his own in San Diego, and resold it for $21 per ton. It was only after this prosecution had been instituted that he paid for the hay.

Appellant's assignments of error are as follows: First, that the value of the property obtained was not proved to exceed $200; second, that the evidence fails to establish that the fraud committed by the defendant caused Washington to part with his property; third, that there was no actual fraud committed; fourth, that the court erred in allowing testimony showing other hay deals (not crimes), which showed guilty knowledge of the defendant; fifth, that the district attorney was guilty of misconduct prejudicial to the defendant.

[1] We are of the opinion that there is no merit in any of these assignments of error. It seems unnecessary further to mention any of them, except the third and fourth. The claim that there was no actual fraud committed is based upon the fact that the defendant and his father and his mother all testified that they knew F. T. Fuller, a hay dealer in San Diego, and that the defendant actually was buying hay for Fuller, and that Fuller, at about the time of these transactions, left San Diego and turned over the hay to the defendant. Our introductory statement gives the substance of some evidence to the contrary. Albert Brown, owner of the ranch run by Washington, in Imperial county, testified that he went to the San Diego address which defendant had given to Washington as the address of Fuller, and found that Fuller was not known there. He made other investigations, through the city directory and the telephone directory, and could find no F. T. Fuller in San Diego. George Wright, deputy sheriff, testified that he had asked defendant's father who F. T. Fuller was, and defendant's father said he had no knowledge of any such person, and that he made other investigations in the city of San Diego and was unable to find said F. T. Fuller. Taking the evidence as a whole, the jury was justified in finding that there was no such person.

[2] Over the repeated objection of attorney for defendant, the prosecution was allowed to introduce evidence of three other transactions, all occurring in the same month as the Washington transaction. In each instance defendant attempted to purchase hay in Imperial county—on April 10th from L. J. Thomas; on April 11th from J. H. Otis; on April 14th from L. A. Harris. Each purchase purported to have been made on behalf of "Adams Hay Company," of Los Angeles. In each instance the vendor became suspicious concerning the supposed "Adams Hay Company" and failed to deliver the hay. In at least one instance defendant gave to the vendor a Los Angeles address as the address of said company, but there was no such company at that place. In one instance the vendor sent a telegram to "Adams Hay Company" at that address, and received a telegraphic reply. The witness George Wright testified concerning these telegrams as follows: "I brought that telegram back to the county jail, and took them both, and in his presence I accused him of being the Adams Hay Company himself, and he said he was." Wright testified that, at the said supposed address of the "Adams Hay Company" of Los Angeles, he found a manufacturing concern, which was manufacturing a bed under a patent of the defendant's father.

[3] We think that there was no error in admitting the evidence of these collateral transactions. Although they did not show the commission of any crime of theft, they did show three several attempts to commit such crime. An attempt of this kind is itself a felony. Pen. Code, § 664. Where fraud is an essential element of a crime, it is necessary to prove the intent with which the actions of the defendant were done. In proving such intent, it is permissible to introduce evidence of like offenses, especially when committed at or about the same time. People v. Lucas, 67 Cal. App. 452, 227 P. 709; People v. Morani, 196 Cal. 154 at pages 158, 159, 236 P. 135.

The judgment and order are affirmed.

We concur: HOUSER, J.; YORK, J.

95 Cal. App. 249

PEOPLE v. BASTIAN et al. (Cr. 1490.)

District Court of Appeal, First District, Division 2, California. Dec. 4, 1928.

Witnesses ⚷337(1)—Where defendant takes stand, testimony to reputation for truth, honesty, and integrity, referring to time after commission of offense, is admissible (Code Civ. Proc. § 2051).

Where defendant took stand in prosecution for robbery, he subjected himself to provisions of Code Civ. Proc. § 2051, so that testimony regarding his reputation for truth, honesty, and integrity was proper, though it referred to time after commission of offense.

Appeal from Superior Court, Alameda County; Fred V. Wood, Judge.

Gene Bastian and another were convicted of robbery, and they appeal. Affirmed.

John Corgiat, Jr., of Oakland, for appellants.

U. S. Webb, Atty. Gen., and Wm. F. Cleary, Deputy Atty. Gen., for the People.

STURTEVANT, J. The defendants have appealed from a judgment of conviction on a charge of robbery, and have brought up a typewritten record, including the judgment roll and a transcript of the reporter's notes. No briefs have been filed by either party.

At the time of the argument the defendants stated that they desired to present but one point. They contended that the trial court erroneously allowed certain witnesses to testify regarding the defendant Bastian's reputation for truth, honesty, and integrity. They asserted that the questions as propounded referred to his reputation down to and including the date of the trial, whereas the investigation should have been limited to an inquiry as to such reputation prior to the commission of the offense charged in the information. They cited in support of this contention People v. Thourwald, 46 Cal. App. 261, 189 P. 124. That case is not helpful. The facts in that case were that Thourwald was on trial charged with the violation of section 288 of the Penal Code; as a part of his case Thourwald introduced testimony that his reputation for morality was good; in rebuttal, the prosecution called three witnesses who testified that it was bad; each of those witnesses was asked the question, "Do you know his general reputation in the town of Dunsmuir for morality?" The court on appeal directed attention to the fact that no objection was made in the trial court presenting the point. However, it is patent that the testimony there under consideration was regarding a factor of the crime itself; whereas in the case before us the question involved is merely one as to the weight of evidence. The defendant Bastian took the stand and testified in behalf of both defendants. Having done so, he subjected himself to the provisions of section 2051 of the Code of Civil Procedure. The court held to that effect regarding a question as to whether the defendant had been convicted of a felony. People v. Crowley, 100 Cal. 478, 482, 35 P. 84. The same rule was declared regarding evidence as to the general reputation for truth, honesty, or integrity of a defendant who had taken the stand and testified in his own behalf. People v. Prather, 120 Cal. 660, 53 P. 259. Whether the impeachment occurs in one manner or the other, it is addressed to the reputation of the witness prior to his taking the stand, and is not limited by the date the offense on trial is alleged to have been committed.

We find no error in the record. The judgment is affirmed.

We concur: KOFORD, P. J.; NOURSE, J.

95 Cal. App. 289

KROHN v. BOARD OF WATER AND POWER COM'RS OF CITY OF LOS ANGELES et al. (Civ. 5529.)

District Court of Appeal, Second District, Division 1, California. Dec. 5, 1928.

1. Municipal corporations ⚷218(11)—Insertion in minutes of board of civil service commissioners of statement that charges against city employee were not sustained held sufficient finding in writing.

Insertion in the minutes of the board of civil service commissioners of statement that charges against city employee were not sustained *held* a sufficient compliance with provision of city charter requiring finding of the board to be in writing; there being no express form required by charter provision, and minutes of the board thoroughly and completely covering the situation, so far as either or any of the interested parties were concerned.

2. Municipal corporations ⚷218(11)—Board of civil service commissioners were not required to conduct hearing in determining propriety of city employee's discharge; "investigate" (Los Angeles City Charter, 112 (a).

Board of civil service commissioners, in determining propriety of discharge of city employee, were not required, by reason of the provisions of Los Angeles City Charter, § 112 (a), St. 1925, pp. 1024, 1067, to conduct a public or judicial hearing, in that the word "investigate" was used in a narrower sense than a public hearing or trial, in view of legislative history as shown by St. 1903, pp. 555, 579, St. 1905, pp. 980, 992, and St. 1911, pp. 2051, 2116.

[Ed. Note.—For other definitions, see Words and Phrases, First, Second, and Third Series, Investigate; Investigation.]

Appeal from Superior Court, Los Angeles County; Hartley Shaw, Judge.

Mandamus by Alexander Krohn against the Board of Water and Power Commissioners of the City of Los Angeles and others. Judgment for plaintiff, and defendants appeal. Affirmed.

Jess E. Stephens, City Atty., W. B. Mathews, Clarence S. Hill, Floyd M. Hinshaw, Francis H. Lindley, and Geo. P. Adams, all of Los Angeles, for appellants.

Rosecrans & Emme, of Los Angeles, for respondent.

HAUSER, Acting P. J. The appeal herein is predicated upon the following facts: Plaintiff, who was a civil service employee of the city of Los Angeles, was discharged for alleged insubordination. Thereafter plaintiff duly filed a request with the board of civil service commissioners of said city "for an investigation of this case," in pursuance of which one of the members of the said board who had been delegated to perform such duty, after inquiry regarding the circumstances surrounding the discharge of plaintiff, filed with said commission his report, to which were attached several affidavits purporting to deal with the situation. Thereupon the said board of civil service commissioners considered said report and adopted a motion, the effect of which was that the discharge of plaintiff was not sustained and that plaintiff should be restored to duty. The department of the city of Los Angeles in which plaintiff was employed having refused to conform to such finding and order by the civil service commission, on application for writ of mandate, it was ordered and adjudged by the superior court that plaintiff be reinstated in his said position with the city of Los Angeles, pending which plaintiff be paid his regular wages until he be assigned to duty.

The points made by appellants for a reversal of the judgment relate to the jurisdiction of the board of civil service commissioners to make the finding of fact and the order of reinstatement of plaintiff to which reference has been had. Of such points, those which are deemed necessary of consideration by this court are that the finding made by the board of civil service commissioners was not in writing; nor was the "investigation" had by said board such as is contemplated by the provisions of section 112 (a) of the charter of the city of Los Angeles (Stats. 1925, pp. 1024, 1067) governing the situation here presented.

So far as is here material, it will suffice to state that in general said section purports to provide for the procedure incidental to the "removal, discharge, or suspension" for "cause, which shall be stated in writing" of classified civil service employees of the city of Los Angeles, as well as for the investigation of the sufficiency of the "grounds" of such action as affecting any such employee; and in the event of lack of sufficient "grounds" for such "removal, discharge, or suspension," the reinstatement or restoration to duty of such employee. Omitting the portion of the charter provision which deals with the manner of removal of an employee, the section to which reference has been had, among others, contains the following provision: "* * * Upon such filing [statement of cause of removal] such removal, discharge, or suspension shall take effect. Within fifteen days after such statement shall have been filed, the said board, upon its own motion, may, or upon written application of the person so removed, discharged, or suspended, filed with said board within five days after service upon him of such statement, shall proceed to investigate the grounds of such removal, discharge, or suspension. If after such investigation said board finds, in writing, that the grounds stated for such removal, discharge, or suspension were insufficient or were not sustained, and also finds in writing that the person removed, discharged, or suspended is a fit and suitable person to fill the position from which he was removed, discharged, or suspended, said board shall order said person so removed, discharged, or suspended, to be reinstated or restored to duty. * * *"

[1] Appellants contend that the board of civil service commissioners failed to comply with the provision of the charter which requires that the finding shall be "in writing." With reference thereto, by the return to the writ it appears that, as shown by the minutes of the board, the following action was taken:

"Commissioner Buzzell presented a detailed written report of his investigation of the discharge of Alexander Krohn from the position of auto machinist, water and power department, together with affidavits bearing on the conduct of F. M. Vandeventer, foreman, which Mr. Krohn stated had caused him to knock Mr. Vandeventer down. After the reading of Mr. Buzzell's report and the accompanying affidavits it was moved that, as the board considered the charges for which Mr. Krohn was discharged were not sustained and as the board considered him a fit and suitable person to fill the position from which he was removed, Alexander Krohn be restored to his position as auto machinist in the water and power department. The motion was adopted by the following vote: Ayes: Commissioners Schreider, Stoneman, Workman, Buzzell, and Fryman. Noes: None."

Specifically, it is urged by appellants that the insertion in the minutes of the board of the statement that the charges against the employee were not sustained was insufficient, but that such finding should appear by some other and separate instrument or document. It is clear that no one was injured by the course adopted by the board; to the contrary, all the rights of either the employee or of the employer were as fully and adequately protected thereby as might or could have been done by virtue of any other procedure which has been suggested. No express form is required by the charter provision, and it is manifest that the substance has been preserved. Whatever may be said of the claimed lack of regularity in compliance with the possibly lawful requirement of what might be termed a "red tape" finding, with all its accompanying various and sundry legal technicalities, it is unquestionable that so far as either or any of the interested parties were concerned, the minutes of the board thoroughly and completely covered the situation.

[2] Probably a more serious objection of appellants is that the "investigation" had by the board of civil service commissioners was such that no jurisdiction existed in it as a foundation for its assumed power in making the order of reinstatement of the employee. In this connection, several different interesting legal questions are submitted for consideration by this court—all of which, however, being primarily dependent upon the construction of the charter provision affecting the "investigation" by the board of the grounds for the discharge of the employee. Reverting to the provision in question, it will be noted that its requirements are that either "upon its own motion," or by reason of the application of the discharged employee, the board "may * * *" or "shall proceed to *investigate* the grounds for such removal, * * *" It is claimed by appellants that the meaning or significance of the word "investigate" is identical with the word "hearing" or "trial," and that as so construed the procedure adopted and pursued by the board in reaching its conclusion with reference to the sufficiency of the "grounds" for the removal of the employee was wholly ir-

regular and of no validity so far as conferring jurisdiction on the board was concerned.

The history of the section of the charter of the city of Los Angeles would point to a different conclusion. Ordinarily a trial of the nature of that here in question is a result following the filing of charges or an accusation of some sort at which the accused may have the right to be heard in his own defense. Also, the trial tribunal may administer oaths, issue subpœnas for witnesses and enforce the production at the trial of books, papers, documents, etc., pertinent to the inquiry. The charter of 1889 (Stats. 1889, p. 455) contains no provision relating to the point at issue. It is not until 1903 (Stats. 1903, p. 555) that any legislation may be found affecting the remedy for alleged wrongful discharge of civil service employees of the city of Los Angeles. Section 242 of the latter act or concurrent resolution (Stats. 1903, p. 579) provides that:

"No officer or employé in the classified civil service of this city other than one belonging to the police force or fire force, who shall have been appointed under said rules, and after said examination, shall be removed or discharged except for cause upon written charges, and after an opportunity to be heard in his own defense. Such charges shall be publicly investigated by the civil service commission. The finding and decision of such commission shall be final and shall be certified to the appointing officer, and shall be forthwith enforced by such officer. Nothing in this article shall limit the power of any officer to suspend a subordinate for a reasonable period, not exceeding thirty days. In the course of an investigation of charges each member of the commission shall have power to administer oaths, and shall have the power to secure by its subpœna both the attendance and testimony of witnesses and the production of books and papers relevant to such investigation for any cause. Nothing in this section shall be construed to require such charges or investigation in case of unskilled laborers."

Said section 242, to which reference has just been had, was amended at the next session of the Legislature (Stats. 1905, pp. 980, 992), by eliminating therefrom the following provision: "In the course of an investigation of charges each member of the commission shall have power to administer oaths, and shall have the power to secure by its subpœna both the attendance and testimony of witnesses and the production of books and papers relevant to such investigation for any cause."

Although the charter was variously amended in the years 1907 and 1909, the section thereof relating to public hearing on written charges against an employee remained intact until the year 1911, when it was amended by section 241, pp. 2051, 2116, Statutes of 1911. That amendment was carried practically verbatim into the present charter of the city of Los Angeles (sec. 112 (a), Stats. 1925, pp. 1024, 1067), and, as hereinbefore set forth, instead of providing for a discharge of an employee only for "cause upon written charges, and after an opportunity to be heard in his own defense," and that such charges be publicly "investigated"—the provision was inserted that either upon written application therefor by the discharged employee, or upon the board's own motion, the board should "proceed to investigate the grounds for such removal. * * * "

Further consideration of the charter of 1903 (Stats. 1903, pp. 555, 579) discloses further procedural provisions ordinarily incident to a public hearing or trial, in that in connection therewith each member of the civil service commission is given the power to administer oaths and to secure by subpœna "both the attendance and testimony of witnesses and the production of books and papers relevant to such investigation. * * * " As compared with the charter provision of 1903, it may be noted that nowhere in the present charter provision relating to the "investigation" of the grounds of discharge of an employee is any language employed either identical with, or even similar to, the words or phrases "written charges," "opportunity to be heard in his own defense," publicly investigated," "administer oaths," "subpœna," "attendance of witnesses," or "production of books and papers"—which characterize the procedure and powers indicated in the charter of 1903.

Attention is also directed to the language of the present charter provision to the effect that within 15 days following the filing of the statement containing the "cause" of the discharge of the employee, the board of civil service commissioners "upon its own motion may * * * proceed to investigate the grounds of such removal. * * * " Assuming that a proposed "investigation" necessarily should take the form of a trial in its ordinary sense, it would seem at least unusual, if not irregular or incongruous, that the court itself should initiate the proceedings. It is therefore evident that the difference between the procedure and powers skeletonized by the provisions of the 1903 charter, and that of the present charter, is radical and significant. It points, if not conclusively, at least distinctly, to an intention on the part of the framers of the charter, and of the Legislature in its resolution, to an abandonment of anything resembling a judicial hearing on the application by the discharged employee for an "investigation" of the grounds of his removal from his position.

In the state of New York it has been held that a provision of a statute, in effect that a civil service employee shall not be removed "until he has been informed of the cause of his removal and has been allowed an opportunity for explanation," is clearly distinguishable in its procedural requirements from a provision which provides for removal of such an employee "for cause after opportunity to be heard." People v. Thompson, 94 N. Y. 451; People v. La Grange, 2 App. Div. 444, 37 N. Y. S. 991; People v. Cruger, 17 App. Div. 483, 45 N. Y. S. 519; People ex rel. Lawson v. Coler, 40 App. Div. 65, 57 N. Y. S. 636. In the case last cited it was held that the language of the statute to the effect that the employee might be discharged only after he had been informed of the cause of his proposed removal and had been "allowed an opportunity for explanation" did not contemplate a public hearing or trial of the matter. In connection therewith, in part the court said: "* * * The charges were not verified under oath, no witnesses were sworn, and the hearing was had before the deputy comptroller, instead of before the comptroller himself. These objections would be substantial, if the opportunity to make an explanation, provided for by the act of 1898 [Laws 1898, c. 186], was in any sense a trial. * * * The act of 1898 contemplates no such formal procedure. It requires nothing more than that the reasons inducing the contemplated removal shall be communicated to the person proposed to be dismissed, and that he shall be fairly heard, if he desires to be heard, in his own behalf, to explain any alleged misconduct, neglect, or incapacity on his part. * * * It seems to afford adequate protection if made to a principal deputy, who communicates it to the superior officer, by whom the removal must actually be made. * * *"

The case of Price v. City of Seattle, 39 Wash. 376, 81 P. 847, is also in point, in that it deals with, and lays down the principle of, the conclusive right of a city to adopt such procedure as it may see fit with reference to the discharge of its employees.

It is therefore concluded that, in the use of the word "investigate," as contained within the charter provision of the present charter of the city of Los Angeles, the legislative intention was to narrow its significance to something less than a public hearing or trial, as those words are generally understood; and that the position of the civil service commission in its relation to the several departments of administration of the city of Los Angeles wherein assistants were employed in the classified civil service of said city, was analogous to that of a superior or chief executive officer of a corporation toward its departmental manager or foreman, so far only as "investigating" or examining into the cause of discharge of an employee was concerned. Assuming the correctness of such determination, the right and power of the board of civil service commissioners to adopt and to pursue such reasonable course as it saw fit with reference to its "investigation" is unquestioned. The jurisdiction being thus established, the findings and order of the board of civil service commissioners in the premises are conclusive.

It follows that the judgment should be affirmed. It is so ordered.

We concur: YORK, J.; CRAIL, Justice pro tem.

---

95 Cal. App. 224

BAUCUS v. RIVEROLL. (Civ. 5338.)

District Court of Appeal, Second District, Division 1, California. Dec. 1, 1928.

1. **Stipulations ⚷17(3)—Order disregarding parties' stipulation is discretionary.**

Order of court, disregarding a stipulation entered into between parties to an action, is discretionary.

2. **Appeal and error ⚷949—Order disregarding stipulation will be disturbed only when clearly shown to be result of abuse of discretion.**

Order of court, disregarding stipulation entered into between parties to an action, will be disturbed on appeal only when it clearly appears that order was the result of an abuse of discretion.

3. **Judgment ⚷363—Motion to vacate judgment and require filing of findings of fact held properly granted, where consent to waive findings was inadvertently given.**

Motion to vacate judgment and to require filing of findings of facts and conclusions of law *held* properly granted, where it appeared that consent of plaintiff to waive findings of fact was inadvertently given.

Appeal from Superior Court, Los Angeles County; Walter Guerin, Judge.

Action by B. D. Baucus against E. Riveroll. Judgment for defendant. From an order granting plaintiff's motion to vacate judgment, defendant appeals. Affirmed.

Denis & Griffith, of Los Angeles, for appellant.

William Ellis Lady, of Los Angeles, for respondent.

PER CURIAM. On the conclusion of a trial before the court without a jury, the judge announced that judgment would be rendered in favor of defendant. Thereupon, on request of defendant, plaintiff waived findings of fact, and judgment was entered accordingly. Within a few days following the entry of said judgment, plaintiff gave defendant notice of a motion to vacate the judgment, and to require the filing of findings of fact and conclusions of law in the action.

The court granted the motion and the appeal herein is from such order.

[1, 2] Appellant contends, first, that the court was without authority to set aside the stipulation of the parties; and, secondly, "that such action on the part of the lower court amounted to an abuse of discretion." That an order of a court disregarding a stipulation entered into between the parties to an action is discretionary, and that such order may be disturbed only when it clearly appears that the order was the result of an abuse of discretion, see authorities under sections 63 to 76, inclusive, title "Stipulations," volume 44, Century edition, American Digest; also, in succeeding volumes of the American Digest, under section 12 of the same title.

[3] It appearing that the affidavit in support of the motion here under consideration set forth facts sufficient to show that the consent of plaintiff to waive findings of fact in the action was inadvertently given, this court is unable to agree with appellant in his contention that, in granting the motion to which reference has been had, the court abused its discretion.

The order is affirmed.

---

95 Cal. App. 205

SPIEGELMAN v. EASTMAN. (Civ. 3645.)

District Court of Appeal, Third District, California. Nov. 30, 1928.

1. Appeal and error 🔑933(1)—Same presumptions attach to order granting new trial by different judge as in case order was made by judge presiding at trial.

Same presumptions attach to order granting a new trial by a different judge that would have attached to order if made by judge before whom the cause was heard.

2. Bills and notes 🔑296—Assignor's concealment of fact that he had taken unsecured note as payment of installments constituted fraud based on implied warranty, by reason of qualified indorsement (Civ. Code, §§ 1710, subd. 3, 1774, 3146).

Assignor's concealment of fact that, instead of receiving payments on installment note, he had taken an unsecured promissory note for unpaid installments and had written off interest due, *held* to constitute fraud within Civ. Code, § 1710, subd. 3, and sections 1774, 3146, based on implied warranty, by reason of qualified indorsement, that he had no knowledge of any fact which would impair validity of instrument or render it valueless.

3. Bills and notes 🔑296—Qualified indorsement does not relieve indorser from liability in accordance with implied warranty.

While a qualified indorsement on a promissory note relieves indorser from position of security for payment, it does not permit a transfer of worthless paper and still leaves indorser liable as vendor with warranty that instrument is genuine and that indorser has good title thereto, without knowledge of any facts impairing validity of instrument or rendering it valueless.

4. Bills and notes 🔑296—Indorser "without recourse" warrants that he possesses no knowledge which would indicate insolvency on part of maker of note.

Though an indorser "without recourse" does not warrant solvency of maker, nevertheless he does warrant that he possesses no knowledge which he would indicate insolvency on part of maker or that he does not know of anything which would tend to indicate that payor of note would be unable to make payment.

5. New trial 🔑68—Order granting new trial cannot be sustained in case evidence establishes any one cause of action.

An order granting a new trial cannot be sustained in case the evidence establishes any one of the causes of action set forth in plaintiff's complaint.

6. New trial 🔑102(3)—New trial was properly denied for newly discovered evidence consisting of testimony of witnesses known to attorneys, two of whom testified during trial.

Where alleged newly discovered evidence consisted of testimony by witnesses known to attorneys, two of whom were on the witness stand and examined at length during the trial, and conversation claimed as newly discovered evidence was mentioned during testimony given on trial, new trial because of such evidence was properly denied.

Appeals from Superior Court, Los Angeles County; T. A. Norton, Judge.

Action by Abraham Spiegelman against George A. Eastman. Judgment for plaintiff, and order granting a new trial after judgment, and both parties appeal. Order granting a new trial reversed, and judgment affirmed.

Samuel Horowitz and W. W. Kaye, both of Los Angeles, for plaintiff.

William A. Barnhill and Lewinson & Barnhill, all of Los Angeles, for defendant.

PLUMMER, J. This cause is before the court upon an appeal by the defendant from the judgment entered therein in favor of the plaintiff, and also upon an appeal by the plaintiff from an order granting a new trial after judgment. If the order granting a new trial was properly made, the judgment from which the defendant has appealed falls of its own weight. On the contrary, if the order granting a new trial should be reversed, it follows as a matter of course that the judgment should be affirmed.

[1] This cause was heard before the Honorable T. A. Norton, sitting with a jury, and verdict rendered in favor of the plaintiff. Thereafter a motion for new trial was heard

---

🔑For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

and determined by Hon. Hartley Shaw, and granted on the ground of insufficiency of the evidence, and on the further ground of newly discovered evidence, and though, as held in the cases of Jones v. Sanders, 103 Cal. 678, 37 P. 649, and Garton v. Stern, 121 Cal. 347, 53 P. 904, the same presumptions attach to the order made by Judge Shaw that would have attached to the order granting a new trial if made by Judge Norton, yet, if any one of the causes of action relied upon by the plaintiff is established without any substantial conflict in the testimony, the order granting a new trial on the ground of insufficiency of the evidence cannot be sustained.

The action was begun by the plaintiff to recover the sum of $26,600 as the unpaid portion of the purchase price of an apartment house sold by the plaintiff to the defendant. By the terms of the sale, the defendant agreed to pay to the plaintiff the sum of $47,000, as follows: $16,500 cash, $26,600 by assigning the note of one Philips, secured by chattel mortgage, $1,250 by assigning a chattel mortgage on certain machinery, and $2,650, by the personal note of the defendant, payable on or before 6 months.

The only item involved in this action is the $26,600 represented by the Philips note and chattel mortgage. The face of the Philips note was for $28,000, dated April 26, 1924, and payable at the rate of $350 per month until January 26, 1926, and at the rate of $1,100 per month thereafter. The apparent face of the note and of the installments accruing after September, 1924, the date of the sale by the plaintiff to the defendant of the apartment house referred to, amounted to $26,600. The Philips note was secured by a chattel mortgage covering furniture in a certain building known as the Victoria Hotel. The same mortgage also secured a note, set out in the chattel mortgage, for the sum of $12,000, signed by Jack E. Philips and Mrs. Olive Philips. The note involved in this action was signed only by Jack E. Philips. At the time of the execution of the $28,000 mortgage on the 26th day of April, 1924, and also at the time of its transfer by the defendant to the plaintiff, the property mortgaged was covered by two prior mortgages, one given to secure the rent of the hotel at the rate of $1,350 per month, and the second given to Mr. and Mrs. Troutman in the sum of $15,000, and hereinafter referred to as the Troutman mortgage. The defendant guaranteed the payment of the first $5,000 to be paid by Philips on the $26,600 note; this, by a separate instrument. The note itself was transferred by the defendant without recourse. The note dated April 26, 1924, given, as hereinbefore stated, in the sum of $28,000, bore upon the reverse side thereof the following indorsement: "Paid May 26, 1924, $350; paid June 26, 1924, $350; paid July 26, 1924, $350; paid interest to July 26, 1924, $490; paid August 26, 1924, $350"—apparently reducing the amount due on the note to the sum of $26,600, and showing apparent installment payments and an interest payment in the aggregate sum of $1,890. These installments, however, were not in fact paid, the defendant simply taking from Jack E. Philips an unsecured promissory note for $1,400 and indorsing upon the note an interest payment of $490, without the receipt of either cash or promissory note. In other words, as appears further in the transcript, the interest was simply marked off, or, in the language of one of the parties, "forgiven."

Without taking into consideration the rental agreed to be paid by Jack Philips for the Victoria Hotel, which called for the payment of $1,350 per month, the record shows the following indebtedness of Jack Philips and the liens against the personal property, furniture, good will, etc., including leasehold interest of the Victoria Hotel:

First. A mortgage to secure the payment of the monthly rental accruing on the lease.

Second. A mortgage to George D. Troutman and Lucille C. Troutman, in the sum of $15,000.

Third. An incumbrance in the form of lease contract in the sum of $10,500.

Fourth. A furniture contract, introduced as Exhibit B, calling for the payment of $300 per month, with 8 per cent. interest for 7 months, and thereafter $500 per month for 5 months, bearing interest at 8 per cent.

Fifth. A certain other incumbrance due the Baker Linen Company, for $875. These items aggregate the sum of $20,475, excluding the lease contract of $10,500, which, together with the two notes included in the mortgage given, in part, to secure the $28,000 note, show a total indebtedness of $60,475. The testimony of the defendant, as well as the testimony of some other witnesses, was to the effect that the furniture, leasehold interest, and good will of the Victoria Hotel was of the value of, and would sell for, about $45,000. It does not appear that Jack E. Philips had any other property than that covered by the liens and mortgages herein referred to.

The complaint is in three counts. In the first cause of action set forth in the complaint the plaintiff seeks to recover from the defendant the sum of $26,600 and interest, on the grounds of fraud, to wit, that the defendant made certain fraudulent representations as to the value of the note, and that the plaintiff was thereby induced to accept the same as part payment on the purchase price of the Ambassador Hotel. The second cause of action is based upon the implied warranty of the defendant, by reason of the qualified indorsement on the note, to wit, that he had no knowledge of any fact which would impair the validity of the instrument or render it valueless. The third cause of action is based upon mistake, in that it is alleged that the plaintiff accepted the $26,600 note under the mistaken view or understanding that Jack Philips, the maker thereof, was solvent, that he had no information, and no information was given to him of anything which would tend to show his insolvency, and also under the mistaken understanding that Olive Philips, the mother of the defendant, had signed the $28,000 note.

[2] In the consideration of the issues presented upon this appeal, the testimony as to the first and second causes of action set forth in the complaint overlap, yet there is a clear distinction between what is required to prove the first cause of action and the testimony necessary to sustain the second cause of action. In addition to what we have hereinbefore stated, the record shows that, immediately after acquiring the $28,000 note hereinbefore referred to, the defendant placed the same in the hands of a broker named Odell, to be by him disposed of. Odell was given information as to the amount due on the note, but was given no information as to the installment payments thereon having been marked as paid without being paid, nor was he given any information as to the marking off of the interest due on the note by an indorsement thereon indicating that the interest had been paid. The first offer to the plaintiff to purchase the Ambassador Hotel and include the note in part payment therefor, was made by Odell on behalf of the defendant, in which offer it was represented that there was then due on the $28,000 note the sum of $26,950. This offer was not acceptable, and thereafter, on or about the 10th day of September, 1924, an offer was made which was acceptable to all parties, and in this offer the amount due on the $28,000 note was, in consideration of the indorsements thereon, figured at $26,600. The assignment of the note and mortgage stated the balance due on the $28,000 note to be $26,600. The record shows that the $12,000 note secured by the same chattel mortgage as the $28,000 note was signed by Mrs. Olive Philips as well as by Jack E. Philips, and that Mrs. Philips was reputed to be a very wealthy woman, thus giving additional strength and security for the payment of that note. This note, however, was not included in the assignment to the plaintiff. The defendant testified, in substance, that he made no special effort to collect the installments falling due on the $28,000 note; that he had given no consideration to the insolvency of Philips, and thought that he would be able to work out of his difficulties; that the scare over the hoof and mouth disease prevalent during the latter part of 1924 had lessened the tourist travel and interfered with the apartment house business. The record, however, shows that the financial condition of Philips, known to the defendant, was such as to lead unerringly to the conclusion that Philips, at all times after giving the $12,000 note and the $28,000 note on April 26, 1924, was insolvent. Section 3450, Civil Code, relating to assignments for the benefit of creditors, defines an insolvent in the following language: "A debtor is insolvent, within the meaning of this title, when he is unable to pay his debts from his own means, as they become due."

While the maker of the $28,000 note had not made any assignment for the benefit of his creditors, and therefore this section of the Code is applicable only as a definition, yet the situation presented is exactly parallel with the one described in the Code as testified to by the defendant, the business Philips, the maker of the note, was conducting did not yield sufficient revenue to enable him to make payment of the installments as they came due on his indebtedness. The record shows that, including the security given to cover the lease, there was an indebtedness of over $70,000, almost one-half of which was prior in point of time to the mortgage held by the defendant, and more than half of which was prior to the $28,000 note assigned to the plaintiff, and, at the same time, the property securing the indebtedness was valued at about $45,000, including the leasehold interest, good will, and all that went to make up the business. This shows the payment of the installments could not be enforced or obtained out of any means belonging to Philips by reason of the prior liens. It is true the defendant testified that the indorsements made on the $28,000 note, indicating that installments thereon had been paid when nothing had been paid, was not done with intent to defraud, but this testimony has little or no weight in view of the fact that parties holding secured notes do not, in the ordinary course of business, waive the security, mark off the interest due, and take an unsecured note representing only a portion of the amount credited on the back of the secured instrument. Being directly contrary to the usual course of business, and no other explanation having been given than that herein referred to, only one conclusion can be reached from the transaction under consideration, and that is a purpose to give to the $28,000 note an apparent value which it did not possess; likewise to give to the maker thereof an apparent ability to pay the installments on the notes as they became due, which he did not possess. The $28,000 note was in the hands of a broker for sale, and its transfer or commercial value depended directly upon the payment of the monthly installments specified therein. While we are setting forth these matters primarily in relation to the second cause of action contained in the plaintiff's complaint, we see no escape from the further conclusion that the defendant was seeking by this subterfuge and concealment of the true situation to pass a worthless piece of paper on to some uninformed person, and thus gain something for nothing, an act which is expressly denounced by the third clause of section 1710 of the Civil Code, which describes deceit as follows: "The suppression of a fact, by one who is bound to disclose it, or who gives information of other facts which are likely to mislead for want of communication of that fact." Here the apparent information was that the installments accruing had been paid. The concealment consisted in the fact that, instead of receiving payment, the defendant had taken an unsecured promissory note for the unpaid installments, and had written off the interest due. If that does not also amount to a fraud upon an uninformed purchaser of such a note, we do not understand the meaning of the word. What we have said relates to uncontradicted testimony, and establishes the first cause of action, were it not for the technical defect, if it be a defect in this case, of the omission of one question and one answer in the record, to wit, a question as to whether the plaintiff relied upon the record representations as shown thereby, and an answer thereto that he did.

We do not need to decide whether, when the fraud consists in deceit or concealment, such testimony of reliance thereon is necessary to make out a case of fraud. The uncontradicted testimony in this case and what we have hereinbefore set forth brings this case so clearly within the second cause of action set forth in plaintiff's complaint that we do not need to dwell at length upon either the first or the second cause of action. The $28,000 note was transferred by a qualified indorsement, and therefore carries with it the warranty created by law. Section 3146, Civil Code, reads: "Every person negotiating an instrument by delivery or by a qualified indorsement, warrants—(1) That the instrument is genuine and in all respects what it purports to be; (2) That he has a good title to it; (3) That all prior parties had capacity to contract; (4) That he has no knowledge of any fact which would impair the validity of the instrument or render it valueless." And section 1774 of the same Code reads: "One who sells or agrees to sell an instrument purporting to bind anyone to the performance of an act, thereby warrants that he has no knowledge of any facts which tend to prove it worthless, such as the insolvency of any of the parties thereto, where that is material, the extinction of its obligations or its invalidity for any cause." Turning to section 3146, Civil Code, the act of the defendant directly violated the first subdivision thereof, where it says that such an indorser "warrants that the instrument is genuine and in all respects what it purports to be." For the purposes of this discussion it may be admitted that the instrument was genuine, but it was not in all respects what it purported to be. The instrument purported to be one upon which $1,890 had been paid in installments and in interest, whereas in truth and in fact not one cent had been paid. By the Code section referred to the defendant likewise warranted that he had no knowledge of any fact which would impair the validity of the instrument or render it valueless. This again was directly violated by the defendant, who knew that he was unable to collect the installments accruing upon the note. He knew that the maker of the note, as shown by the record which we have recited, was absolutely financially unable to meet the installments, and that the maker of the note had no property whatever out of which the installments could be realized by legal proceedings. Turning to section 1774, Civil Code, we find that the defendant violated the warranty that he had no knowledge of any facts which would tend to prove the instrument worthless, such as the insolvency of the parties thereto. This latter is given only as an illustration, but in this particular case it applies, because the defendant did know, from what we have set forth and shown, that he could not have avoided knowing of facts which tended to prove the paper worthless, such as the example given in the Code provision, the insolvency of the maker of the note, the fact that the maker of the note was mortgaged for almost twice the value of property he possessed, and that the property possessed was not bringing sufficient income to enable Philips to meet the accruing installments due on his indebtedness. The record shows that, subsequent to the transfer to the plaintiff of the note involved in this action, foreclosure proceedings were begun against Philips on the prior liens mentioned in this opinion, but is not considered as bearing upon any issues presented for determination.

[3, 4] While a qualified indorsement on a promissory note relieves the indorser from the position of a security for its payment, it does not open the door for the transfer of worthless paper. As said in 19 California Jurisprudence, p. 882, § 70: "One who exempts himself from liability as an indorser by using the expression 'without recourse', or its equivalent, does not stand freed from all obligation with respect to the indorsement. His liability to subsequent parties is precisely the same as the liability of a transferor to his transferee, where the instrument is negotiated by delivery only. An indorsement 'without recourse' still leaves the indorser liable as a vendor with the following warranties: That the instrument is genuine and in all respects what it purports to be; that the indorser has a good title to it; * * * and that the indorser has no knowledge of any fact which would impair the validity of the instrument or render it valueless." Section 1774 incorporates, also, the warranty that the transferor has no knowledge of anything which would tend to show the insolvency of the payor. Likewise, as said in Carroll v. Nodine, 41 Or. 412, 69 P. 51, 93 Am. St. Rep. 743: "On an indorsement 'without recourse' there is an implied warranty by the seller that the paper is what it purports to be, and that no payments have been made except those which appear to be indorsed thereon, and that such as so appear are genuine and operate to continue the obligation in force as against the Statute of Limitations."

As we have shown herein, the indorsement appearing upon the notes transferred to the plaintiff are not genuine; they are simply fictitious indorsements made thereon to give the note a fictitious value. While an indorser "without recourse" does not warrant the solvency of the maker, he does warrant that he possesses no knowledge which would indicate insolvency on the part of the maker, or, to use a different expression, that he does not know of anything which would tend to indicate that the payor of the note would be unable to make payment, which is equivalent to insolvency where one is unable to pay his debts and has no means out of which payment can be obtained, as the record conclusively shows in this case. In support of what we have here stated, we may further refer to the case of State Exchange Bank v. National Bank of Commerce, 70 Okl. 234, 174 P. 796, 2 A. L. R. 211, and the extended note following said case. There is likewise a distinction to be drawn between fraud and warranty. This distinction is best shown by quoting the language of the text found in 22 California Jurisprudence, 960: "While the fact that the defendant acted with superior knowledge is the gist of the action, whether it be one on the case for false representation, or upon contract, for breach of warranty, there is, in theory at least, a plain distinction between fraud and warranty in respect to the degree of the defendant's knowledge. To support the action for deceit, the plaintiff must prove that the defendant was aware of the falsity of his statement, or, at any rate, that he spoke with a conscious lack of knowledge as to the truth, whereas, to the maintenance of an action for breach of warranty, it is not essential to show that the seller consciously misstated the fact as to the quality, fitness or value of the goods or thing; the plaintiff need only establish an assumption by the seller of superior knowledge as to the fact—a state of mind which is perfectly consistent with good faith or a belief in the truth of the statement. In short, fraud or deceit is proved by the fact that the defendant knew the statement to be false, whereas, breach of warranty is established by proof that he ought to have known that it was erroneous."

[5] In support of the contention that the same rules apply as to pleading, practice, and testimony in cases of implied warranty, where the warranty is created by law, that applies to actions based upon fraudulent misrepresentation, and that the plaintiff must show by testimony, not only that the representations were made, but that he relied upon them, the defendant cites the case of Crocker-Woolworth National Bank v. Nevada Bank, 139 Cal. 564, 73 P. 456, 63 L. R. A. 245, 96 Am. St. Rep. 169. An examination of that case, however, shows that it is inapplicable, as it was based upon representations, and not upon an implied warranty or warranty created by law; and this is true in relation to the case of Goings v. White, 33 Ind. 126, cited in Crocker-Woolworth v. Nevada Bank, supra, in support of the language there used, which, if the distinction is not carefully made between fraudulent representations and warranties created by law, would lead to the conclusion that the case holds there is no distinction between the two. The case of Pepper v. Vedova, 26 Cal. App. 406, 409, 147 P. 105, draws the distinction which we are here making, and likewise refers to the case of Spreckels v. Gorrill, 152 Cal. 383, 92 P. 1011, where the same subject is considered, showing a distinction between fraudulent representations and warranties which enter into and become a part of the contract by reason of the Code provisions which we have heretofore cited. Again, as said in 35 Cyc. p. 368: "There is a definite distinction between representation and warranty, although it is sometimes difficult to determine whether a given statement is the one or the other. A representation is an antecedent statement made as an inducement to the contract, but not a part of or an element in the contract, whereas a warranty becomes, by agreement, a part of the contract. The untruthfulness of the representation, unless material or fraudulent, will not affect the contract. On the other hand, in the case of a warranty, it is immaterial whether the seller knew his statements were untrue or not. A statement is none the less a warranty because it is false and fraudulent. In the case of a warranty, however, the rights of the purchaser rest in contract, while in the case of representation and fraud they are based on tort."

In the case at bar, the rights of the purchaser of the note in question rest upon contract. He took the note with certain warranties written into it by operation of law. These warranties, as we have just stated, constituted a part and parcel of the contract, and, when the plaintiff, suing upon the contract, established a breach thereof, by uncontradicted testimony, a case was made out which necessitated a verdict in favor of the plaintiff. Any other verdict would have been contrary to both the law and the facts. This being true, the order of the trial court granting a new trial on the ground of insufficiency of the evidence is without support. One cause of action set forth in the plaintiff's complaint being thus established, and no question being raised as to the correctness of the instructions given by the court to the jury, the verdict should stand. While it is alleged that the court erred in refusing certain proffered instructions, no argument is made and nothing set forth in the briefs to show in what particular the court erred, and while, under the circumstances, we are not compelled so to do, we have examined the refused instructions and find no cause of complaint on the action of the trial court in refusing the same, or in instructing the jury as to the issues involved in this action. It is unnecessary for us to consider further either the first or the third cause of action set forth in the plaintiff's complaint, for the simple reason that, if one cause of action is properly made out and sustained, as we have stated, the plaintiff is entitled to recover.

[6] In relation to the subject of newly discovered evidence, the law is well summarized in 20 California Jurisprudence, p. 77, § 55, as follows: "To entitle a party to a new trial on this ground it must appear that the evidence, and not merely its materiality is newly discovered; that the evidence is not cumulative, merely; that the evidence is something as to render a different result probable, on a new trial; that the party seeking relief could not, with reasonable diligence, have discovered and produced the evidence at the trial." The affidavits in support of the motion for new trial fall short of any of these requirements. The witnesses whose testimony is claimed to constitute newly discovered evidence are named as J. E. Philips, Mrs. Phoebe Philips, E. A. Odell, and F. J. Easley. The record shows that, of these witnesses, J. E. Philips, mentioned in the record as Jack Philips, and E. Odell, testified repeatedly during the course of the trial. The examination of both witnesses was very exhaustive. They testified as to all of the subject-matter embraced in the recitals contained in the affidavits. Mrs. Phoebe Philips is the wife of Jack Philips, and her presence at the conversation related by her in her affidavit was repeatedly testified to by the witnesses Jack Philips, Olive Philips, and the plaintiff. The remaining witness, F. J. Easley, was a clerk at the hotel kept by Jack Philips, and reference to him is made in the testimony of Jack Philips. It is thus shown that all of the witnesses whose testimony is now claimed to constitute newly discovered evidence were known to the attorneys for the defendant; that two of them were on the witness stand and were examined at length; that the conversation constituting the newly discovered evidence purports to be a conversation which took place at the very instant of time mentioned in the testimony of Jack Philips, wherein he refers to a visit of the plaintiff to the Victoria Hotel at a time preceding the 10th day of September, 1924. The record contains an affidavit, on the part of the plaintiff, showing that the conversation referred to in the affidavit, had with the plaintiff, occurred after the transfer of the note and mortgage when the plaintiff subsequently visited the Victoria Hotel. Be that as it may, the record shows that the attorneys for the defendant and the defendant himself knew all the parties who were present in the Victoria Hotel; that their names were mentioned; that the conversation supposed to have been had with the plaintiff and Philips was detailed by Philips, and now it is sought to add thereto additional testimony as to the conversation referred to, when the defendant and his counsel made no attempt whatever, so far as the record shows, to ascertain whether they had brought out in full the entire conversation had between the plaintiff and Philips relative to the Victoria Hotel. The affidavits seek now to introduce testimony that during said conversation Philips stated, in substance, to the plaintiff that he was not meeting his installment payments. This would touch the question of fraud, but not the question of warranty. It would extend this opinion to too great a length to review the testimony of the different witnesses and review the alleged newly discovered evidence, but the record shows that the defendant is resting his case upon the statement that he and his counsel did not know of the testimony, and made no attempt whatever to show any effort to discover all the claimed facts relative to the conversation now sought to be made the basis of a motion for new trial. Where no effort is shown to have been made to produce the alleged newly discovered evidence, and where the record shows that, if any effort whatever had been made, all of the alleged facts might have been ascertained, no foundation is laid for the granting of a new trial on the ground of newly discovered evidence.

It follows from what we have said that the order granting a new trial in this cause must be, and the same is, hereby reversed, and the judgment affirmed.

We concur: FINCH, P. J.; HART, J.

94 Cal. App. 652

CITY OF NORTH SACRAMENTO v. IRWIN.
(Civ. 3688.)

District Court of Appeal, Third District, California. Dec. 1, 1928.

Municipal corporations 🔑918(2)—Recitals in ordinance calling bond election, though unnecessary, cannot be treated as surplusage.

Where ordinance calling bond election stated the time when first payments of principal and interest would be made, the recitals thereof cannot be treated as surplusage, though it was unnecessary to recite such date, in that the proposition as stated in ordinance was the only one approved by the voters, and vote authorizing indebtedness imports the particulars named as conditions on which that assent was given.

On rehearing. Rehearing denied.

For former opinion, see 271 P. 788.

Chas. L. Gilmore, of Sacramento, for petitioner.

W. O. Irwin, in pro. per.

FINCH, P. J. The petitioner has applied for a rehearing. It is urged that it was unnecessary to recite, in the ordinance calling the election, when the first payments of principal and interest would be made, and therefore the recitals thereof may be treated as surplusage and that they constitute "no part whatever of the proposition voted upon by the elector." The proposition as stated in the ordinance, however, was the one, and the only one, approved by the voters. As said in Skinner v. City of Santa Rosa, 107 Cal. 464, 472, 40 P. 742, 745 (29 L. R. A. 512): "Particulars were inserted in the submission which the statute did not require to be submitted; but these particulars having been submitted, the vote authorizing the indebtedness to be incurred imports the particulars named as the conditions upon which that assent has been given, and hence no one can say that without these favorable conditions the result of the election would have authorized the indebtedness to be incurred." Petitioner relies upon City of Santa Barbara v. Davis, 6 Cal. App. 342, 92 P. 308; Derby v. City of Modesto, 104 Cal. 515, 38 P. 900; and Law v. San Francisco, 144 Cal. 384, 77 P. 1014. In each of those cases the departure in the issuance of the bonds from the recitals in the ordinance calling the election was in respect to the number of the bonds and not the times or amounts of the annual payments thereof. In the first of these cases the proposition submitted to the voters was the issuance of 40 bonds of $1,250 each, payable one each year. The ordinance adopted pursuant to the approval of such proposition by the voters provided for the issuance of 80 bonds of $625 each, payable two each year. Manifestly, the variance was immaterial and in no sense increased the burden on the taxpayer. The other cases relied on by petitioner are to the same effect.

The petition for a rehearing is denied.

We concur: HART, J.; PLUMMER, J.

95 Cal. App. 347

ANTHONY v. CROCKER FIRST NAT. BANK. (Civ. 6577.)

District Court of Appeal, First District, Division 2, California. Dec. 7, 1928.

1. Appeal and error 🔑1011(1)—Findings on substantially conflicting evidence that bond interest coupons were deposited with bank for collection only will not be disturbed on appeal.

Findings, based on substantially conflicting evidence, that depositor and bank agreed that bond interest coupons, amount of which were credited to depositor's account, were deposited for collection only, and that advance to depositor was conditioned on collection thereof, and that depositor was instructed not to draw any further checks against account until bank reported collection, will not be disturbed on appeal.

2. Appeal and error 🔑204(3)—Contention that bank passbook constituted written contract, which could not be varied by parol testimony, cannot prevail on appeal, where no objection was made to such evidence (Code Civ. Proc. § 1856).

Contention that bank passbook, showing unrestricted credit for amount of bond interest coupons, constituted written contract, which could not be varied by parol testimony that coupons were deposited for collection only, under Code Civ. Proc. § 1856, cannot prevail on appeal, where no objection was made to such evidence.

3. Evidence 🔑408(1)—Bank passbook is not "written contract," which cannot be varied by parol testimony (Civ. Code, § 1625; Code Civ. Proc. § 1856).

A bank passbook does not constitute a contract in writing, within Civ. Code, § 1625, so as to preclude parol testimony, under Code Civ. Proc. § 1856, that bond interest coupons, amount of which was credited to depositor, were deposited for collection only.

[Ed. Note.—For other definitions, see Words and Phrases, Written Contract.]

4. Banks and banking 🔑134(1)—Statute held to entitle bank to charge uncollectible bond interest coupons to depositor's account (Bank Act, § 16c).

Under Bank Act (St. 1925, p. 513) § 16c, which became part of terms under which uncollectible bond interest coupons were deposited with bank, which forwarded them for collection on following day, it was entitled to charge them to depositor's account, in absence of written agreement to contrary.

5. Banks and banking 🔑159—Bank held entitled to judgment against depositor for amount advanced on uncollectible bond interest coupons deposited for collection only, irrespective of statute (Bank Act, § 16c).

Uncollectible bond interest coupons having been deposited with bank for collection only, not sold to it, it was entitled to judgment against depositor for amount advanced thereon, irrespective of Bank Act (St. 1925, p. 513), § 16c.

Appeal from Superior Court, City and County of San Francisco; Franklin A. Griffin, Judge.

Action by Lee Anthony against the Crocker First National Bank, which filed a cross-complaint. Judgment for defendant, and plaintiff appeals. Affirmed.

Sawyer & Sawyer and F. W. Sawyer, all of San Francisco, for appellant.

Morrison, Hohfeld, Foerster, Shuman & Clark and W. T. Fitzgerald, all of San Francisco, for respondent.

BURROUGHS, Justice pro tem. Plaintiff commenced this action to recover from the defendant the sum of $2,320. Defendant denied the alleged indebtedness, and by way of cross-complaint prayed judgment against plaintiff in the sum of $500. The court denied plaintiff any relief, and gave judgment for the defendant in accordance with the prayer of its cross-complaint. From said judgment the plaintiff appeals.

[1] In support of his cause of action, the plaintiff, Lee Anthony, testified that on the 15th day of June, 1926, he called at defendant's banking house in San Francisco, and asked Charles Pratt, Jr., an assistant cashier of the defendant, if they would purchase 94 interest coupons of Santa Fé Railway bonds, their face value being $2,820; that after examining said coupons Mr. Pratt stated they were the same as cash, and the bank would buy them. The bank then issued to him a depositor's passbook of the bank, and he was given a credit of $2,820 therein, and he immediately drew a check thereon in the sum of $500. Mr. Pratt then introduced him to the cashier of the bank, with directions to the latter to cash the check, stating that the check was all right and plaintiff had money there. The check was thereupon paid. The bank thereafter refused to pay any more checks, or to pay him the balance due as shown by his passbook.

In sharp conflict with this testimony is that of Charles Pratt, Jr., who testified that there was no conversation as to the bank purchasing the coupons, and that it was explained to plaintiff the bank would take them for collection, and he assented thereto; that a depositor's passbook was thereupon issued to plaintiff, in which he was given a credit for the face value of said coupons, but he was told not to check upon the account until the bank had made collection of the money; that plaintiff thereupon requested an advancement of $1,000 to pay some hospital bills, and that amount was refused. After further conversation, the witness agreed to advance the sum of $500. The latter wrote out the check, had the plaintiff sign it, and then took the check himself, drew the money, and gave it to the plaintiff, again advising the latter not to draw any more money until the bank reported collection. The witness further testified that the coupons were returned to the bank as uncollectible.

James O'Hanlon, coupon teller of the defendant bank, testified that he was called by Mr. Pratt, and counted and listed the coupons; that when he was through counting them Mr. Anthony said to Mr. Pratt, " 'Well, can you give me some money on those coupons?' and Mr. Pratt said, 'Well, how much do you want?' and he said, 'Well, $1,000,' and Mr. Pratt objected. Mr. Pratt turned to me, and I said, 'Well, it will not be—the funds won't be in our hands for several days.' Mr. Pratt said to Mr. Anthony: 'It is not the usual practice to advance money on these. I could not give you $1,000 anyway. If it was a matter of a couple of hundred dollars I might accommodate you.' I told plaintiff we would let him know when the coupons were collected." Paul Herbert Devine, an employee of the bank, testified that the coupons were tendered to the plaintiff and demand made upon him for the return of the $500 advanced to him by the bank. The letter of the bank, forwarding the coupons for collection, bears date June 16, 1926.

Other evidence tending to corroborate that of Pratt and O'Hanlon is in the record, but the foregoing is ample to establish that certain findings of fact, to the effect that it was agreed by the parties that said coupons were deposited for collection only, and that the $500 advanced to plaintiff was conditioned upon the bank collecting the coupons, and the further finding that plaintiff was instructed not to draw any further checks against said account until the bank reported collection, are based upon a substantial conflict in the evidence, and they will not be disturbed upon appeal. 2 Cal. Jur. § 543, and cases there cited.

[2, 3] Indeed, counsel for appellant admits such conflict, but earnestly contends that such evidence should not have been admitted, that the passbook issued by the bank, showing an unrestricted credit of $2,820, constituted a contract in writing and could not be varied by parol testimony. Section 1856, Code Civ. Proc. This claim is answered in the negative, because there was no objection made to the evidence and, further, we are of the opinion that a passbook does not con-

stitute a contract in writing, within the meaning of section 1625 of the Civil Code. In 3 Ruling Case Law, § 160, p. 531, it is said: "An entry in a passbook, however, is not a written contract, within the rule that parol evidence is inadmissible to vary a written contract; but it is in the nature of a receipt, and is prima facie evidence that the amount credited was received by the bank, and the entries may be explained or contradicted." We have been unable to find any California cases exactly in point, but National Gold Bank v. McDonald, 51 Cal. 64, 21 Am. Rep. 697, and Ocean Park Bank v. Rogers, 6 Cal. App. 678, 92 P. 879, hold that a credit made in a passbook of a depositor, and nothing else appearing, no presumption is raised that the check is received as cash or otherwise than for collection.

[4, 5] A number of California cases bearing upon the relation between a depositary bank and its depositor are cited by counsel for both appellant and respondent, but in each of these cases there is some feature distinguishing it from the case at bar. These cases were decided upon a state of facts arising prior to 1925. In the latter year the Legislature enacted section 16c of the California Bank Act. Stats. 1925, p. 513. So far as material to the question under discussion it provides as follows: "Any credit allowed by any bank organized under the laws of, or doing business in, this state, for any check, note or other instrument providing for the payment of money and drawn on or payable at the same bank in which it is deposited or on or at any other bank, or on any other branch of the same bank, or on any other party, shall be only provisional, subject to final payment and to the receipt by the bank in which it is deposited of the funds in actual money, or in solvent credit on the books of any federal reserve bank, or on the books of any bank designated as a depositary by the forwarding bank; * * * and further provided, that when such check, note or other instrument providing for the payment of money is drawn on or payable at any other bank, or on any other party, it shall be sent in course of collection by the end of the next succeeding business day. * * * Until the proceeds of any check, note or other instrument providing for the payment of money shall have been actually received by the bank allowing such credit, in actual money, or in solvent credit on the books of any federal reserve bank, or on the books of any bank designated as a depositary by the forwarding bank, such check, note or other instrument may be charged back to or collected from, the depositor from whom it was received regardless of whether or not the check, note or other instrument itself can be returned. * * * Any provision of this section may be modified or set aside by an agreement in writing between any such bank and any party from whom any check, note or other instrument is received for collection, deposit, or other purpose."

So far as we are advised this section of the Bank Act has never been construed, but in construing a similar statute of the state of Florida in Federal Reserve Bank v. Malloy, 264 U. S. 160, 44 S. Ct. 296, 68 L. Ed. 617, 31 A. L. R. 1261, the Supreme Court of the United States held that the relation of the payee to the initial bank of deposit was controlled by the Florida statute, with respect to which they must be presumed to have dealt with each other. Applying the principle of that decision to the instant case, section 16c, supra, became a part of the terms under which the deposit was made. This conclusion is further strengthened by the following indorsement appearing on the inside page of the passbook: "The rights and obligations of the depositor are defined by the laws of the state of California and the United States of America." In the absence of an agreement in writing to the contrary, the coupons in suit having been forwarded for collection on the day following the deposit, and being uncollectible, the defendant bank, by the terms of the statute, was entitled to charge the worthless paper so deposited to the plaintiff's account. We further hold that the trial court having held the transaction to have been a deposit of the paper for collection only, and not one of sale, irrespective of section 16c, supra, the defendant was entitled to judgment.

The judgment is therefore affirmed.

We concur: NOURSE, Acting P. J.; STURTEVANT, J.

95 Cal. App. 299

PURDY v. BUFFUMS, Inc. (Civ. 5523.)

District Court of Appeal, Second District, Division 1, California. Dec. 5, 1928.

1. Master and servant 🔑3(1)—Defendant's acceptance of plaintiff's offer to work for stipulated salary and stipulated percentage of sales held not conditional, notwithstanding expression of hope that plaintiff would change terms as to percentage.

Defendant's acceptance of plaintiff's offer to work for stipulated sum and stipulated percentage of sales *held* not conditional, notwithstanding that "percentage seems a bit high" and expression of hope that plaintiff might later change her terms, and rules of law that agreement to make contract in future amounts to nothing and that sale contract is incomplete until price is fixed or agreed on, are inapplicable.

2. Master and servant 🔑70(3)—Servant held entitled to percentage of sales as stipulated in original offer, though she subsequently signed employer's printed form carrying notation, "Rate $50.00 per wk." (Code Civ. Proc. § 1858; Civ. Code, § 1642).

Employee *held* entitled to percentage of sales as stipulated in original offer in addition to salary, notwithstanding that she subsequently signed printed form of employer carrying notation, "Rate $50.00 per wk.," since such form did not use word "only" or words "no commission," and court must construe instruments to give effect to every clause unless such construction would be obviously repugnant to parties' intention or lead to absurdity, under Code Civ. Proc. § 1858, and Civ. Code, § 1642.

3. Contracts 🔑169—Rules that contract may be explained by circumstances and that acts of parties thereunder may show intention are inapplicable to unambiguous contracts (Civ. Code, § 1639).

Rules that contract may be explained by reference to circumstances under which it was made, and that acts of parties done under it afford reliable means of arriving at their intention, are inapplicable in construing clear and unambiguous contracts, since intention is to be ascertained from writing alone, if possible, under Civ. Code, § 1639.

4. Master and servant 🔑80(13)—Interpretation of employment contract held law question.

Interpretation of contract of employment sued on *held* to be question of law and not of fact.

Appeal from Superior Court, Los Angeles County; Charles S. Burnell, Judge.

Action on a contract for services by Aleen Purdy against Buffums, Inc. Judgment for plaintiff, and defendant appeals. Affirmed.

Denio & Hart, Denio, Hart, Taubman & Simpson, and Geo. P. Taubman, Jr., all of Long Beach, for appellant.

Benjamin & Benjamin, of Los Angeles (Aaron Elmore, of Los Angeles, of counsel), for respondent.

CRAIL, Justice pro tem. Some time prior to June 23, 1923, the plaintiff entered into negotiations with the defendant for her employment as manager of its hair goods and beauty parlor department, and wrote the defendant a letter in which she offered to enter upon such employment at $50 per week and 5 per cent. of the gross sales of the department. Thereupon the defendant replied by letter as follows:

"Our Mr. Johnson handed me your note, which I have gone over carefully, and am glad to know that you have decided to come with us later, when our building is ready. * * *

"As I recall, your wage was to be $50.00 per week and five per cent of the gross sales. Without going into the matter more fully, I might say that the percentage seems a bit high, at least while the business is being developed. The wage is all right, for I am sure you can put across the program that we are intending to inaugurate. However, we are willing to let the percentage part remain, and will work it out with you later.

"We want you to feel that you are engaged for the job, and will leave the entire matter in your hands."

And from that time on both parties considered that plaintiff was employed as manager of the department which was to be established when a new building was completed. On May 1, 1924, the plaintiff commenced upon her duties as indicated. She had several conversations with Mr. Buffum, president of the company, but nothing was ever said about changing her compensation. On May 5, 1924, she went downstairs to the bookkeeper, named Miss Brown, who prepared "a little yellow slip," which was in printed form, "Form 19–1M," but contained blank spaces for name, date to begin, rate per week, etc., which plaintiff signed, as follows:

Form 19-1M 4-23 Del Mar. No. 2401
Buffums'
24 and 25 Date 5/5, 1924.
Department: Beauty Parlor
Name: Mrs. Aleen Purdy
Address: 239 Ximeno
Telephone number.
Occupation: Beauty Parlor
To begin 5/5, 1924. Rate $50.00 per wk.

It is understood and agreed that my term of employment may be discontinued at any time by myself or Buffums', and that my compensation shall be based on the actual time employed.

Employed by

Aleen Purdy
Employé's Name.

Approved by C.A.B.
Entered Pay Roll
Record No.

Plaintiff accepted for almost a year $50 per week, and made no demand for her commission until the day prior to her resignation. In explanation she said she did not expect the payment of the commission until the end of the year.

The trial court held in effect that the two letters constituted a contract between the parties, and that this contract was not modified, so far as compensation was concerned, by the writing of May 5th, and entered judgment accordingly.

[1] It is the contention of appellant (1) that there was no valid contract between the parties, and (2) that, if there were such a contract, it was modified by the writing of May 5th, and that plaintiff's compensation was limited thereby to $50 per week. In support of these contentions appellant expounds several propositions of law which it seems our duty to consider.

Appellant contends that there is no contract "when essential parts of the intended agreement are to be determined by future negotiations." 6 Cal. Jur. 45. But in this case we have an offer and an unequivocal acceptance of it. Answering the offer, defendant says: "We are glad to know that you have decided to come with us. * * * Your wage was to be $50.00 per week and five per cent of the gross sales. * * * The percentage seems a bit high. The wage is all right. * * * However, we are willing to let the percentage part remain. * * * We want you to feel that you are engaged for the job," etc. The acceptance may be a "grumbling" one, but it is unequivocal. Johnson v. Federal Union, etc., Co., 187 Mich. 454, 153 N. W. 788; 1 Elliott on Contracts, 44; 13 Cor. Jur. 283. "We are willing to let the percentage part remain." How else could it remain except as offered or demanded by plaintiff? It is true that there is added, "and we will work it out with you later." No length of time was fixed for the continuance of the employment, and either party could terminate it at will. The words are a mere expression of hope that later the offeror will change her terms. This does not make the acceptance conditional. 13 Cor. Jur. 283.

Appellant next asserts that "Preliminary negotiations are not evidence of a binding agreement and are nudum pactum." It is certainly true that an agreement that parties will, in the future, make such contract as they may then (later) agree upon amounts to nothing. Dillingham v. Dahlgren, 52 Cal. App. 322, 198 P. 832. But this law has no application to the writing before us, as we have endeavored to point out above.

Again it contends that, "Where the price of the commodity called for * * * is to be subsequently * * * fixed by the agreement of the parties, the contract of sale is incomplete and unenforceable, until the price is so fixed or agreed upon" (citing Jules Levy & Bros. v. A. Mautz & Co., 16 Cal. App. 666, 117 P. 936). This is merely a more specific or detailed statement of the same law. If the acceptance be qualified or go not to the actual thing proposed, there is no binding contract. Four Oil Co. v. United Oil Producers, 145 Cal. 623, 79 P. 366, 68 L. R. A. 226. However, in the instant case there is a definite proposal, and the proposal was squarely assented to.

[2] Appellant next contends for the rule that the intention of the parties should be gathered from the whole instrument, taking it by the four corners, and, when several papers concerning one subject-matter are separately executed by the same parties, all should be construed together as one contract, and the intention of the parties should be gathered from all the instruments, taken together. Civ. Code, § 1642, and 6 Cal. Jur. 298. But this apparently is what the learned trial judge did. There are no words in the little yellow slip which annul or strike out of the contract the 5 per cent. commission. Both writings refer to a wage of $50 per week; but the second writing speaks neither for nor against a 5 per cent. commission. For instance, it does not use the word "only," or the words "no commission." The words "and five per cent. of the gross sales" still remain in the contract. It is the duty of a court to so construe a written instrument as to give force and effect to every clause so that no clause may become redundant, unless such construction would be obviously repugnant to the intention of the parties, to be collected from its terms, or would lead to some absurdity. 6 Cal. Jur. 259; Scudder v. Perce, 159 Cal. 429, 114 P. 571. To the same effect is the Code provision which reads: "Where there are several provisions or particulars, such a construction is, if possible, to be adopted as will give effect to all." Code Civ. Proc. § 1858.

[3] Appellant next contends for the rules that a contract may be explained by reference to the circumstances under which it was made, and that the acts of the parties done under a contract afford one of the most reliable means of arriving at their intention. But these rules are not applicable in construing clear and unambiguous contracts. They have to do with contracts in which the intention of the parties cannot be ascertained from the writing alone because the writing is doubtful, uncertain, or ambiguous. Salter v. Ives, 171 Cal. 790, 155 P. 84. The intention of the parties is to be ascertained from the writing alone if possible. Civ. Code, § 1639. Surrounding circumstances and subsequent conduct may be invoked to interpret a contract only in cases where upon the face of the contract itself there is doubt, and the evidence is used to dispel that doubt, not by showing that the parties meant something other than what they said, but by showing what they meant by what they said. United Iron Works v. Outer Harbor, etc., Co., 168 Cal. 81, 141 P. 917; Pierce v. Merrill, 128 Cal. 464, 61 P. 64, 79 Am. St. Rep. 56.

[4] In closing, appellant sets out "five salient facts" which it claims the evidence dis-

closes. But they already have been referred to and disposed of in what we have said above, and we would not feel justified in discussing them at further length in this opinion, since the interpretation of the contract is a question of law and not of fact.

The judgment is affirmed.

We concur: HOUSER, Acting P. J.; YORK, J.

95 Cal. App. 327

MAZURAN v. STEFANICH et ux.★
(Civ. 6564.)

District Court of Appeal, First District, Division 2, California. Dec. 6, 1928.

Rehearing Denied Jan. 5, 1929. Hearing Denied by Supreme Court Feb. 4, 1929.

1. Appeal and error 🔑731(5)—Specification of insufficiency of evidence as being insufficient to justify decision held too general (Code Civ. Proc. §§ 648–653).

Where record was brought by bill of exceptions settled pursuant to provisions of Code Civ. Proc. §§ 648–653, specification of insufficiency of evidence in bill of exceptions as being insufficient to justify the decision that the court rendered was too general to permit examination into sufficiency of the evidence by appellate court; section 648 requiring that objection must specify particulars in which evidence is alleged to be insufficient.

2. Evidence 🔑434(9)—Oral evidence held admissible to show contract between attorney and clients was signed by clients without reading it, pursuant to fraudulent representation by attorney.

Oral evidence *held* admissible to show that written agreement between attorney and client was signed by clients without reading it, in the belief, fraudulently induced by attorney's representations, that it embodied the terms of their previous oral agreement, though theoretically attorney and client, when agreeing on terms of employment, are dealing at arm's length with one and another, and no relation of confidence ordinarily exists until after execution of contract.

3. Contracts 🔑94(1)—Written contract induced by misrepresentation by party occupying confidential relation may be set aside.

Where parties occupying a relation to one and another which the law regards as confidential, a written contract which one of the parties inducing the other to sign by knowingly misrepresenting its contents may be set aside.

4. Trial 🔑404(4)—Blanket finding that all allegations in answer were true held sufficient finding that relation existed as alleged therein.

Blanket finding to the effect that all the allegations contained in the answer were true *held* sufficient finding that relation of attorney and client existed as alleged in answer.

5. Fraud 🔑20—Attorney's misrepresentation, inducing client to sign employment contract contrary to oral agreement, constituted actionable fraud (Civ. Code, § 1572, subd. 4).

Where attorney orally agreed to perform seven distinct legal services for clients, and fraudulently induced clients to execute a writing which they believed provided for all seven services, but which in fact provided for only one, there was actionable fraud, under Civ. Code, § 1572, subd. 4, by reason of making a promise with no intention of performing it.

6. Fraud 🔑58(1)—Evidence held insufficient to establish ratification of contract for attorney's services after knowledge of fraud in inducing written contract.

Evidence *held* insufficient to establish ratification by clients of contract with attorney for legal services after they had full knowledge of attorney's fraud in inducing them to execute a written contract providing for one service contrary to oral agreement for seven distinct services.

7. Fraud 🔑35—Ratification of fraudulent transaction can only be made with full knowledge of facts.

Ratification of a fraudulent transaction can only be made where there is full knowledge of the facts constituting the fraud, and depends primarily on the intention of party as shown by his declarations, acts, and conduct.

8. Fraud 🔑50—Party claiming ratification of fraudulent transaction has burden of proof.

Burden of proving ratification of a fraudulent transaction rests on party making a claim thereof.

9. Appeal and error 🔑1071(6)—Failure to make finding which would be adverse to appellant is not error.

Failure of trial court to make finding which would necessarily be adverse to appellant is not reversible error.

10. Appeal and error 🔑1071(1)—Finding on cross-complaint that sum paid attorney for services before discovery of fraud was reasonable compensation held not prejudicial.

Finding of court on cross-complaint for money alleged to have been paid to attorney on employment contract before discovery of fraud, to effect that such sum was reasonable compensation for legal services rendered, *held* not prejudicial as to attorney, in view of fact that judgment would not be res judicata in suit to recover for any other services performed by attorney.

Appeal from Superior Court, Fresno County; K. Van Zante, Judge.

Action by Marion J. Mazuran against Frank Stefanich and wife. Judgment for defendants, and plaintiff appeals. Affirmed.

D. A. Knapp, of Los Angeles, for appellant.

Lindsay & Gearhart and B. W. Gearhart, all of Fresno, for respondents.

DOOLING, Justice pro tem. This is an action upon a note and mortgage. Judgment

---

★Rehearing denied. Hearing denied by Supreme Court.

went for defendants below, and plaintiff appeals. Defendants in their answer set up as an affirmative defense that the note and mortgage were procured by certain fraudulent representations of plaintiff, and the trial court found in defendants' favor on this issue. In this behalf the court found that, prior to the execution and delivery of the note and mortgage, plaintiff, who is an attorney at law, promised and assured defendants, who are husband and wife, that he could and would, in consideration thereof, perform seven distinct legal services, each of which is specifically set out in the findings; that he made said promises without any intention of performing, and did not perform, them; that solely by reason of said promises and in reliance thereon defendants executed and delivered the promissory note and mortgage. The court further found that, contemporaneously with the execution of the note and mortgage, defendants also signed a certain agreement in writing which in terms bound plaintiff to perform only one of the seven legal services theretofore agreed upon in consideration of the giving of said note and mortgage, but that this agreement was signed by defendants without reading it, in reliance upon the false and fraudulent representation of plaintiff that the agreement embodied the promise to render all seven of the legal services theretofore agreed upon. This summary of the findings on this issue will suffice for a general understanding of the questions raised on the appeal. Other findings are discussed hereafter in connection with the consideration of certain claimed errors to which they are pertinent.

[1] A large part of the briefs is devoted to the contention that certain of the findings are not supported by the evidence. The record is brought here by a bill of exceptions settled pursuant to the provisions of sections 648–653 of the Code of Civil Procedure. The only specification of insufficiency of the evidence in the bill of exceptions is in the following language: "That the evidence is insufficient to justify the decision of the court rendered in this action." Under the settled rule of practice in this state, this specification is too general to permit this court to examine into the sufficiency of the evidence to support any or all of the findings. Section 648, Code of Civil Procedure, provides in this regard that, "when the exception is to the verdict or decision, upon the ground of the insufficiency of the evidence to justify it, the objection must specify the particulars in which such evidence is alleged to be insufficient." Under this provision of the Code it has always been the rule that the bill of exceptions must, at the very least, specify the particular finding or findings which it is claimed are not supported by the evidence (Mills v. Brady, 185 Cal. 317, 320, 196 P. 776, and cases cited; Schultz v. City of Venice, 200 Cal. 50, 251 P. 913), and this for the very good reason that "the adverse party may know what evidence by way of amendments to embody in the statement or bill and that the trial court's attention may be directed to these designated matters." Crow v. Crow, 168 Cal. 607, 611, 143 P. 689, 690. It follows that, in the absence of any more particular specification of the insufficiency of the evidence than that above quoted, this court not only should not, but cannot, review the evidence set out in the bill of exceptions to determine whether or not it is sufficient to support the findings attacked. We may add, however, without discussing it, that an inspection of the record satisfies us that the findings are sufficiently supported by the evidence included in the bill.

[2] Appellant urges that the court erred in permitting evidence to be introduced to show that the written agreement was signed by respondents without reading it in the belief, fraudulently induced by appellant's representations, that it embodied the terms of their previous oral agreement. In this behalf appellant contends that one who signs a written instrument is under the legal duty to ascertain its contents before signing it, and, having failed to read it, cannot afterwards attack it on the ground that he relied on the false representation of the other party that its contents were different from those which it actually contained. This is a question which has perplexed the courts of this and other jurisdictions. The rule contended for by appellant is supported by the following California decisions: Hawkins v. Hawkins, 50 Cal. 558; Kimmel v. Skelly, 130 Cal. 555, 62 P. 1067; De Laval Supply Co. v. Steadman, 6 Cal. App. 651, 92 P. 877. The opposite rule is announced in an equal number of cases. Wenzel v. Schulz, 78 Cal. 221, 20 P. 404; Togni v. Taminelli, 11 Cal. App. 7, 103 P. 899; Knight v. Bentel, 39 Cal. App. 502, 179 P. 406. In neither line of decisions is any reference to be found to the other. A similar contrariety of opinion exists in other jurisdictions. See the cases collected in notes in 6 L. R. A. (N. S.) 463, and L. R. A., 1917F, 637. It is said in 6 R. C. L. p. 634, that, "while there is always a sharp struggle in the courts between the desire to repress fraud upon the one hand, and on the other to discourage negligence and the opportunity and invitation to commit perjury, the rule seems to be settling down to hearing all the facts, still scrutinizing closely, and even suspiciously, the claim of a party to such an instrument that he had not read it." We are inclined to the view, announced in this quotation, that, upon a clear showing that a written instrument was executed by one party to it without reading it, in the belief, induced by the fraudulent representations of the other party, that its provisions were different from those set out, the courts should set the

agreement aside. Certainly it would be a reproach to our law if an attorney, in negotiating the terms of his employment by a client, could thus deliberately misrepresent the terms of a writing and hold the client to a bargain which he never intended to make. While theoretically, in agreeing upon the terms of such employment, the attorney and prospective client are dealing at arm's length with one another, and no relation of confidence ordinarily exists until the contract of employment is executed (Cooley v. Miller & Lux, 156 Cal. 510, 105 P. 981), we cannot close our eyes to the fact that, as a practical matter, many people would sign such a contract without reading it, when prepared by an attorney, because of the fact that the drawing of contracts is a matter which the average person, and very rightly, feels is peculiarly a lawyer's business.

[3, 4] There is another factor in this case, however, which compels us to decide this point against appellant in any event. Whatever may be the diversity of opinion on this question where the parties are dealing at arm's length, it is the unquestioned rule that, where the parties occupy a relation to one another which the law regards as confidential, a written contract which one of the parties induces the other to sign by knowingly misrepresenting its contents may be set aside. Calmon v. Sarraille, 142 Cal. 638, 76 P. 486. It is alleged in paragraph I of defendants' separate answer and defense that at and prior to the time of the negotiations leading up to the execution of the writings here in question appellant was and had been "the attorney and confidential adviser of the defendants herein." While there is no specific finding covering this allegation, there is a blanket finding, VIII, "that all the allegations contained in the answer * * * of the defendants are true." This is a sufficient finding that the relation of attorney and client existed at the time of the negotiations as alleged in the answer. Continental B. & L. Ass'n v. Wilson, 144 Cal. 776, 78 P. 254.

[5] Appellant further urges that, since the trial court found that appellant's misrepresentations consisted in the promise that he "could and would" perform certain legal services for respondents, and his ability to perform those services depended entirely upon the facts which were only known to appellant as related to him by respondents, in the absence of a finding as to just what facts were related to appellant and whether those facts were true, his promise that he could and would do certain things amounted only to an expression of opinion based entirely on respondents' story, and could not constitute actionable fraud. It is unnecessary for us to pass upon this interesting question. The court found, as we have seen, that appellant orally agreed to perform seven distinct legal services for respondents and fraudulently induced respondents to execute a writing which they believed provided for all seven services, but which in fact provided for only one. It is clear from this that appellant in no event intended to perform, or to endeavor to perform, the six services which he caused to be omitted from the written agreement prepared by himself. A promise made with no intention of performing it is actual fraud. Civ. Code, § 1572, subd. 4. The gist of appellant's fraud in this case was not that he promised to do something which he could not do, but that he promised to do something which he did not intend to do.

[6] Another of appellant's contentions is that the evidence shows that, after full discovery of the fraud, respondents ratified their contract with him. While not presented in that way, this contention really amounts to the claim that the trial court failed to find on the material issue of ratification. This issue was not raised by the pleadings, since the issue of fraud was first set up by the answer. It arose, if at all, on the evidence, under section 462, Code of Civil Procedure. If the evidence would support a finding that respondents ratified the contract with full knowledge of the fraud, the failure to find on that issue was error. Taylor v. Taylor, 192 Cal. 71, 81, 218 P. 756, 51 A. L. R. 1074. This rule necessitates an examination of the evidence on this point.

The bill of exceptions shows that respondent Frank Stefanich testified that, after signing the contract, he put it away in his desk. He then testified: "I next saw this contract in July some time." Respondent Mary Stefanich testified: "I do not read English very well. I never went to school. I can read English if it is written plainly. I also write plain English, with a lot of mistakes. I did not read the contract marked Exhibit A and attached to the cross-complaint. I read it long afterwards. It is very difficult to read. There are lots of words in it that I do not understand. I did not read it until long after it was written and signed, probably in August." Two letters were introduced in evidence written by Mrs. Stefanich to appellant. One was dated August 6, 1923, and signed Frank Stefanich, but Mrs. Stefanich testified that it was written by her. In this letter appellant's conduct of the suit referred to in the written contract was discussed, and he was told to try to settle matters amicably. "If not then you can do what is best." The second, dated September 23, is signed by Mrs. Stefanich, and, without mentioning any litigation by name, says that I "do hope you can win both cases very soon to show others that you can. I did hear lot of misunderstandings in S. F., but does not bother me any." The evidence shows that appellant was discharged by respondents some time in October.

From this meager testimony appellant argues that respondents, after they had full knowledge of the fraud, elected to ratify their contract with him and retain his services, citing Nounnan v. Sutter Land Co., 81 Cal. 7, 22 P. 515, 6 L. R. A. 219, and Schmidt v. Mesmer, 116 Cal. 267, 48 P. 54. We do not think that the evidence is sufficient to support this contention.

[7] "When the original fraud is clearly established by circumstances not liable to doubt, a confirmation of such a transaction is so inconsistent with justice, so unnatural, so liable to be connected with fraud, that it ought to be watched with the utmost strictness, and to stand only upon the clearest evidence as an act done with all the deliberation that ought to attend a transaction the effect of which is to ratify that which in justice ought never to have taken place." Morse v. Royal, 12 Ves. 373, quoted in Green v. Duvergey, 146 Cal. 379, 80 P. 234. Ratification of a fraudulent transaction can only be made where there is a full knowledge of the facts constituting the fraud (Siebold v. Berdine, 61 Cal. App. 158, 214 P. 655), and depends primarily on the intention of the party as shown by his declarations, acts, and conduct. French v. Freeman, 191 Cal. 579, 590, 217 P. 515.

[8, 9] In the light of these principles, we are satisfied that the evidence above quoted is not sufficient to support a finding of ratification. The burden of proving ratification was on appellant. The testimony of Stefanich that he "saw" the contract again in July does not establish that he read it then. And, even if he did read it in July, he had nothing to do with the writing of either letter, and the evidence is silent as to whether he had knowledge of their writing. Mrs. Stefanich's testimony that she read it probably in August does not fix any definite date, and is qualified by her testimony that she does not read English well and found the contract difficult to read and much of that she did not understand. How much she understood when she did read it is left to speculation. It is likewise left in complete uncertainty whether the letter of August 6 was written before or after Mrs. Stefanich had read the contract. What cases are referred to in the letter of September 23 is equally undetermined. These are all matters which counsel for appellant could have cleared up by further questions, and neither this court nor the trial court would be justified in spelling out a ratification from the fragmentary testimony which was elicited. This evidence neither shows the full knowledge of fraud nor the unequivocal intent to waive the fraud and abide by the contract which are essential to ratification. The failure to make a finding which would necessarily be adverse to appellant is not reversible error. Furlong v. White, 51 Cal. App. 265, 272, 196 P. 903.

[10] Respondents cross-complained for $2,000 alleged to have been paid to appellant before discovery of the fraud. As to this payment, the court found "that said sum was and is ample, just and reasonable compensation to plaintiff for any and all legal services rendered by plaintiff." Appellant complains that this finding is outside the issues and not supported by the evidence. It is difficult to see how appellant is injured thereby. The suit was one for foreclosure of a mortgage, and the judgment simply decrees that the note and mortgage are void, and that plaintiff take nothing. As to the services agreed to be rendered by appellant in consideration of the note and mortgage, the court found that they were not performed, and this finding cannot be reviewed because of the insufficiency of the specification hereinabove discussed. If appellant performed any other services for respondents the judgment in this case would not be res adjudicata in a suit to recover for them.

This disposes of all the errors alleged except those directed to the insufficiency of the evidence to support the findings.

The judgment is affirmed.

We concur: KOFORD, P. J.; STURTEVANT, J.

95 Cal. App. 320

NATHAN v. AMERICAN PHOTOPLAYER CO. (GOODMAN, Intervener).★

(Civ. 6394.)

District Court of Appeal, First District, Division 1, California. Dec. 6, 1928.

Rehearing Denied Jan. 5, 1929.

1. Brokers ⚷86(1)—Evidence held to support judgment for defendant in action on contract for services as financial agent in procuring extension of credit.

In action on contract for services as financial agent or broker in procuring extension of credit, evidence showing that no loan was consummated, and that plaintiff never performed services contemplated, *held* sufficient to support judgment for defendant.

2. Appeal and error ⚷1071(3)—Where findings on material issues were supported by evidence, fact that additional findings were unsupported will not warrant reversal.

Where findings on material issues are supported by evidence, fact that additional findings, which would not have affected judgment, if made the other way, were not supported by evidence, will not warrant reversal, since it is only when judgment rests on some particular finding for its validity and support that lack of evidence sufficient to support such finding becomes material.

3. Brokers ⚷49(1)—Broker's agreement to procure extension of credit on terms acceptable to borrower is consummated at time terms are accepted.

Broker's agreement to procure extension of credit, under which terms must be acceptable

---

★Rehearing denied.

to borrower, is consummated at time of acceptance of terms obtained.

4. Appeal and error ⚷882(3)—Broker, suing on express contract, cannot for first time on appeal urge recovery on quantum meruit.

Where action for services as broker in procuring extension of credit was brought on theory that plaintiff was working under terms of express contract, plaintiff cannot for first time on appeal urge recovery on quantum meruit.

5. Corporations ⚷592—Corporation delinquent in payment of taxes does not forfeit charter and become defunct, but may defend action brought against it (St. 1917, pp. 371, 377; Pol. Code, § 3669c, subd. 2).

Under St. 1917, pp. 371, 377, and Pol. Code, § 3669c, subd. 2, corporate rights, privileges, and powers of domestic corporation are suspended for nonpayment of taxes, but it does not forfeit charter and become defunct, and statute expressly reserves power to defend any action brought against it.

Appeal from Superior Court, City and County of San Francisco; James M. Troutt, Judge.

Action by Harry Nathan against the American Photoplayer Company, in which Louis E. Goodman intervened. From judgment for defendant, plaintiff appeals; and from an order denying a motion to dismiss the action, intervener appeals. Affirmed.

Dowd & Reagh, of San Francisco, for appellant.

Brownstone & Goodman, of San Francisco, for respondent.

SPENCE, Justice pro tem. Plaintiff and appellant Harry Nathan brought this action against defendant and respondent American Photoplayer Company, seeking judgment in the sum of $2,500 upon an alleged express contract, and also upon common counts for services as a financial agent or broker in procuring the extension of credit to respondent by a New York bank. The cause was tried by the court without a jury, and judgment entered in favor of defendant and respondent, American Photoplayer Company, from which judgment plaintiff and appellant Harry Nathan appeals.

Louis E. Goodman intervened as a stockholder of the defendant and respondent corporation, and moved that the action be dismissed on the ground that the corporation had forfeited its charter in 1924 by reason of failure to pay its taxes, and had therefore ceased to exist prior to the commencement of this action. The motion was denied, and from this order the intervener and appellant Louis E. Goodman appeals. It was stipulated by the parties that the bill of exceptions and transcript might be used on the appeal of the intervener, as well as on the appeal of plaintiff.

[1, 2] On this appeal plaintiff and appellant Harry Nathan contends that the findings are not supported by the evidence. Plaintiff and appellant failed to embody in the bill of exceptions any objections specifying the particulars in which the evidence is alleged to be insufficient as required by section 648 of the Code of Civil Procedure. We have, however, examined the transcript, which purports to set forth all of the evidence introduced, and conclude that the evidence is sufficient to support the findings on certain material issues, and sufficient to justify the decision in favor of defendant and respondent. These findings, which were against plaintiff and appellant and are supported by the evidence, were the findings upon material issues which were essential to plaintiff and appellant's cause of action. If there were additional findings made by the court, which were not supported by the evidence, this would not warrant a reversal of the judgment. "It is only when a judgment rests upon some particular finding for its validity and support that the lack of sufficient evidence to support such finding becomes material; complaint may not be made of an unsupported finding which, had it been made the other way, would not have affected the judgment." 24 Cal. Jur. 993, 994; Nelson v. Dutton, 63 Cal. App. 717, 220 P. 12; American Nat. Bank v. Donnellan, 170 Cal. 9, 148 P. 188, Ann. Cas. 1917C, 744; Schurman v. Look, 63 Cal. App. 347, 218 P. 624.

The amended complaint here consisted of four counts, all relating to the same transaction or subject-matter. The first count alleged an agreement whereby defendant, "in consideration that plaintiff would procure the extension of credit in the sum of $100,000, or any part thereof, from any banking corporation in the city of New York to defendant, promised, agreed and undertook forthwith upon the same being so procured to pay plaintiff the sum of five (5%) per cent. of the amount of any credit so established for defendant." It further alleged that plaintiff had "fully and in all things complied with all the conditions and obligations of said contract resting upon him and * * * under the terms of said contract secured for defendant * * * an agreement to extend to defendant credit to the sum of fifty thousand ($50,000) dollars." The second count is substantially the same, except that the words "the extension of credit" are changed to "a loan of money." The third and fourth counts were drawn somewhat in the form of common counts for work and services. All of the material allegations were put in issue by the answer, and the court found against the plaintiff and appellant upon practically all of these allegations.

We are satisfied that, under the evidence, plaintiff's only color of claim to a right of recovery was under the first alleged cause of action. In fact the plaintiff himself takes the position in the closing brief, in dealing with the merits of the case, that "plaintiff was under the duty of showing (a) a contract between himself and the defendant; (b) that he secured a customer ready, willing, and able to extend the credit on terms which were either the same as those proposed by defendant, or satisfactory to it; (c) that the failure of the transaction to go through was neither the fault of himself or the customer." We will therefore direct our attention to the first alleged cause of action, for, if the evidence was sufficient to support findings adverse to plaintiff on the material allegations therein contained, the plaintiff under the evidence here would not be entitled to recover under the other alleged causes of action covering the same subject-matter.

We will refer to plaintiff and appellant as "Nathan" and the defendant and respondent as "the company." The company was doing a large business in the manufacture of musical instruments, which were frequently sold on installment contracts, payable over a period of 24 to 30 months. The company had previously received credit from various banks in financing its business. Nathan was a financial agent or broker in New York. Nathan and Werner, the president of the company, had conversations in the early part of 1923 relating to the possibility of Nathan obtaining accommodations for the company from a New York bank. Werner stated that the company would want a line of credit of from $50,000 to $100,000, one-half to be on the company's paper, and one-half to be on the company's paper guaranteed by a bonding company. With relation to the nature of the "line of credit," Werner testified without contradiction that he advised Nathan that the bank would have to agree to renewals of the loans over the length of time covered by their installment contracts, and that the bonding company which would be secured by the installment contracts required that such arrangement be made with the bank. Both parties testified that the guaranty of the bonding company was to cover only one-half of the amount. There is a conflict as to the amount of compensation which Nathan would receive, and also as to whether any compensation would be due unless the loan was actually made. We deem these matters immaterial, however, as the evidence failed to show that Nathan ever obtained "a line of credit" upon the terms proposed.

Several months after the conversations between Nathan and Werner, and after Nathan had failed to get accommodations on the terms proposed, the committee of the Irving National Bank took action, as shown by the minutes of their meeting of June 1, 1923, for "$50,000 on collateral consisting of installment purchase notes. Loan for four months, guaranteed in total by Fidelity & Casualty Company of Baltimore, approved, provided commensurate balances are carried." Plaintiff's Exhibit I shows that Nathan in applying to the bank, stated that "obligations will be paid without renewal and they will keep commensurate balances." Nathan wired the company on June 12th, advising them briefly, but not in detail, of the action of the bank. In reply, M. J. Samuels, vice president of the company, wired Nathan on June 13th, asking him to have the bank forward necessary resolutions and forms of notes, and requesting Nathan to "please write details." No resolutions or note forms were ever received from the bank, nor did Nathan ever advise the company of the details upon which this loan could be arranged. No loan was consummated with the bank on the terms proposed or any other terms. Shortly thereafter the company was placed in the hands of a committee and underwent a reorganization.

From a review of the evidence it is apparent that Nathan never performed the services contemplated. The uncontradicted testimony shows that Nathan was to procure (1) a "line of credit" of from $50,000 to $100,000; (2) upon an understanding that loans were to be renewed for a period equal to the life of the company's installment contracts; (3) with one half of the amount to be guaranteed by a bonding company and the other half to be without such guarantee. All that the testimony tends to show that Nathan did procure was (1) a loan of $50,000; (2) for a definite period of four months, with the understanding, given to the bank by Nathan, that the obligation would be paid without renewal; (3) and the entire amount to be guaranteed by a bonding company.

It affirmatively appeared from the bank records, introduced by Nathan himself as Exhibit I, that he called at the bank on June 11th, and that he was advised that his original proposition "was not interesting," and that, when Nathan was advised of the terms upon which the bank would make a loan, it "was not pleasing." He then told them that he would like to bring some further information and see if they "could not get a different point of view." Instead of furnishing further information, he sent the brief wire of June 12th above mentioned, and the vice president of the company wired back, asking for forms and details which were not forthcoming. Nathan obviously knew that he had not procured a line of credit on the terms proposed. It is further apparent that the company was not fully advised of the details of the plan upon which the bank would make any loan, and therefore it cannot be said that it accepted any new or different terms, or that such terms were satisfactory to it.

[3] It may well be doubted whether an agreement, as alleged in the amended complaint, to pay a commission in the event that a broker will "procure the extension of credit," without further specifications of the time, rate of interest, security, balances required,

or understanding regarding renewals, is sufficiently definite to form the basis of a contract or cause of action, unless the terms finally obtained are acceptable to the borrower. In the latter case, the agreement is consummated at the time of the acceptance of the terms obtained.

Assuming, however, that the proposition made to Nathan in the present case was sufficiently definite to form the basis of a unilateral contract upon performance by Nathan, the evidence fails to show performance according to the terms proposed, and fails to show acceptance by the company of any other terms. Without such performance according to terms, or acceptance of new terms, mutuality was entirely lacking, and in fact no contract existed. The findings of the trial court to the effect that Nathan did not perform any of the terms or conditions, and that no credit was secured under the terms of any contract, were supported by the evidence and fatal to his recovery.

It may be further noted that the bank had never made any binding agreement to make a loan to the company on any terms, and in view of the contemplated reorganization of the company at the time that Nathan finally sent the wire in June, 1923, and his failure to forward note and resolution forms as requested, the court was justified in inferring that the bank was not then ready and willing to extend any credit to the company. The fact that under the indefinite allegations the court made findings adverse to plaintiff and appellant on practically all of the remaining allegations is not material. These supported findings were conclusive, and, under the authorities above cited, no reversal should be had on the ground that some other finding or findings are not supported by the evidence.

[4] Counsel further argues that, because of the company's financial condition and the impossibility of obtaining credit, Nathan should recover for his services on a quantum meruit. This theory of the case seems to have been first advanced by counsel on this appeal. The case was tried upon the theory that there was an express contract, duly performed by Nathan. In his proposed findings, which were not signed, he abandoned the common counts of his complaint, and asked no findings on the allegations therein contained, nor on the financial condition of the company. No misrepresentation of the financial condition was alleged or proved. On the contrary, statements showing the condition of the company were forwarded to Nathan upon his request, shortly after his conversation with Werner, the correctness of which statements is not questioned. At all times involved here, it was admittedly in need of credit to finance its business. It was many months after the conversations with Werner that Nathan secured the unsatisfactory action of the committee of the Irving National Bank, and it was about this time that the reorganization was being contemplated. Counsel has at all times taken the position that Nathan could and did obtain credit for the company under the terms of an agreement, and cannot at this stage of the proceedings turn about and say that this was impossible, and that he therefore should recover on a quantum meruit.

[5] On the appeal of the intervener and appellant Louis E. Goodman, it is claimed that his motion to dismiss the action should have been granted, on the ground that prior to the commencement of this action the defendant corporation was defunct, having forfeited its charter for nonpayment of taxes. Counsel on both sides argue at length concerning the provisions of section 416 of the Code of Civil Procedure, relating to the manner of suing corporations whose charters have been forfeited and whose directors have become the trustees. The argument of counsel leads to the conclusion that they have overlooked the provisions of Statutes 1917, pp. 371, 377, and section 3669c, subdivision 2, of the Political Code. The penalty for nonpayment of taxes was thereby changed, so that a domestic corporation no longer forfeits its charter and becomes defunct, but its corporate rights, privileges and powers are merely suspended; the statute, however, expressly reserving to the corporation the power to defend any action brought against it. "Under the former law, when the charter was forfeited, the directors then in office became the trustees of the creditors and of the stockholders of the corporation. Under the present law, however, the charter is not forfeited, the corporation does not become defunct, and there are no trustees." Usher v. Henkel (Cal. Sup.) 271 P. 494. Although delinquent in payment of taxes, the defendant corporation was properly made a defendant in this action, and had the power to defend as provided by statute. The motion of the intervener as a stockholder to dismiss the action was properly denied.

The judgment in favor of defendant and respondent American Photoplayer Company is affirmed, and the order denying the motion to dismiss of the intervener and appellant Louis E. Goodman is also affirmed.

We concur: TYLER, P. J.; KNIGHT, J.

95 Cal. App. 270

CITY OF OAKLAND v. DE GUARDA et al.★
(Civ. 6401.)

District Court of Appeal, First District, Division 2, California. Dec. 5, 1928.

As Modified on Denial of Rehearing Jan. 3, 1929.

1. Municipal corporations ⚷348—City, as trustee for property owners who were assessed greater amount upon performance of contract by second contractors, may recover such excess cost for benefit of property owners in action on street contractor's bond (Street Improvement Act 1911, §§ 1–7, 10–16, 19, 20, 26, 27, 29; Civ. Code, § 2837).

In action on street contractor's bond, given under Street Improvement Act 1911 (St. 1911, p. 730) § 15, city, as trustee, for benefit of property owners who were assessed upon performance of contract by second contractor for larger sum than would have been assessed if first contractor had performed, may recover such excess cost, since in equity property holders are beneficiaries of bond under provisions of Civ. Code, § 2837, and Street Improvement Act 1911, §§ 1–7, 11–16, 19, 20, 26, 27, 29, and bond is distinguishable from those given under sections 10 and 19.

2. Municipal corporations ⚷347(1)—Street contractor's bond should be construed in connection with statute as well as contract.

Street contractor's bond should be construed, not only in connection with contract which it is given to protect, but also in connection with statute in pursuance of which contract was entered into and bond given.

3. Trusts ⚷160(2)—Equity will not permit execution of trust to fail for want of sufficient trustee.

Equity will not permit execution of trust to fail for want of sufficient trustee, for equity looks to intent rather than form, and regards that as done which ought to be done, and goes beneath external form to substance of things for purpose of making remedies more complete.

4. Municipal corporations ⚷348—Street contractor's surety cannot, in action by city as trustee, urge defense based on assumption that city would wrongfully hold money received for its own use.

In action on street contractor's bond brought by city as trustee, defendant surety company cannot be permitted to urge defense based on assumption that city would attempt to hold for its own use and benefit money which it received for use and benefit of real parties damaged.

Appeal from Superior Court, Alameda County; T. W. Harris, Judge.

Action by the City of Oakland individually and as trustee against Salvatore De Guarda and another. From the judgment, plaintiff appeals. Reversed, with directions.

Leon E. Gray, former City Atty., Preston Higgins, City Atty., and Homer W. Buckley, Deputy City Atty., all of Oakland, for appellant.

Heller, Ehrman, White & McAuliffe and F. Whitney Tenney, all of San Francisco, for respondents.

BUCK, Presiding Justice pro tem. This is an action to recover against a defendant street contractor and a defendant surety company upon a statutory surety bond given by the defendants for the faithful performance of a contract for street improvement in the city of Oakland under the provisions of the Street Improvement Act of 1911 (Stats. 1911, p. 730).

Two counts are pleaded in the complaint; the first being on behalf of the city individually, and the second by the city as trustee for the property holders in the assessment district.

The defendant contractor De Guarda made default, and judgment was rendered against him and no appeal taken by him. The defendant National Surety Company interposed a general and special demurrer to the two causes of action stated in the complaint. The demurrer to the first cause of action was overruled with leave to answer. But defendant's demurrer to the second cause of action was sustained without leave to amend. Defendant National Surety Company having failed to answer as to the first cause of action within the time allowed, judgment was entered against the defendant on the first cause of action; and, as to the second cause of action, the plaintiff not having been granted leave to amend its complaint, judgment was given in favor of the National Surety Company on the second cause of action. No appeal was taken by the National Surety Company from the judgment entered against it on the first cause of action. And this appeal is taken by plaintiff from the judgment against the plaintiff and in favor of the defendant surety company upon the second cause of action.

[1] In the second cause of action, facts are alleged showing valid proceedings by the city under the Street Improvement Act of 1911, leading up to the entering into a contract between the city and defendant De Guarda for the performance of street work, some of which work, as shown by the resolution of intention and other proceedings, made a part of the contract, was to be paid for by the city out of the general fund, and the balance of the work "shall be and is hereby made chargeable against and shall be assessed upon" a certain described district in pursuance of the statute. The contract in question is set out in the complaint; and it is further alleged in both causes of action that the defendant De Guarda executed a bond to the city of Oakland with the defendant National Surety

---

★For opinion on rehearing and modification, see 273 P. 819.

Company as surety, and payable to the city in the sum of $10,000, conditioned for the faithful performance of said contract, and which provided that the defendants are jointly and severally bound to the city of Oakland, which bond provided also by its terms that, "if the defendant contractor shall well and truly perform all the covenants and conditions and agreements of said contract then said bond shall become void, else to remain in full force and virtue." It is then alleged in both causes of action that "said defendant, De Guarda, never did any work under the terms or in pursuance of the said contract or in performance of the work specified in said contract—and said plaintiff made repeated demands upon defendant, De Guarda, and repeatedly requested defendant surety company to commence and complete said contract but both the said defendants utterly failed, neglected and refused to commence and complete said contract." It is then alleged in both causes of action that the said delinquency was reported to the city council, and facts are stated showing that the city council undertook all the proceedings provided for in the statute for the letting of a new contract covering the same work to a new and different contractor, which contract was in all respects properly performed, and that, after it had been performed under the direction and to the satisfaction of the superintendent of streets "the City Engineer of the City made a diagram of the property affected and benefited by said work and improvement as described in the Resolution of Intention and to be assessed to pay the expenses thereof"; this being the same resolution of intention which was the basis of the contract signed by the defendant De Guarda and for the faithful performance of which the defendant surety company executed its bond. The complaint then alleges that "said diagram showed each separate lot, piece, or parcel of land, the area in square feet of each of such lots, pieces, or parcels of land, and the relative location of the same to said work, all within the limits of the assessment district, and that thereafter, and after the contractor had fulfilled the contract to the satisfaction of the superintendent of streets, he later proceeded to estimate upon the lands and lots within said assessment district the benefits arising from said work and to be received by each such lot, portion of such lot, piece, or subdivision of land, and thereupon made an assessment to cover the sum due for work performed and specified in said contract." And it is further alleged that under the entire contract the total amount assessed against the district for the work to be paid for by the property holders of the district in proportion as their property was benefited thereby, was the sum of $40,076.92. While under the contract entered into by the defendant De Guarda, and for the performance of which contract the defendant surety company became surety, the total amount to be assessed against the lots in the assessment district in proportion to the benefits conferred was the total amount of $36,538.26. Consequently, the property holders benefited by the improvement in question were under the new contract assessed for $3,538.66 more than they would have been had the defendant De Guarda well and truly performed the contract entered into between De Guarda and the city for the performance of which the defendant surety company became surety. Judgment for said sum of $3,538.66 was therefore demanded by plaintiff as trustee for such property holders. And, as already stated, the demurrer of the surety company was sustained to this second cause of action without leave granted plaintiff to amend. Both respondent and appellant agree that the single question involved on this appeal is, "Can the City of Oakland as trustee for the property owners who are assessed upon performance of the contract by the second contractor for a larger sum than would have been assessed if the first contractor had performed the contract, recover for the benefit of such property owners this excess cost?"

In the case at bar, the bond sued upon is given under the provisions of section 15 of the Street Improvement Act of 1911, and is to be distinguished from the bond providing for a forfeiture given under section 10 of the same act, as construed in the case of Mill Valley v. Bonding, etc., Co., 68 Cal. App. 372, 229 P. 891, and also from the bond to protect laborers and materialmen given under the provisions of section 19 of the act, as construed in the case of Los Angeles S. Co. v. National Surety Co., 178 Cal. 247, 173 P. 79.

In each of the above cases the surety company sought to escape liability by contending for a strict construction of the rule laid down in section 2836 of the Civil Code, to the effect that a surety cannot be held beyond the express terms of his contract. But in each of the above cases the appellate court held the surety company liable under their bond by applying the principle laid down in section 2837 of the Civil Code, to the effect that "in interpreting the terms of a contract of suretyship, the same rules are to be observed as in the case of other contracts."

And in the Mill Valley Case the court availed itself of the following rules of interpretation: "The law at the time of the execution of a bond is a part of it; if it gives to the bond a certain legal effect it is as much a part of the bond as if in terms incorporated therein, and must be construed with the statute [citing cases]." And also, "a contract must receive such an interpretation as will make it lawful and operative if it can be done without violating the intention of the parties. (Civ. Code, sec. 1643.)"

In the case of Los Angeles S. Co. v. National Surety Co., supra, the following rule of construction was made applicable to a surety bond given under section 19 of the Street Improvement Act, in connection with the performance of work of a public character which was for the benefit of specified individuals: "The surety is charged with notice that he is entering into what is in a very proper sense a public obligation and one that will be relied upon by persons who can in no manner control the conduct of the nominal obligee and with respect to whom the latter is a mere trustee"—citing Equitable Surety Co. v. United States, 234 U. S. 448, 34 S. Ct. 803, 58 L. Ed. 1394. And, in applying the foregoing principle of construction to the bond given by the surety company in the case of Los Angeles S. Co. v. National Surety Co., supra, the court also used the following language (citing many cases): "The covenant in the bond should be read in the light of the statute, the purpose of which was to protect those who furnished labor and materials for work described in the contract and not the particular engagements under which the work is done." And in the case at bar, if we are to be guided by the foregoing established rules of interpretation, we should first avail ourselves of "the light of the statute," and determine therefrom, if we can, what was the purpose of the covenant in the bond by which the defendant surety company insured the faithful performance of the contract, and for whose protection such covenant was entered into by the defendant surety company.

Also, as stated in the case of Callan v. Empire State Surety Co., 20 Cal. App. 483, at page 489, 129 P. 978, 980: "Section 2837 of the Civil Code provides that in interpreting the terms of a contract of suretyship, the same rules are to be observed as in the case of other contracts. As was said by Mr. Justice Lorigan in Sather Banking Co. v. Briggs Co., 138 Cal. 724 (72 Pac. 352), 'While it is true that a surety cannot be held beyond the express terms of his contract, yet in interpreting the terms of a contract of suretyship the same rules are to be observed as in the case of other contracts. Such construction does not mean that words are to be distorted out of their natural meaning, or that by an implication something can be read into the contract that it will not reasonably bear; but it means that the contract shall be fairly construed with a view to effect the object for which it was given, and to accomplish the purpose for which it was designed. The old rule of strictissimi juris applies only to the extent that no implication shall be indulged in to impose a burden not clearly inferable from the language of the contract, but does not apply so as to hold that a contract shall not be reasonably interpreted as other contracts are.' (See, also, to the same effect, Pratt v. Matthews, 24 Hun [N. Y.] 387.)"

Also, as stated in the case of Turner v. Fidelity & Deposit Co., 187 Cal. 76, at page 85, 200 P. 959, 962:

"In this case the Surety Company stands upon a purely technical defense, and while it is true that the rule is in its favor that it may rely upon the strict terms of its contract, there is no reason in law or equity why the same liberality of construction and interpretation of those terms should not be applied as in construing any other contract.

"In the matter of the obligations of corporations organized to execute surety bonds and securities as a business there is a growing disposition in the courts to hold such sureties to their obligations unless there has been some material departure from the conditions of the agreement. (21 R. C. L. p. 1160; Ann. Cas. 1912B, 1087.)"

See, also, Hunstock v. Royal Securities Corp., 51 Cal. App. 769, at bottom of page 773, 197 P. 763, 765.

In the case at bar, it is the contention of the respondent surety company that the covenant in the bond reciting that the bond was given for the faithful performance of the covenants of the contract was applicable only to that portion of the work to be paid for by the city, and was consequently for the sole benefit of the city of Oakland individually, as set out in the first cause of action, because the city of Oakland was the only obligee expressly mentioned by name in the bond. But, if the foregoing rules of interpretation, applied in the cases cited above, be applied in the case at bar, and the bond be construed in the light of the statute in pursuance of whose provisions it is given, and in the light of the contract as a whole to protect the performance of which the bond was given, and "with a view to effecting the object for which it was given and to accomplish the purpose for which it was designed," and that this rule of interpretation be applied for the purpose of ascertaining whether or not in truth and in fact the city of Oakland was intended to be the sole and only beneficiary of the covenant of the bond insuring faithful performance of the contract—if this be done, it would seem to follow that the same result may be obtained in the case at bar as was obtained in the cases cited above, where the respective surety companies, when sued by the actual beneficiaries of the bond who paid for protection under the bond, were required to respond to the obligations clearly assumed by such surety companies under their contracts of suretyship.

From the language of the statute as it must be construed, it appears that the amount of the bond, for the giving of which the surety company receives compensation, is based, not simply upon the contract price of the work that is to be paid for by the city alone, but the amount of the bond and the consequent risk assumed by the surety company thereunder is based upon the contract price of the entire work done under the contract, including both the work which is for the special benefit of the city as a whole and the work which is for the special benefit of the individuals owning the specific properties within the assessment district. And, consequently from this provision alone of the statute relating to the amount of the bond, a fair inference may be drawn that the obligations of the bond are intended to be for the benefit, not only of the city individually, but also for the benefit of the property holders within the assessment district who, under the contract, bear the greater portion of the burden of the contract, the faithful performance of the whole of which is intended to be protected by the bond as construed in the light of the provisions of the statute and in the light of the contract itself. But it is respondent's contention that, notwithstanding the foregoing facts stated and admitted as true in the complaint, no recovery should be had on behalf of the property holders because "the sole beneficiary of the bond was the City of Oakland * * * and no mention is made of the property holders in either the bond or the contract, and the only damage respondent obligated itself to pay was the damage suffered by the city." And in this connection respondent contends "that in the case at bar the liability under the bond extends only to the city in that the only purpose appearing from a reading of both the bond and contract is that of protecting the city from any damage it might suffer."

[2] It is undoubtedly true, as contended by learned counsel, that "it is not so nominated in the bond" given by the surety company in so many words or by expressed language that the property holders "were to be beneficiaries." Nor is it "so nominated" by the express terms of the statute. But defendant's bond should be construed, not only in connection with the contract which it was given to protect, but also in connection with the statute in pursuance of which the contract was entered into and the bond given. Also the rights and obligations of the parties herein should be considered in the light of established principles of equity. As to the contention of the respondent that the property holders were and are not in law and equity the rightful beneficiaries of the contract and the bond given by the defendant surety company holding the surety company bound that the said contract should be in "full force and effect" in the event that the defendant contractor "should fail to perform the covenants of such contract"—at the outstart sections 1 and 2 of the statute provide that the city council of each municipality "is hereby invested with jurisdiction to order to be done thereon any of the work mentioned in this act under the proceedings hereinafter described," and that "whenever the public interest or convenience may require, the City Council is hereby authorized and empowered to order the whole or any portion" of the streets of the city to be graded, etc. And throughout the balance of the statute and in every portion of the statute pertaining to the carrying on of the work and raising money to pay for the work it is clearly recognized and impliedly expressed that the property holders owning property abutting on the work have a special interest in the work, and under the law this special interest in the work is based upon the presumption that their particular property being specially benefited by the work, as such property holders they are rightfully burdened with the obligation to bear the expense of the work upon a proper performance of the work. Section 3 recognized the equitable doctrine that cost of the work should not be assessed against any property holder where the council has excepted from the frontage "any of said work already done upon a street to the official grade"; and section 3 provides that "the lots and portions of lots fronting upon said excepted work already done shall not be included in the frontage assessment for the class of work from which the exception is made"; and section 4, in recognition of the equitable doctrine that the expense assessable on any lot should not exceed one-half of the total assessed value of the lots and lands assessed, makes special provision that the expense in such a case may be made "chargeable upon a district, which the said City Council shall * * * declare to be the district benefited by said work or improvement"; and section 5 of the act, in further recognition of the special interest of the abutting property holders in the work, makes special provision that notices of the passage of the resolution of intention shall be "posted along the line of said contemplated work or improvement, at not more than 300 feet in distance apart, * * * and thereafter all persons shall be deemed to have notice of the date of the completion of such posting." Section 6 provides that, after the posting and publication of the notice of the resolution then "any *owner of property* liable to be assessed for said work may make written protest against the proposed work or against the extent of the district to be assessed, or both"; and, in further recognition of the interest possessed in said work by the property holders, section 6 makes special provision for the time and place for the hearing of such protests and provides that if "the City Council finds that such protest is made by the owners of more than one-half of the area of the property to be assessed for said improvements, no further proceedings shall be taken for a period of six months from the date when said protest was received. * * *" And section 7 specifically provides that the council may not be deemed to have acquired jurisdiction to order the proposed improve-

ments until "fifteen days after the date of the completion of the posting of the said notice of improvement. * * *" And sections 11 and 12 provide that, after the work is ordered and the contract awarded, that notice "of such award of contracts shall be posted for five days," and shall be published in a certain manner; and, in further recognition of the interest of the property holders owning "frontage of lots and lands liable to be assessed," it is provided that "within ten days after the first publication of said notice of said award," the owners of three-fourths of said frontage may "elect to take said work and enter into a written contract to do the whole work at the price at which the same has been awarded." Sections 13 and 14, in recognition of the agency of the city in furthering the work, provide that there shall be further advertising in the event that the original bidder neglects to enter into the contract. Section 15, after the foregoing recognition in the statute of the interest in the work possessed by the property holders and the duty on the part of the city to expedite the commencement of and the carrying on of the work to the advantage of the parties interested therein, provides that "all contractors, contracting owners included, shall, at the time of executing any contract for street work, execute a bond to the satisfaction and approval of the Superintendent of Streets of said City, with two or more sureties and payable to such City, in a sum not less than twenty-five per cent. of the amount of the contract, conditioned for the faithful performance of the contract." It was under the provisions of the foregoing section that the bond of the defendant surety company herein was executed, and the sections immediately following clearly show that the property holders by virtue of the interest they have in the work and the further fact that they, and they alone, ultimately and directly pay for the work including, of course, as a part of the cost of the work the remuneration which the defendant National Surety Company received for executing its bond, it is quite apparent that in equity at least such property holders should be deemed to be the persons beneficially interested, not only in the contract under which the work is done, but also in the bond given to secure and insure the faithful performance of the contract; and section 16 indicates and demonstrates how highly interested in the work such property holders are, and to what extent by virtue of their interest therein they can waive defects in any of the proceedings "relating to said improvement." And, as indicating the trusteeship of the city in the performance of the work being done as aforesaid for the benefit of the property holders who are interested therein by virtue of their frontage holdings, section 18 provides that the superintendent of streets is authorized in his official capacity to make all written contracts and to receive all bonds authorized by this act, and to do any other act either express or implied that pertains to the street department under this act; and the city council may by ordinance prescribe general rules directing the superintendent of streets and the contractor as to the materials to be used and the mode of executing the work and "the assessment and apportionment of the expenses of all such work, or improvement shall be made by the Superintendent of Streets in the mode provided by this Act." Section 19 provides for the execution of the bond to be "made to inure to the benefit of any and all persons, companies or corporations who perform labor on, or furnish materials to be used in the said work or improvement." This bond is for the direct benefit of the materialmen, and is only indirectly for the benefit of the property holders, and it is for the benefit of the property holders in that it induces a larger class of materialmen to compete in the work. And, as conclusive and ultimate proof of the fact that in law and equity the property holders are the persons deemed to be beneficially interested in the performance of the work, it is provided in subdivision 1 of section 20 that "the expenses incurred for any work authorized by this act * * * shall be assessed upon the lots and lands fronting thereon, except as otherwise in this act specifically provided; each lot or portion of a lot being separately assessed, in proportion to the frontage, at a rate per front foot sufficient to cover the total expense of the work." And other subdivisions of the same section provide in detail for the equitable assessment of such cost upon the property and owners benefited by such work. Section 26, in further recognition of the interest possessed in said work by the property holders who are specifically benefited thereby, provides that "the owners, whether named in the assessment or not, the contractor, or his assigns, and all other persons directly interested in any work done under this act, or in the assessment, feeling aggrieved by any act or determination of the superintendent of streets in relation thereto, or who claim that the work has not been performed according to the contract in a good and substantial manner, * * * shall, within thirty days after the date of the warrant, appeal to the city council, as provided in this section, by briefly stating their objections in writing, and filing the same with the clerk of said city council," and special provision is made for the hearing of these objections and the correction of the errors indicated therein; and, in further recognition of the interest of the property holders in the work and in indorsement of the fact that such property holders must be specifically benefited thereby, section 27 provides that the contractor or his assign may sue the owner of land, lots, or portion of lots assessed and recover the amount of any assessment remaining unpaid, with interest thereon at the rate of 10 per cent. per annum until paid, and, in addition to cost, may recover attorney's fees, and that notwithstanding that any suit may be settled or a tender may be made before recovering in said action. And section 29 provides that "the court * * * shall have power to adjudge and decree a lien against the premises assessed, and to order such premises to be sold on execution. * * *"

From the foregoing it is therefore evident that in equity the property holders who pay for the work and whose interests are protected in the performance of the work by the provisions of the statute are the beneficiaries of the work, and hence are the beneficiaries in equity, at least, of the bond given to secure the faithful performance of the work. This equitable interest is well recognized by the authorities. Volume 1 (4th Ed.) of Elliott on Roads and Streets, p. 756, par. 646, states in general language as follows: "Street improvement statutes usually provide that a bond shall be required to secure the faithful performance of the contract, but the municipality would doubtless have power to require a bond without any specific grant of authority. It has been held that such a statutory provision is mandatory and for the benefit and protection of the property owners who have to pay for the improvement." Among other cases cited by the author as authority is the case of Barker v. Southern Const. Co. (Ky.) 47 S. W. 608, which uses the following language at page 609: "It seems to us that the statute requiring security for the faithful performance of the contract is mandatory, and manifestly for the benefit and protection of those who have to pay for the improvements, because it is well known that it is possible for work to be apparently done in the manner required, and yet in fact great frauds might be perpetrated by contractors; and, if no security had been taken, the loss would fall upon those who had to pay for the improvements, because, if the improvements prove worthless, the property owners would again be liable to assessment for additional improvements."

In the case at bar, the property holders had a valid and subsisting contract with the defendant De Guarda under the provisions of the statute. As the result of the wrongful default of the contractor, the property holders under the provisions of the statute were obliged to accept and be obligated under the contract from Tobin, which contract required them, under the provisions of the statute, to pay out a large sum in excess of what they were required to pay out under the contract with De Guarda if the same had been performed. And under the bond given by the National Surety Company at their expense they were intended to be protected against any loss which would consequently follow from not having the work done under the first contract.

In other words, it is the clear intent of the statute in this case, not only to recognize, but to give full force and effect and proper protection to, the beneficial interest possessed by the property holders in the performance of the work to be done under the contract entered into in pursuance of the provisions of the statute. This is recognized as already indicated in the various provisions of the statute itself. The city, through its council and its street superintendent, is required by the statute to protect at all stages of the proceedings and recognize this special interest that the property holders have in the contract. And that they are deemed to be beneficially interested is made evident by the very effective remedies given to the contractor to enforce against property holders, both by personal judgment and by a special lien on their property, the rights of the contractor if he faithfully performs his contract. It would, therefore, follow as a matter of right and equity that the duties of the contractor towards the property holder as well as the obligation of those who have gone surety for the contractor should be commensurate with and in direct proportion to the rights which they have against the property holder. In other words, the obligations of the contract as well as of the bond given to secure it should be enforceable for the benefit of the property holders who are made to bear and shoulder the corresponding obligations of the contract. In enforcing the obligations of the property holder, the city, under the statute, for the benefit of the contractor, acts as the agent and assistant of the contractor, and in fairness and equity it would seem that the property holder should be permitted to, at least in a formal way, avail himself of the same use of the city and its good offices. Surely the same public interest which evoked the original action of the city in passing its resolution of intention to do the work would be a sufficient warrant to protect the individuals for whose benefit the work is done and whose interest in the work is specifically recognized at every stage of the progress of the work under the statute. The mere failure on the part of the Legislature to state in hæc verba that the property holders are interested in the work and benefited thereby does not in a court of equity prevent a fair inference to be drawn from the language and purpose of the statute that such beneficial interest does as a matter of fact exist.

[3] In the case at bar, it cannot be said that the contract expressly provides that the defendants have no liability under the bonds. By the explicit language of the bonds, both defendants are liable to some one if the contract is not performed, and by fair and equi-

table implication they are liable to those interested in the contract. In substance, the only contention of the defendant National Surety Company here is, not that the surety company is not liable under the bond, but that the surety company is not liable to the plaintiff herein suing as trustee for the benefit of the property holders. But equity will not permit the execution of a trust to fail for want of a sufficient trustee, for equity looks to the intent rather than to the form, and regards that as done which ought to be done, and goes beneath the mere external form to the substance of things for the purpose of making its remedies more complete, thereby awarding and securing to the person beneficially interested the remedy to which he is entitled by the principles and doctrines of equity. It would seem that the property holders whose rights under the De Guarda contract were taken away by the failure to well and truly perform such contract and to their damage as already indicated by the enhanced sum they were required to pay for the same work under the statute, that these property holders should have all the resources of a court of equity at their command to pursue their remedy against a defendant who, for a full and fair consideration, insured the performance of the violated contract. 1 Pomeroy's Equity (4th Ed.) 360–380.

In Missouri cases cited and relied upon by counsel (St. Louis v. Wright Contracting Co., 202 Mo. 451, 101 S. W. 6; St. Louis v. Wright Contracting Co., 210 Mo. 491, 109 S. W. 6; St. Louis v. Anderson, 229 Mo. 181, 129 S. W. 528, 138 Am. St. Rep. 414; City of St. Joseph v. Rackliffe-Gibson Const. Co. et al. [Mo. App.] 203 S. W. 223), it does not appear that the statute construed by the learned court contained the numerous provisions enacted in our statute above, showing the direct and tangible interest taken by the city through its council and street superintendent in the performance of the contract and the doing of the work for the benefit of the property holders and the direct interest taken by the city for the benefit of the contractor in requiring the property holder to bear the burdens and pay the expenses of the work, all of which should properly vest in the property holder sufficient correlative rights to enable them to avail themselves of the agency and trusteeship of the city in the enforcement of the statutory bond given to the city for the proper protection of the property holders under the contract in question.

In the case at bar, the same reasoning and the same rule is applicable as was announced by our Supreme Court in the case of Los Angeles S. Co. v. National Surety Co., 178 Cal. 247, 173 P. 79, where the court used the following language taken from the United States Supreme Court in the case of Equitable Surety Co. v. McMillan, 234 U. S. 448, 34 S. Ct. 803, 58 L. Ed. 1394: "The surety is charged with notice that he is entering into what is in a very proper sense a public obligation, and one that will be relied upon by persons who can in no manner control the conduct of the nominal obligee, and with respect to whom the latter is a mere trustee."

Also in the case of City of Philadelphia (to Use of Rose Brick Mfg. Co.) v. Stewart, 195 Pa. 309, 45 A. 1056, it was held that a city may sue in its own name to use of the persons for whose security it was given, on a bond given it by a contractor for city work, conditioned that he shall pay for labor and material furnished therefor and shall comply with an ordinance for protection of subcontractors as well as laborers and materialmen. It was held in that case that "the city recovers on its legal title, though the money may ultimately go to the use of plaintiffs."

Also in the case of City of Alpena v. Title Guarantee Insurance Co., 158 Mich. 678, 123 N. W. 536, it was held that a city contracting for a public work and requiring the contractor to give a bond conditioned on his paying for the labor and materials used in the work, may sue on the bond for the use of materialmen. And the same reasoning which gave this protection to the laborers and materialmen would enable the property holders in this case to avail themselves of the suit brought in their behalf by the city of Oakland, as was done in the case cited, by having the action brought in the name of city of Alpena.

[4] But it is the contention of the respondent "that the obvious result achieved in the event the city is allowed to recover in the capacity of trustee would be that any sum recovered would go in the general fund; lose its identity and the real parties damaged would not be benefited thereby." But this unfortunate conclusion can be based only upon the assumption that the city of Oakland, through its proper officers, would attempt to hold for its own use and benefit money which it had received for the use and benefit of "the real parties damaged," who were rightly and justly entitled to the money. The defendant surety company cannot be permitted to urge in its own defense any such assumed wrongful conduct on the part of the city of Oakland.

The judgment, therefore, is reversed, with direction to the court below to allow plaintiff to amend the complaint as it may be advised.

We concur: NOURSE, J.; STURTEVANT, J.

95 Cal. App. 92

PEOPLE v. ROSENCRANTZ. (Cr. 1492.)

District Court of Appeal, First District, Division 2, California. Nov. 21, 1928.

1. Criminal law 🔑1202(1)—Withdrawal of defendant's plea of guilty and dismissal of charge after conviction of felony, if shown by defendant's probation, did not prevent consideration of conviction in subsequent prosecution (Pen. Code, §§ 644, 1203(d).

Withdrawal of defendant's plea of guilty and dismissal of charge after conviction, if shown by probation, did not prevent consideration of the conviction in determining liability of defendant under repeater statute, imposing additional penalty in case of prior conviction for felony (Pen. Code, § 644), since such statute does not relate to manner in which judgment on conviction has been expiated, under section 1203(d).

2. Criminal law 🔑1202(1)—Information in previous prosecution for passing fictitious instrument charged crime as regards applicability of repeater statute (Pen. Code, §§ 476, 644).

Previous information for making and passing a fictitious instrument charged crime under Pen. Code, § 476, denouncing the making and passing of bill, note, check, or other instrument in writing for payment of money, in determining question of defendant's prior conviction for felony under repeater statute (Pen. Code, § 644).

3. Indictment and information 🔑147—Objection to information for uncertainty should be raised by demurrer.

Uncertainty of information in alleging passing of worthless check on particular persons, whereas evidence showed check was made payable to different party, should be raised by demurrer.

4. Witnesses 🔑337(5)—District attorney's reference on cross-examination, for purpose of impeachment, to defendant's second prior conviction, held not error.

Reference by district attorney to defendant's second prior conviction, made on defendant's cross-examination for purpose of impeachment, *held* not error.

5. Criminal law 🔑624—Refusal to permit trial of question of insanity, first raised near close of trial, and supported only by showing of defendant's previous commitment to asylum, held not error.

Refusal of court to try question of insanity, on request made near close of trial, *held* not error, where only showing in support of motion was that defendant had been twice committed to asylum, and it was not shown whether she was insane, or was committed for habitual intemperance.

6. Constitutional law 🔑203—Statute imposing life imprisonment for felony, where defendant has been three times previously convicted of felony, held not ex post facto (Pen. Code, § 644, as amended by St. 1927, p. 1066).

Pen. Code, § 644, as amended by St. 1927, p. 1066, fixing term of imprisonment at not less than life, where defendant has been previously three times convicted of felony, *held* not ex post facto, as adding new punishment to previous convictions.

7. Constitutional law 🔑203—Law authorizing graduation of punishment for future offense by consideration of offender's past conduct is not ex post facto.

Law is not objectionable as ex post facto which, in providing for punishment for future offenses authorizes consideration of offender's past conduct and graduation of punishment accordingly.

Appeal from Superior Court, Alameda County; Fred V. Wood, Judge.

E. Rosencrantz was convicted of fraudulently making, drawing, and uttering a check without sufficient funds, and of three prior convictions for felonies, and she appeals. Affirmed.

See, also, 271 P. 902.

W. L. Albert and T. L. Christianson, both of Oakland, for appellant.

U. S. Webb, Atty. Gen., and Emery F. Mitchell, Deputy Atty. Gen., for the People.

NOURSE, J. Defendant was tried before a jury on an information charging the fraudulent making, drawing, and uttering a check upon a bank without sufficient funds, and also charging three prior convictions of separate felonies. The defendant denied the first prior conviction alleged and admitted the second and third. The jury found her guilty of the offense charged in the information, and also found that she had suffered the first alleged prior conviction. She was thereupon sentenced to the state prison at San Quentin for the term prescribed by law, which, under the terms of section 644, Penal Code, calls for imprisonment for not less than life. From the judgment following the verdict, and from the order denying her a new trial, the defendant has appealed on a typewritten record.

[1] The first prior conviction set out in the information was for fraudulently drawing a check without sufficient funds on January 12, 1920. The defendant denied this conviction, and, the issue having been joined, the jury found against the defendant. She now argues that, because she was given probation following that conviction, it might be possible that the plea of guilty had been withdrawn and the charge dismissed. Aside from the fact that it was for the defendant, and not the state, to prove those circumstances if they existed, it is sufficient to say that they are wholly immaterial here. The Code sec-

tion (Pen. Code, § 644) relates to a prior conviction of a felony, and not to the manner in which the judgment on the conviction has been expiated. Pen. Code, § 1203, subd. (d).

[2] The second prior conviction set out in the information was alleged to have been for a felony—making and passing a fictitious "instrument." It is now argued that this is not a crime under our Code, but that the law covers the making and passing of fictitious bills, checks, and drafts only. Section 476 of the Penal Code expressly denounces the making and passing of "any fictitious bill, note, or check, purporting to be the bill, note, or check, or other instrument in writing for the payment of money * * * knowing the bill, note, check, or instrument in writing to be fictitious."

[3] It is argued that the information is insufficient because it alleges the passing of a check on G. E. and C. A. Anderson, whereas the evidence shows that the check was made payable to the Auditorium Garage, and the information fails to show any connection between the Andersons and the Auditorium Garage. If the information was uncertain in this respect, the point should have been raised by demurrer, but this was not done. It might be that there is a variance between the pleading and the proof, but this is not the point raised by defendant.

[4] Criticism is made of the action of the district attorney in referring to the second prior conviction, to which charge the defendant had pleaded guilty. The reference was made on cross-examination of the defendant for the purpose of impeachment. This was not error. People v. Oubridge, 38 Cal. App. 68, 69, 175 P. 276, and cases cited.

[5] It is stated, with apparent lack of confidence in the point, that the trial court erred in not trying the question of insanity. The issue of insanity was not raised by the defendant by plea, but near the close of the trial her counsel suggested to the court that he believed her to be insane and requested leave to change the plea and have the question of insanity submitted to the jury. The only showing in support of the motion was that several years before the trial the defendant had been twice committed to an asylum in this state, but whether the commitments were made upon a finding that she was then insane, or whether she was committed for habitual intemperance, was not made clear. We find no error in the court's ruling.

[6, 7] Finally, it is argued that section 644 of the Penal Code, as amended in 1927 (St. 1927, p. 1066), and which fixes the term of imprisonment at not less than life where the defendant has been previously three times convicted of a felony, is ex post facto, in that it, in effect, adds new punishment to the previous convictions. "A law is not objectionable as ex post facto which, in providing for the punishment of future offenses, authorizes the offender's conduct in the past to be taken into the account, and the punishment to be graduated accordingly." Ex parte Gutierrez, 45 Cal. 429, 432, quoting from Cooley's Constitutional Limitations.

The judgment and order are affirmed.

We concur: KOFORD, P. J.; STURTEVANT, J.

---

95 Cal. App. 219

Ex parte CROWLEY. (Cr. 1064.)

District Court of Appeal, Third District, California. Nov. 30, 1928.

1. Drunkards ⟹2(1)—Proceedings for commitment of persons charged with excessive use of stimulants must be in substantial compliance with statute (Pol. Code, §§ 2168, 2185c).

Proceedings under Pol. Code, §§ 2168, 2185c, relating to commitment of persons charged with excessive use of stimulants, being purely statutory, the requirements of the statute must be at least substantially, if not strictly, followed in order to give the court wherein it is proposed to hear proceedings jurisdiction thereof.

2. Drunkards ⟹2(1)—Affidavit in proceeding for commitment of person because of excessive use of stimulants held fatally defective for failure to set out facts (Pol. Code, §§ 2168, 2185c).

Affidavit in proceeding under Pol. Code, § 2185c, relating to commitment of person charged with excessive use of stimulants, stating in attempted compliance with section 2168 that person sought to be committed had lost all self-control and will power from the excessive use of stimulants, *held* fatally defective for failure to set out facts and circumstances with at least some particularity, showing on what the conclusion of the affiant was based.

Application by Ida M. Brickell for a writ of habeas corpus in behalf of Eva Crowley, to secure a release from the Napa State Hospital. Writ granted.

Daniel A. Ryan and George F. Snyder, both of San Francisco, for petitioner.

U. S. Webb, Atty. Gen., and J. Chas. Jones, Deputy Atty. Gen., for respondent.

PLUMMER, J. This matter is before the court upon the petition of Ida M. Brickell, praying for a writ of habeas corpus in behalf of Eva Crowley, wherein it is alleged that the said Eva Crowley is unlawfully detained, confined, and restrained of her liberty by Dr. G. W. Ogden, medical superintendent of the Napa State Hospital; that said writ be di-

---

⟹For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

rected to the said Dr. G. W. Ogden, and that upon the hearing hereof, the writ be granted, restoring said Eva Crowley to her liberty and releasing her from the custody of Dr. G. W. Ogden, as superintendent of said Napa State Hospital. The petition is based upon the alleged insufficiency of the affidavit upon which the proceedings in this matter were instituted to have the said Eva Crowley committed for and on account of the alleged excessive use of intoxicating stimulants, to give the court jurisdiction to proceed with the hearing and commitment of the said Eva Crowley.

The affidavit upon which the proceedings were instituted, in so far as material here, is in the following words: "James B. Crowley, being duly sworn, deposes and says: That there is now, in said county of San Francisco, a person named Eva Crowley who is so far addicted to the intemperate use of stimulants as to have lost the power of self-control." And then, in the attempted statement as required by section 2168 of the Political Code, contains only those words: "Has lost all self-control and will power from the excessive use of stimulants—quarrelsome and threatening." Following what we have just stated, the affidavit prays, in the usual form, that proceedings be had, commitment be made, etc., and is subscribed and sworn to.

The basis for this proceeding is found in section 2185c of the Political Code, containing provisions for the commitment of persons addicted to the intemperate use of narcotics or stimulants to such an extent as to have lost the power of self-control, etc. This section provides for an affidavit being made before a magistrate, and, after so providing, specifies that the affidavit and warrant of arrest must be substantially in the form provided by section 2168 of the Political Code relating to the arrest of persons charged with insanity. Section 2168 of the Political Code contains the form which must be used as a foundation for the proceeding, and also requires that the facts relating to the party charged, or the actions of the party charged, must be set forth. The cases based upon this section in this state relative to the commitment of persons charged with the intemperate use of intoxicating liquors require, in order to give jurisdiction for the institution of the proceeding, that something more be set forth than the mere opinion of the person making the affidavit; that is, that the facts and circumstances be detailed with at least some particularity, showing upon what the conclusion of the affiant is based, and not merely the opinion or conclusion of the person making the affidavit.

[1, 2] Upon the hearing of this cause it was urged with considerable emphasis that, while the hearing was had in a superior court, it was and is a proceeding in which such court exercises only limited powers, and that, therefore, the presumptions and intendments in favor of the jurisdiction, which prevail where a cause is heard before a court of general jurisdiction, do not apply; that upon habeas corpus the scope of inquiry is not limited, by reason of the order of commitment, as is the case after trial in a criminal cause upon an information or indictment. By reason of the decisions hereafter set forth upon which the order of the court in this cause will be based, we deem it unnecessary to enter into a discussion of this question, as it would only be academic, in that it is not requisite to any determination we may make herein.

It is sufficient to state that the proceeding in relation to the commitment of persons charged with the excessive use of stimulants is much narrower in its provisions than those which are provided for an inquiry into a determination of a person's mental state. If a person is found by the court to be insane, he is entitled to a jury trial, whereas, the provisions of section 2174 of the Political Code awarding a jury trial to an alleged insane person, do not extend that right to one alleged to be an excessive user of intoxicating liquors. It may also be stated that proceedings such as the one under consideration are purely statutory, and are not based upon the common law, which has always recognized the power of courts or commissions in lunacy, to inquire into the mental condition of persons alleged to be insane. This leads to the conclusion that the requirements of the statutes must be at least substantially, if not strictly, followed, in order to give the court wherein it is proposed to hear the proceedings, jurisdiction thereof. Thus the cases hold that facts and not conclusions must appear in the affidavit filed at the institution of the matter, and upon which the validity of further proceedings must rest. If jurisdiction is not acquired by reason of the affidavit not complying with section 2168 of the Political Code, it appears that the subsequent action of the court in directing the issuance of the commitment does not give vitality to that which was void in the first instance.

In the case of Henley v. Superior Court, 162 Cal. 239, 121 P. 921, the affidavit under consideration, in a case where one was held for examination under the Code provision, supra, relating to the excessive use of stimulants, read as follows: "Nellie H. Tayler, being duly sworn, deposes and says that there is now in said county, in the city or town of Sacramento, a person named Wm. Henley, who is so far addicted to the intemperate use of stimulants as to have lost the power of self-control." The court in that cause issued a writ of prohibition restraining the superior court from proceeding with an inquiry as to whether Wm. Henley was or was not addicted to the excessive use of intoxicating liquors, based upon such an affidavit, holding that the affidavit was fatally defective and did not give the court jurisdiction, and a writ of prohibition was ordered issued. The affidavit in that case is, in all substantial particulars, no different from the affidavit presented to us for consideration.

If a writ of prohibition will issue restraining a court from further proceedings upon an affidavit which does not give the court jurisdiction, we do not perceive how the taking of proceedings by a court not having jurisdiction to proceed can logically lead to the conclusion that an affidavit, void at the beginning of the hearing, becomes valid at the conclusion thereof. It is not a question of mere insufficiency; it is a failure to give life at the very birth of the cause, and we do not see how a court, proceeding to do that which it has no jurisdiction to do, can "animate the corpse."

In Re Watson, 63 Cal. App. 424, 218 P. 600, this court held that an affidavit charging that "James * * * Watson had been for a period of several weeks last past, and then and there is a person who, from the inordinate use of alcoholic liquor and the influence thereof is irresponsible in his acts and insane therefrom," insufficient to give the court jurisdiction, citing the sections of the Political Code hereinbefore referred to, and also the case of Henley v. Superior Court, supra.

Somewhat analogous to the proceedings here under consideration are the provisions of the Juvenile Court Law (St. 1915, p. 1225), although certain sections of that law provide for appeals, and in that respect are less drastic than the provisions of the Political Code relative to the commitment of inebriates. Nevertheless, under the Juvenile Court Law, if the petition upon which the proceedings are founded is insufficient to give the court jurisdiction, a writ of habeas corpus will lie for the discharge of the juvenile so held after commitment.

In the Matter of the Application of Azhocar, 49 Cal. App. 352, 193 P. 505, for a writ of habeas corpus, where a commitment had been issued, the court held as follows: "A ward of the juvenile court is entitled to her discharge on habeas corpus where the petition upon which the order of commitment was made was insufficient to confer jurisdiction."

Likewise, in the Matter of the Application of Richard Watts Burner, 23 Cal. App. 637, 139 P. 90, it was held, after commitment, that, if the petition was insufficient to give the court jurisdiction, the juvenile was entitled to discharge upon habeas corpus. Also, in the Matter of Edward Mundell, 3 Cal. App. 472, 86 P. 833, upon application for a writ of habeas corpus after commitment, it was held that the petitioner was entitled to the writ on the ground that the petition was insufficient to give the court jurisdiction.

While we have pointed out that the Code provisions relative to committing inebriates are more restrictive in the rights granted to such a person than the rights guaranteed to a person charged with insanity, nevertheless it has been held that in lunacy proceedings the statutory requirements giving jurisdiction must be strictly followed. 32 Cal. Jur. p. 634.

In view of the cases which we have cited, we see no escape from the conclusion that Eva Crowley is entitled to the writ prayed for herein, and it is so ordered, and the said Eva Crowley is hereby discharged from the custody of Dr. G. W. Ogden, as superintendent of the Napa State Hospital.

I concur: FINCH, P. J.

---

95 Cal. App. 101

SMITH v. PITTLER. (Civ. 6379.)★

District Court of Appeal, First District, Division 2, California. Nov. 21, 1928.

Rehearing Denied Dec. 20, 1928. Hearing Denied by Supreme Court Jan. 17, 1929.

1. Sales 🔑159—Purchase and delivery of furs was completed when buyer took them from seller to another for finishing, and buyer could not refuse delivery or payment.

Purchase and delivery of furs having been completed when buyer took them from seller to another, with whom he independently contracted to have them finished and subsequently delivered to him, *held*, that the buyer could not refuse delivery or payment.

2. Pleading 🔑114—Allegation in answer specifying that different contract than one sued on was made may be treated in findings as traverse, not constituting allegation of new matter.

Allegation in answer, although in form of an affirmative allegation specifying that different contract than one sued on was made, may be treated in findings as a traverse, and not constituting an allegation of new matter.

3. Partnership 🔑64—Assignee of foreign partnership, doing business under fictitious name outside state, may maintain action on claim against person within state (Civ. Code, § 2468).

Assignee of foreign partnership, doing business under fictitious name outside of state, may maintain action on claim assigned against person within state; Civ. Code, § 2468, prohibiting partnerships transacting business within state under a fictitious name from maintaining an action, not applying to a partnership not transacting business in this state.

4. Assignments 🔑137—Testimony of one of original owners of claim held sufficient to show assignment.

Testimony of one of original owners in assignee's action on claim *held* sufficient to show

---

★Rehearing denied. Hearing denied by Supreme Court.

assignment, without proof of written assignment itself.

5. Corporations ⚷432(4)—Written assignment in name of corporation by its president, under corporation's seal, properly acknowledged and proved, held sufficient, without proof of formal resolution authorizing execution by president.

Assignment in writing in name of corporation by its president, under the corporation's seal, properly acknowledged and proved, *held* sufficient, without proof of formal resolution authorizing corporation's president to execute the assignment.

6. Corporations ⚷34(3)—Person, having contracted for purchase of furs from company as corporation, cannot deny seller's corporate capacity, when sued on contract.

Person, having made contract for purchase of furs with company as a corporation, and addressing letters to seller as a corporation, cannot deny seller's corporate capacity, when sued on contract.

Appeal from Superior Court, City and County of San Francisco; Percy S. King, Judge.

Action by R. A. Smith against L. Pittler. Judgment for plaintiff, and defendant appeals. Affirmed.

John H. Crabbe, of San Francisco, for appellant.

William Klein, of San Francisco, for respondent.

KOFORD, P. J. Plaintiff recovered a money judgment against defendant upon two assigned claims. One claim of $960 was for the purchase by defendant while in New York from Anton D. Dimou & Co. of a quantity of raw furs, and the other claim of $124.25 was for the cost of matching and sewing said furs by Albanos Company, also of New York. When the purchased furs arrived in San Francisco by express, the defendant refused to accept them, claiming that they arrived later than agreed upon. In addition to this claim she now claims the contract was within the statute of frauds. This appeal on these points resolves itself into a question of fact as to whether the sale and delivery of the furs was complete in New York.

[1] The plaintiff's several witnesses testified that defendant visited the place of business of Anton D. Dimou & Co., where she selected and purchased the furs upon 60 days' credit; that she ordered the furs taken to the shop of Albanos Company for finishing; that she accompanied the furs to the latter place and gave directions there for finishing and shipment to San Francisco; in other words, that she purchased the furs outright from the first merchant, received delivery of them, and then made her own separate contract with the second merchant for the finishing and shipment of the furs. This is the version of the transaction which the court accepted in making its findings and decision in favor of plaintiff. Defendant's testimony is in direct conflict with this version of the transaction, but the record fails to show that the trial court did not decide this issue of fact in accordance with the weight of the evidence. Delivery and purchase being complete in New York, the above-mentioned points on appeal furnish no warrant in law for defendant to refuse delivery of or payment for the furs.

Defendant's version of the transaction is set out in her answer. Her answer denies the allegation of the complaint that said Anton D. Dimou & Co., Inc., on the 16th day of October, 1925, sold and delivered to defendant merchandise for the agreed price of $960, terms 60 days. This denial is immediately followed by the following allegation: "In that regard defendant alleges that on or about the 16th day of October, 1925, said Anton D. Dimou & Co., Inc., plaintiff's assignor, sold to defendant herein in New York certain Baum Martin dressed skins to be by them made up for the agreed price of $1,040.00, terms eighty dollars on receipt of goods in San Francisco, the balance in sixty days, said goods to be delivered in San Francisco not later than November 1, 1925; that said goods were purchased for the Christmas season of 1925; that said goods did not arrive at San Francisco until December, 1925, too late for the said season's sale; that plaintiff on or about November 13, 1925, notified the said Anton D. Dimou & Co., Inc., that owing to the fact that the goods were not received, she would not be able to use them, and that the order was canceled."

[2] The only evidence offered of any attempted cancellation on November 13 was defendant's letter on that date to Albanos Company. There was none written to Anton D. Dimou & Co. before December 7. The furs had been shipped by express by Albanos Company on December 1, to defendant at San Francisco. Regardless of dates, appellant could not cancel her purchase from Anton D. Dimou & Co., Inc., after a complete sale and delivery in New York, even if Albanos Company was too slow in performing its agreement to finish the furs. In making its findings of fact, the court followed the allegations of the complaint and ignored the above-quoted allegation of the answer. This is assigned as error. This allegation was sufficiently covered by the findings on the first cause of action, which on this point, omitting unnecessary words, were "that on the 16th of October, Anton D. Dimou & Co. sold and delivered to defendant merchandise for the agreed price of $960, terms 60 days."

⚷For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

and on the second cause of action, in substance, "that in the month of November, 1925, Albanos Company performed work, labor and services and furnished materials to defendant at her special instance and request —reasonable value $124.25." The allegation in the answer, although in the form of an affirmative allegation, is really nothing more than a denial of the contract as alleged in the complaint, specifying that a different contract was made, so different that the two could not both be true. Such an allegation may be treated in the findings as a traverse and does not constitute an allegation of new matter. Goddard v. Fulton, 21 Cal. 430; Kendrick v. Gould, 51 Cal. App. 712, 197 P. 681.

[3] If Albanos Company was a partnership doing business under a fictitious name, plaintiff, as its assignee, was still entitled to maintain this action in California. The provisions of Civil Code, § 2468, prohibiting partnerships transacting business in this state under a fictitious name from maintaining an action, do not apply to a partnership not transacting business in this state. Moon v. Martin, 185 Cal. 361, 363, 197 P. 77; Haun v. Rosenmayer, 46 Cal. App. 353, 189 P. 117.

[4, 5] The proof of assignment of the claim of Albanos Company to Anton D. Dimou & Co. is sufficient. Besides the written and acknowledged assignment there is the testimony of Theo. Albanos to the assignment. Defendant had transacted business for seven years with Theo. Albanos, acting for Albanos Company, including the transaction sued upon in the second cause of action herein. If there are any technical defects in the execution of the written assignment the testimony of Theo. Albanos that the document was delivered as the assignment of the claim of Albanos Company would be sufficient. 3 Cal. Jur. "Assignments," §§ 20, 21. The reassignment of the Albanos Company claim from Anton D. Dimou & Co. to the plaintiff is free from all criticism as to form. Only the authority of the president to execute it is questioned. This assignment is executed in writing in the name of the corporation, by its president, and under the seal of the corporation properly acknowledged and proved. This is sufficient without proof of a formal resolution authorizing the president to execute the assignment. Greig v. Riordan, 99 Cal. 316, 33 P. 913.

[6] The court properly found the corporate existence of Anton D. Dimou & Co., without its charter being offered in evidence. Defendant contracted with the company as a corporation, addressed letters to it as a corporation, and in her answer alleged special terms of the contract made with that company as a corporation. Having made the contract with the corporation, she cannot deny its corporate capacity, when it undertakes to sue on that contract. Fresno Canal, etc., Co. v. Warner, 72 Cal. 379, 14 P. 37; J. I. Case Threshing Machine Co. v. Copren Bros., 45 Cal. App. 159, 187 P. 772; Curtin v. Salomon, 80 Cal. App. 470, 251 P. 237.

The judgment appealed from is affirmed.

We concur: NOURSE, J.; STURTEVANT, J.

95 Cal. App. 251

FRELIGH v. McGREW et al. (Civ. 5860.)

District Court of Appeal, Second District, Division 2, California. Dec. 4, 1928.

1. Landlord and tenant 🔑39—Understanding of parties preliminary to executing lease became merged in completed document.

Understanding and stipulation of parties preliminary to execution of lease became merged in completed and executed document.

2. Fraud 🔑22(1)—Misrepresentations, if made by defendant's agent, that objectionable clause in lease was eliminated, did not show fraud, where plaintiff had opportunity to read lease or refer it to attorney before signing.

In action to recover money paid in leasing apartment, on ground that money was obtained by false representations, representations, if made, by defendant's agents, that clause in contract requiring chattel mortgage on furniture to secure rent had been eliminated, when in fact it had not, could not be relied on by plaintiff to establish fraud, where plaintiff had ample opportunity to read conditions of lease before signing it, or refer it to attorney as she previously did.

3. Landlord and tenant 🔑27—Contract for lease, which plaintiff had opportunity to read or have approved, held valid and enforceable, unless rescinded.

Contract for lease of apartment house, which plaintiff had opportunity to read or refer to attorney before signing, *held* valid, and, unless there was rescission, contract would remain in force, entitling defendant to retain first and last month's rent paid down in accordance with contract.

4. Landlord and tenant 🔑34(4)—Plaintiff, suing to recover rent paid two years after signing of lease, held not to have complied with statute requiring prompt rescission after discovery of facts entitling plaintiff to rescind (Civ. Code, § 1691).

Where lease was executed by plaintiff, who was under no disability preventing her from ascertaining contents thereof, and suit to recover rent paid down was not brought until two years after lease was signed, delay, without explanation, showed noncompliance with Civ. Code, § 1691, requiring person rescinding contract to rescind promptly on discovering facts entitling him to rescind.

5. Courts ⚿188(3)—Suits to rescind contracts are equitable, and not within municipal court's jurisdiction (Civ. Code, § 3406; Code Civ. Proc. § 76).

Suits for judicial rescission and cancellation of contracts, under Civ. Code, § 3406, are essentially equitable actions, of which municipal court has no jurisdiction, under Code Civ. Proc. § 76, giving superior court original jurisdiction in all cases in equity.

Appeal from Superior Court, Los Angeles County; Henry M. Willis, Judge.

Action by Stella M. Freligh against Susan B. McGrew, also known as Susan Underwood, and others. Judgment for plaintiff was reversed by the superior court, and plaintiff appeals. Affirmed.

See, also, 260 P. 805.

Arsen Yeretzian, of Los Angeles, for appellant.

Stephen Monteleone, of Los Angeles, for respondents.

KEETCH, Justice pro tem. The plaintiff and appellant brought an action in the municipal court of Los Angeles county to recover the sum of $1,000 paid by her in a transaction involving the leasing of an apartment house in the city of Los Angeles, owned by the defendant Mrs. Susan B. McGrew. Judgment went for the plaintiff, and defendant appealed to the superior court. The matter is now before us on appeal from a judgment of reversal rendered by the superior court.

It appears, from the facts contained in the statement submitted to the superior court on appeal, that about September 9, 1924, Mrs. Freligh began negotiations for the leasing of the McGrew Apartments through Mrs. McGrew's agents, R. J. Frank and J. M. Schisler, codefendants named in the complaint. The term of the proposed lease was for 10 years, at a monthly rental of $500, unfurnished, the first and last months' rent to be paid in advance. The premises were under lease at the time to a Mrs. Craig, and she owned the furniture. It is claimed by the plaintiff that prior to the execution of the lease on Sepember 14, 1924, Frank and Schisler, as the agents of Mrs. McGrew, made certain promises of assistance to her, the plaintiff, in order to close the deal, including an offer of a loan of $500 with which to complete the purchase of the furniture from Mrs. Craig. The lease was prepared, and plaintiff submitted it to her attorney, who made several objections to it. Another lease was presented to the plaintiff for her signature, and it is claimed by her that Frank and Schisler stated that it had been corrected to conform to her wishes. She signed it without reading it, and without again submitting it to her attorney. This fact is admitted by her. Shortly after she discovered that Mrs. Craig had disposed of the furniture, and at about the same time she also discovered that one of the clauses in the lease to which she particularly had objected, requiring the giving of a chattel mortgage upon the furniture to secure the rent, had not been changed or eliminated. These statements of the plaintiff are specifically denied by the defendants; they asserting that Mrs. Freligh's negotiations for the purchase of the furniture from Mrs. Craig was an independent transaction, unknown to Mrs. McGrew, and had nothing whatever to do with the execution of the lease, and that as to the latter the plaintiff had signed it with full knowledge of its contents. Whatever conflict there may be in these particulars, it is undisputed that the lease was executed by the parties, that the receipt of the $1,000 for the first and last months' rental is acknowledged therein, and that plaintiff took possession of the premises and occupied them for several months thereafter.

The complaint consists of two counts, one in the nature of the common count for money had and received, and the other a recital of the contentions of plaintiff as briefly outlined above, and in effect charging that the signature of the plaintiff to the lease was procured by means of false representations. In reversing the judgment, the lower court held as to the first count that, in order to maintain an action for money had and received, when paid under an alleged fraudulent contract, there must have been a rescission of the contract in accordance with the requirements of sections 1689 and 1691 of the Civil Code, and that there was nothing in the record to indicate that that had been done; hence, that the finding of the trial court was erroneous.

It is the contention of appellant here that under the facts as stated there was no need for rescission, because the money was obtained by false representations. In support of this claim counsel relies chiefly upon the language of the court in Minor v. Baldridge, 123 Cal. 191, 55 P. 785. In that case it appears that Baldridge, as representative of the California, Oregon & Idaho Railway Company, entered into a contract with the plaintiff by which the latter agreed to pay $20,000 in six installments to the corporation, in connection with the building of a proposed railroad, conditioned upon the corporation's building the road up Mad river and to purchase lumber from the plaintiff. Some time after the contract was signed Baldridge represented that the terminal had been secured on Humboldt bay and that the first installment of the money was due. The plaintiff, relying upon this statement, paid over $1,000 to the corporation. The jury found the representations to be false, and that the defendant had never purchased lumber from the plaintiff. The language of the court, as quoted by appellant, is as follows: "The action is not based upon a breach of a contract, nor is it necessary to have a rescission of the contract to enable plaintiff to maintain his action. The theory is that the money was obtained upon a false representation that it had become due under the contract, by the performance of the conition precedent by the corporation. This might all be, and the contract still remain in force."

[1-3] It may here be said that, whatever may have been the understandings and stipulations of the parties preliminary to the execution of the lease in the instant case, they became merged in the completed and executed document, and apparently the only basis for plaintiff's contention of fraud is the statement of plaintiff that the agents of Mrs. McGrew assured her that the clause in the contract to which she had objected had been eliminated when it had not. These representations were denied by all of the defendants; but, assuming that they were not, there is no dispute of the fact that Mrs. Freligh, the plaintiff, had ample opportunity to read and ascertain the conditions of the lease before signing it, or, if she preferred, to refer it to her attorney as she had done in the previous instance. This she admits she did not do, and under the circumstances she was not entitled to rely upon the representations of the defendants, if they were made to her as she alleges. Oppenheimer v. Clunie, 142 Cal. 316, 75 P. 900. The contract was a valid, existing contract, and, unless there was a rescission, it would "still remain in force," to quote the language of the court in the case cited by appellant, and under its terms Mrs. McGrew would be entitled to retain the $1,000 paid as the first and last months' rent.

In Oppenheimer v. Clunie, supra, which was an action to have a lease canceled upon the ground that the defendant had made false representations as to certain conditions of a building, the plaintiff took possession and occupied the premises for some months after the contract for lease had been executed. The lease was signed in October, 1900, and the action was not brought until January 10, 1902. It was held that the plaintiff could not maintain his action to rescind, because he did not rescind promptly, and also that he had accepted and ratified the lease after full knowledge of the facts. In this connection the court quotes Pomeroy in his work on Equity Jurisprudence (section 894) as follows: "If in a contract of sale or leasing, representations are made by the vendor concerning some incidents, qualities, or attributes of the subject-matter which are open and visible, so that the falsity of the statement is patent to an ordinary observer, and it is made to appear that the purchaser at, or shortly before, the concluding of the contract, had seen the thing itself which constitutes the subject-matter, then a knowledge of the facts is chargeable upon such party; he is assumed to have made the agreement knowingly, and cannot allege that he was misled by the false representations."

In the case of McGibbon v. Schmidt, 172 Cal. 75, 155 P. 463, the court said: "The action to recover the purchase money was not based on fraud. It was in the form of an action for money had and received. It could not have been successfully maintained except by proof that the contract had been rescinded, or that defendant had been guilty of a breach thereof. The judgment of nonsuit was, therefore, as we must presume, based upon the fact that no rescission, termination, or breach of the contract had been proven and that it was still in force; that the plaintiff had no remedy such as she sought to enforce by that action."

[4] In the case of Deasy v. Taylor, 39 Cal. App. 235, 178 P. 538, which was an action to set aside certain agreements and transfers on the ground of fraud, it was alleged that certain of the defendants named, knowing the plaintiff to be ill, intoxicated, and unable to transact business, fraudulently procured and caused her to sign the document in question, and the court so found. It was there held that it was necessary for the plaintiff to rescind. It is also pointed out in that case that one of the essential elements of an effective rescission required by section 1691 of the Civil Code is that the person seeking to rescind must do so promptly upon discovery of the facts which would entitle him to rescind, if he is free from duress, menace, undue influence, or disability, and is aware of his right to rescind.

We have already noted, so far as is shown by the record before us, that the plaintiff here was under no disability which would prevent her from reading or ascertaining the contents of the lease before she signed it, and it also appears from the record that the instrument in question was signed in September, 1924, and that the action was filed in the municipal court in October, 1926, or two years later, which, without explanation, would certainly indicate a noncompliance with the statute in this particular alone. We again cite the case of Oppenheimer v. Clunie upon this point, where the court, after stating that "it is a fundamental rule in * * * equity that a party desiring to rescind must do so promptly," quotes further from the language of Pomeroy (section 837) as follows: "The person who has been misled is required, as soon as he learns the truth, with all reasonable diligence to disaffirm the contract, or abandon the transaction, and give the other party an opportunity of rescinding it, and of restoring both of them to their original position. * * * If after discovering the untruth of the representations, he conducts himself with reference to the transaction as though it were still subsisting and binding, he thereby waives all benefit of and relief from the misrepresentations."

[5] As to the second cause of action, the superior court, in its opinion, stated as follows: "The second cause of action purports to be an action for judicial rescission under the authority of section 3406 of the Civil Code. If it is an attempt to secure such judicial rescission, it must prove abortive, as the municipal court has no jurisdiction of such an action. Suits for judicial rescission and cancellation of contracts are essentially equitable actions of which the municipal court has no jurisdiction." Section 76 of the Code of Civil Procedure provides that "the superior court shall have original jurisdiction in all cases in equity." After a perusal of the allegations of the second cause of action the correctness of the decision as reached by the judge of the superior court is apparent and requires no further comment by us. We are also in accord with the holding that the findings of fact "do not sustain the conclusions of law nor the judgment based thereon."

Judgment affirmed.

We concur: CRAIG, Acting P. J.; THOMPSON, J.

---

95 Cal. App. 242

PEOPLE v. LALOR. (Cr. 1499.)

District Court of Appeal, First District, Division 2, California. Dec. 4, 1928.

1. Indictment and information 🔑110(18)—Indictment for grand theft following statute and inserting phrase describing property taken held to state offense (Pen. Code, §§ 484, 487, 952, as amended by St. 1927, pp. 1043, 1044, 1046).

Information for grand theft *held* to state public offense, where it followed literally the provisions of Pen. Code, §§ 484, 487, 952, as amended by St. 1927, pp. 1043, 1044, 1046, except there was inserted phrase, "consisting of 400 shares of the stock of the Great Republic Life Insurance Company," describing property taken.

2. Larceny 🔑65—Evidence held to support conviction for grand theft.

Evidence *held* sufficient to support conviction for grand theft, where defendant and another conspired to obtain possession of certain certificates of stock and convert them into cash.

3. Conspiracy 🔑47—Conspiracy may be proved by circumstantial evidence.

Conspiracy may be shown by direct evidence, and should be so proved if this character of evidence is attainable, but circumstantial evidence is also competent to prove it.

4. Criminal law 🔑696(1)—In prosecution for grand theft, on theory defendant and another conspired to obtain stock certificates and convert them into cash, evidence of visit to another than prosecuting witness held properly reinstated after being stricken.

Where it was state's theory that defendant, accused of grand theft, had conspired with another to obtain possession of stock certificates and convert them into cash, testimony regarding visit of defendant and such other at ranch of another than prosecuting witness *held* properly reinstated after being stricken, since, where party's guilt depends on intent, purpose, design, or guilty knowledge, collateral facts in which he bore principal part may be examined.

5. Criminal law 🔑761(2)—Instruction on circumstantial evidence held not erroneous for failure to insert words "if any" after each phrase.

In prosecution for grand theft, instruction on circumstantial evidence *held* not erroneous on complaint that court failed to insert words "if any" after each phrase and that by such failure court assumed every fact mentioned had been proved.

6. Criminal law 🔑761(6)—In prosecution for grand theft, refusal of ambiguous, unintelligible instruction, erroneously assuming that sole act of defendant was act of selling stock certificate, held not error.

In prosecution for grand theft, refusal of instruction which was ambiguous, unintelligible, and assumed that sole act of defendant was act of selling stock certificate, when state's theory was that defendant and another conspired to obtain possession of stock certificates and thereafter convert them into cash, *held* not error, especially where request was that court instruct on one specific piece of evidence.

7. Criminal law 🔑815(1)—Instruction addressed to facts ignoring greater part of case presented by prosecution held properly refused.

In prosecution for grand theft, proposed instruction addressed to set of facts which ignored greater part of case presented by prosecution *held* properly refused.

8. Criminal law 🔑829(1)—Instructions covered by instructions given held properly refused.

In prosecution for grand theft, proposed instructions, which were fully covered by instructions given in so far as they were sound, *held* properly refused.

Appeal from Superior Court, Fresno County; Denver S. Church, Judge.

Steve Lalor was convicted of grand theft, and he appeals. Affirmed.

Joseph A. Brown, of San Francisco, and Carl E. Lindsey, of Fresno, for appellant.

U. S. Webb, Atty. Gen., and Wm. F. Cleary, Deputy Atty. Gen., for the People.

STURTEVANT, J. The district attorney filed an information against the defendant charging him with having committed grand theft. The defendant appeared, pleaded not guilty, and a trial was had before the trial court sitting with a jury, the jury returned a verdict of guilty, the defendant made a motion in arrest of judgment, the motion was denied, the defendant made a motion for a new trial, the motion was denied, and the defendant has appealed from the orders and the judgment.

[1] The defendant contends that the information does not state a public offense. The charging part of the information is as follows: "The district attorney for the county of Fresno, state of California, hereby accuses Steve Lalor of the crime of a felony, towit: grand theft, in that the said Steve Lalor on or about the 9th day of November, 1927, at and in the said county of Fresno, and state of California, unlawfully took the property of one Margaret J. Adams, consisting of 400 shares of the stock of the 'Great Republic Life Insurance Company' of a value in excess of $200, lawful money of the United States." If we omit the words, "consisting of 400 shares of the stock of the Great Republic Life Insurance Company," the information as written follows literally the provisions of section 484, section 487, and section 952 of the Penal Code, as those sections were amended in 1927 (St. 1927, pp. 1043, 1044, 1046). By inserting the deleted phrase, an information which was otherwise sufficient was not made insufficient.

[2] In the next place, the defendant contends that the evidence was insufficient to support the verdict and judgment, and insufficient to show that the defendant committed any offense. After stating some of the facts, the defendant clarifies his contention by saying "there is not a vestige of evidence as a matter of law connecting the defendant with the offense prior to its commission nor any sufficient evidence therein of guilt or criminal participation prior to the commission of the offense." As shown by the opening statement of the district attorney and by the evidence tendered by him, it was at all times the theory of the prosecution that this defendant and a man sometimes called Fred Burdette, alias Walter C. Gillette, alias Herman Fink, did, prior to November 4, 1927, form a conspiracy to obtain possession of the certificates of stock of the Great Republic Life Insurance Company (a corporation doing business in Los Angeles) and thereafter converting the certificates into cash. In carrying out this conspiracy, Fred Burdette was to appear and interview the stockholder and make the representation that the Great Republic Life Insurance Company was about to amalgamate with the Philadelphia Life Insurance Company, and that under the plan one share of stock in the amalgamated company would be issued for two shares of stock of the Great Republic Life Insurance Company; that to substantiate his representations Gillette carried what purported to be a letter written on the letterhead of the Great Republic Life Insurance Company and purporting to be signed by two of the well-known officials of that company; that, after the conspirators had obtained the certificates, then this defendant would negotiate the sale of the certificates and divide the proceeds; that, in conducting these proceedings, Burdette introduced himself as Walter C. Gillette, and exhibited what purported to be the letter of authorization, but which in truth and in fact was entirely a forgery. Following out this theory of its case, the prosecution called witnesses showing: That Burdette and Lalor were together as early as November 4, 1927. That on the 7th they were in Fresno and this defendant registered himself and also registered Burdette under the name of Herman Fink at the Hotel Californian in Fresno, where they took rooms 511 and 512. That on the same date they called at the Wilbur ranch, where Burdette introduced himself as Gillette. That Mr. Wilbur was not at home, and the two left, but that Burdette returned the next day. That on the 9th they called at the post office in Caruthers, a small town located in Fresno county. That at about half past 1 in the afternoon Burdette entered the post office and inquired as to the residence of the prosecuting witness Margaret J. Adams. On being informed of the location of her residence, he went outside and was afterwards seen standing by the side of an automobile talking to a man who was seated in the automobile and who was identified as this defendant. At about 2 p. m. Burdette called on Mrs. Adams and introduced himself as Walter C. Gillette, exhibited the letter above referred to, made the representation hereinbefore recited, and induced her to indorse and deliver her certificate of stock. That thereafter he delivered to her a receipt. While in the house he obtained from H. A. Adams his certificate in the same manner, and executed to him a receipt. On the 11th this defendant and Burdette were in San Francisco. This defendant had the certificates in his possession and delivered the same to W. S. Hopkins with instructions to negotiate a sale and pay the proceeds to the defendant. On that same date Hopkins delivered the certificates to Martin Judge, Jr., & Co. On the next day that company delivered to Hopkins its check for $1,500, which Hopkins cashed and thereafter paid the moneys to this defendant in the defendant's room at the Hotel Plaza. On the same day this defendant paid Burdette out of said moneys the sum of $600. Thereafter, on the 15th, Martin Judge paid Hopkins $3,449.12 in the form of a check. Hopkins immediately cashed the check, and on the same date at the same place paid the defendant the proceeds. Both Mr. and Mrs. Adams testified that they had never received anything for their respective certificates. Persons to whom Burdette had introduced

himself under the name of Gillette were shown a picture of Burdette, and they testified it was a picture of the man who called himself Gillette. Writings proved to have been made by the person claiming to be Gillette were shown to persons who stated they were written by Fred Burdette. We think it needs no argument to show that the evidence so introduced was sufficient to prove the offense alleged in the information and that the offense was committed as contended by the prosecution.

[3, 4] The defendant contends that the trial court erred in receiving evidence. We think it did. However, the error was not against the defendant but in the defendant's favor. Many items of evidence, each tending in some degree to prove a conspiracy, were erroneously rejected. For the purpose of proving the conspiracy, the prosecution called Arthur M. Elburg, who resides at Cupertino, Santa Clara county, and attempted to prove that he was interviewed in November, 1927, by a man representing himself as Gillette, regarding stock held by the witness in the Great Republic Life Insurance Company. The defense immediately interposed numerous objections, and Mr. Elburg was not allowed to do much more than to give his name and address. The defendant now claims that the prosecution erred. The contention is without foundation. The error was on the part of the defense. A general treatment of the law on the subject is contained in 12 C. J. at page 633. Among other things, it is there said: "The fact of a conspiracy may be proved by any competent evidence. The conspiracy may of course be shown by direct evidence, and, it is apprehended should be so proved if this character of evidence is attainable. Direct evidence is, however, not indispensable. Circumstantial evidence is competent to prove conspiracy. Proof of the combination charged, it has been said, must almost always be extracted from the circumstances connected with the transaction which forms the subject of the accusation. * * * The government has the right to show the whole history of the conspiracy from its commencement to its conclusion. And it is no objection that the evidence covers a great many transactions and extends over a long period of time, that it may show another crime. * * * Where the guilt of a party depends on the intent, purpose, or design with which an act is done, or on his guilty knowledge thereof, collateral facts in which he bore a principal part may be examined into for the purpose of establishing such guilty intent, design, purpose, or knowledge. It is sufficient that such collateral facts have some connection with each other as a part of the same plan or as induced by the same motive, and it is immaterial that they show the commission of other crimes. * * *" See, also, People v. Lawrence, 143 Cal. 148, 76 P. 893, 68 L. R. A. 193; People v. Moran, 144 Cal. 48, 77 P. 777; People v. Kizer, 22 Cal. App. 10, 133 P. 516, 521, 134 P. 346. The witness Bernice Gann testified regarding the call at the Wilbur place. Acting upon the motion of the defense, the court struck her testimony out. Later the court reversed its ruling. The defendant complains of the ruling reinstating the evidence. The ruling was clearly correct, and the defendant was laboring under error when he made the motion to strike out.

[5] Finally, the defendant complains regarding the instructions given by the trial court. The court gave an instruction on the subject of circumstantial evidence. It is contended the instruction was erroneous. The contention rests on the assumption that after each phrase the trial court should have inserted "if any," and, in failing to do so, that the trial court assumed that every fact mentioned by the trial court had been proved. The trial court was not bound to continually insert "if any." On the other hand, the duty of the trial court was to instruct clearly. It did so, and committed no error. In this same connection the defendant claims that "no statements of the defendant were in any way given in evidence in this case." Of course, that is not true. Statements made by this defendant were testified to by Verdieck, Stockird, Hopkins, and Du Bois.

[6-8] The defendant calls to our attention that he requested the trial court to give some instructions which the trial court did not give, and assigns the omission as error. In this we think the defendant is mistaken. The first proposed instruction was ambiguous, unintelligible, and assumed that the sole act of the defendant was the act of selling the certificate of stock. Furthermore, it was a request that the court instruct on one specific piece of evidence. The second proposed instruction was addressed to a set of facts which ignored the greater part of the case presented by the prosecution. The third and fourth proposed instructions, in so far as they are sound, were fully covered by instructions which were given. The fifth proposed instruction misquoted the record, and was an incorrect statement of the law as stated in the authorities above cited. All of these requests were, for the reasons mentioned, properly refused.

Both the orders and judgment are affirmed.

We concur: KOFORD, P. J.; NOURSE, J.

95 Cal. App. 257

PEOPLE v. BECK. (Crim. No. 1063.)

District Court of Appeal, Third District, California. Dec. 4, 1928.

Criminal law 🔑796, 1172(9)—Instruction in rape trial that punishment is exclusively for court held prejudicial error, requiring reversal (Pen. Code, §§ 261, 264).

In trial for rape, under Pen. Code, § 261, court's failure to instruct jury to recommend whether punishment should be by imprisonment in county jail or state prison, as provided by section 264, and instruction that question of punishment is one exclusively for court, which jury has no right to consider, was prejudicial error, requiring reversal of conviction.

Appeal from Superior Court, Humboldt County; Thomas H. Selvage, Judge.

John H. Beck was convicted of rape, and he appeals. Reversed, and new trial ordered.

Blaine McGowan, of Eureka, for appellant.

U. S. Webb, Atty. Gen., and J. Chas. Jones, Deputy Atty. Gen., for the People.

PER CURIAM. The defendant was charged, under subdivision 1 of section 261 of the Penal Code, with the crime of rape. He was found "guilty as charged in the information" and was thereupon sentenced to imprisonment in the state prison. He has appealed from the judgment and the order denying his motion for a new trial.

The court failed to instruct the jury to "recommend by their verdict whether the punishment shall be by imprisonment in the county jail or in the state prison," as provided by section 264 of the Penal Code, but instructed the jury that "the question of punishment is one exclusively for the court and with which a jury has no concern and which a jury has no right to consider." This was prejudicial error requiring a reversal. People v. Currie (Cal. App.) 269 P. 770; People v. Sachau, 78 Cal. App. 702, 248 P. 960; People v. Rambaud, 78 Cal. App. 685, 248 P. 954.

The judgment and the order are reversed, and a new trial ordered.

---

95 Cal. App. 370

TOON v. PICKWICK STAGES, NORTHERN DIVISION. (Civ. 6335.)

District Court of Appeal, First District, Division 2, California. Dec. 10, 1928.

1. Trial 🔑133(6)—In automobile collision case plaintiff's counsel's statement that photographs were unfair, in requesting that jury view place of accident, held not prejudicial, considering court's instruction to disregard.

In action for damages sustained in automobile collision, plaintiff's counsel's statement that photographs were unfair, in making request that jury be taken to place of accident, *held* not prejudicial, where court promptly reproved counsel and admonished the jury that they were not to regard or be influenced by statement, and jury viewed place of accident.

2. Trial 🔑234(3)—In automobile collision case, where defendant's witness' testimony showed defendant was negligent, instruction to find for plaintiff if he was not negligent held proper.

In automobile collision case, where negligence on part of defendant was inevitable inference to be drawn from testimony of its own witnesses, if believed, court properly instructed jury that if they believed plaintiff not guilty of contributory negligence they must find in his favor.

3. Trial 🔑339(3)—Where jury returned verdict for plaintiff for $5,000 and medical expenses and other items, court properly sent out jury to find damages specifically (Code Civ. Proc. § 619).

Where jury, after retiring for consideration, returned to court with verdict for plaintiff for $5,000 and medical expenses, court costs, and counsel fees, which fees could not be allowed, court properly sent out jury with instructions to find plaintiff's damages specifically under Code Civ. Proc. § 619.

4. Trial 🔑339(3)—Where jury was sent out to find damages specifically under statute, they could reconsider issues; "or again sent out" (Code Civ. Proc. § 619).

Where jury returned verdict for plaintiff for $5,000 and medical expenses, court costs and counsel fees, which fees could not be allowed, and court sent out jury with instructions to find plaintiff's damages specifically under Code Civ. Proc. § 619, jury could reconsider issues, since "or again sent out" in statute can only be that jury may reconsider issues.

Appeal from Superior Court, Santa Barbara County; S. E. Crow, Judge.

Action for damages for personal injuries by Louis R. Toon against Pickwick Stages, Northern Division. From a judgment for plaintiff, defendant appeals. Affirmed.

William G. Griffith, of Santa Barbara, and B. P. Gibbs, of Los Angeles, for appellant.

Mygatt, Robertson & Crawford, of Santa Barbara, for respondent.

STROTHER, Justice pro tem. This is an action brought by the plaintiff to recover damages for personal injuries suffered in the collision of a light laundry truck, driven by him, with a stage of defendant.

The defense was a denial of negligence on the part of defendant and contributory negligence of plaintiff. The case was tried by a jury, which returned a verdict in favor of plaintiff, and defendant appeals.

The accident occurred in March, 1921, at the intersection of Cacique and Voluntario streets in the city of Santa Barbara. At the northwesterly corner of the intersection was a store or filling station, which obstructed the view between the northerly part of Cacique street and the westerly part of Voluntario street.

Plaintiff was driving easterly on Voluntario street, and defendant's stage was going southerly on Cacique street, thereby entering the intersection to the left of plaintiff. Plaintiff's testimony was that he entered the intersection at the rate of from 8 to 12 miles an hour; that though he looked to the right and left, he never saw the stage, even at the moment of impact; and that he was rendered unconscious by the shock. Sanchez, a witness for plaintiff, testified that plaintiff was traveling at the rate of 10 miles an hour just before he entered the intersection.

Ott, who was driving the stage, was a witness on behalf of defendant. He testified that he was traveling at the rate of between 20 and 25 miles an hour when he arrived at a point 3 or 4 feet from the intersection line; that the plaintiff was then about the same distance from the intersection and was going from 3 to 6 miles an hour faster than the witness, and went straight ahead at the same speed. The witness said that he put on his brakes as he crossed the property line and was going between 10 and 15 miles an hour at the time of collision.

The testimony of Brooks, a passenger on the stage, also a witness for the defendant, was practically to the same effect as that of Ott, except that on direct examination he testified that the stage was going 15 to 20 miles an hour at the moment of collision, and on cross-examination that it was going 5 or 6 miles an hour.

Each car entered the intersection on its own right side of the street. The collision occurred after each vehicle had passed the center line of the street across which it was traveling; hence after the stage had passed from the right to the left side of its road. The laundry wagon was carried diagonally across the street, a distance of 48 feet, into the corner of a lot, and completely demolished.

The court correctly instructed the jury as to the rules regarding negligence, proximate cause, and contributory negligence, as applicable to the facts of the case. A number of assignments of error are made by appellant, but only three appear to be of sufficient importance to justify consideration.

[1] In the course of the trial defendant offered in evidence several photographs of the scene of the accident, and more particularly that part of Cacique street traversed by the stage in its approach to the intersection. These were admitted over the objection of plaintiff that they did not truthfully portray the scene. At the request of both parties the jury was taken to the place of the accident. Plaintiff's counsel in making the request stated that his reason for wanting the jury to see the place was that the photographs were unfair. This statement was objected to by defendant's counsel, and the court reproved plaintiff's counsel and admonished the jury that they were not to regard or be influenced by the statement. Thereupon the incident was assigned by defendant as prejudicial conduct on the part of plaintiff. Considering the prompt action of the court and the fact that the jury were put into a position to determine from their own observation the conditions at the place of the collision, it does not appear that defendant could have been prejudiced.

[2] The court instructed the jury that if they believed that the defendant's stage entered the intersection at a greater rate of speed than was lawful, and further believed that the plaintiff was not guilty of contributory negligence, they should find for plaintiff. The giving of this instruction is assigned as error, as ignoring the question of proximate cause and being in effect a direction to the jury to find for plaintiff. The jury had been told by the court that any negligence on the part of the plaintiff, concurring or co-operating with negligence of the defendant to proximately cause the injury, was contributory negligence, which would prevent the plaintiff from recovering. From the evidence the jury could come to no other conclusion than that the collision was caused by the negligence of one or the other or of both the parties. Negligence on the part of the defendant was an inevitable inference to be drawn from the testimony of its own witnesses, if believed. The court correctly instructed the jury that if they believed that plaintiff was not guilty of contributory negligence they must find in his favor.

[3, 4] At the conclusion of the trial, the jury, after retiring for consideration, returned to court with the following verdict: "We the jury in the above-entitled action find for the plaintiff, and assess his damages in the sum of $5000.00 and medical expenses, court costs and counsel fees." The court advised the jury that counsel fees could not be allowed in the action, and instructed them to retire "and fix specifically your verdict on the amounts you have found." After some discussion between court and counsel, the court instructed the jury that: "The verdict should state specifically what your verdict is as to the amount of damages." The jury then retired and brought in the following verdict: "We, the jury, find for the plaintiff and assess his damages in the sum of $7500.00."

Defendant objected to the entry of the verdict on the ground that it was not their verdict, as they had already assessed the damages at $5,000, and the additional assessment of $2,500 was illegal and void; that the verdict was contrary to the court's instructions; that the verdict had been changed after its rendition and was not the true verdict. The court overruled the objection, and the verdict was entered. This action of the court is urged as error.

Section 619 of the Code of Civil Procedure provides that: "When the verdict is announced, if it is informal or insufficient, in not covering the issue submitted, it may be corrected by the jury under the advice of the court, or the jury may be again sent out."

The court properly sent the jury out with instructions to find plaintiff's damages specifically. The whole issue was at large when they retired. They had evidently not passed upon all the issues presented to them, and had found upon one matter which was not in issue. The statute provides that in such case one of two things shall be done, evidently according to the circumstances, either the jury shall correct the verdict under the advice of the court, "or again be sent out." The latter can only mean that they may reconsider the issues. If they had returned a verdict reducing their finding of damages, or finding for the defendant, it was equally within their power.

The judgment is affirmed.

We concur: KOFORD, P. J.; NOURSE, J.

---

95 Cal. App. 338

ATWELL v. MERCANTILE TRUST CO. OF CALIFORNIA. (Civ. 6472.)

District Court of Appeal, First District, Division 1, California. Dec. 7, 1928.

Rehearing Denied Jan. 5, 1929. Hearing Denied by Supreme Court Feb. 4, 1929.

1. Banks and banking 🔑154(2)—One-year limitation applies to action for payment of forged check, though complaint is in form of one for deposits (Code Civ. Proc. § 340, subd. 3, § 348).

If gravamen of depositor's action against bank is payment of forged or raised check, one-year limitation prescribed by Code Civ. Proc. § 340, subd. 3, applies, though complaint is in form of one for deposits, time for which is not ordinarily limited under section 348.

2. Banks and banking 🔑154(2)—Limitation on action for payment of forged check does not apply to action for payments on forged indorsements (Civ. Code, § 3265 (a), 3112; Code Civ. Proc. § 340, subd. 3; Pen. Code, §§ 470, 476).

A check, which is defined as bill of exchange payable on demand by Civ. Code, § 3265 (a), being complete without indorsement, required to be written on instrument or attached paper by section 3112, Code Civ. Proc. § 340, subd. 3, placing one-year limitation on action against bank for payment of forged or raised check, does not apply to action to recover money paid on checks, indorsements of which were forged in violation of Pen. Code, §§ 470, 476.

3. Banks and banking 🔑148(2)—Depositor may assume that bank paid check on genuine indorsement, in absence of actual knowledge of forgery.

No duty is imposed on depositor to discover forged indorsements of his checks, but, in absence of actual knowledge that indorsement has been forged, he is entitled to assume that bank paid check only on genuine indorsement.

4. Constitutional law 🔑70(3)—Appropriateness of requiring depositor to detect forged indorsements or extending one-year limitation to actions for payments on forged indorsements is for Legislature (Code Civ. Proc. § 340, subd. 3).

Appropriateness of imposing duty on depositor to detect forged indorsements of his checks or extending one-year limitation of Code Civ. Proc. § 340, subd. 3, to include actions for payments by bank on forged indorsements, as well as of forged or raised checks, is a matter of legislative, not judicial, concern.

5. Banks and banking 🔑148(4)—Depositor, not discovering forgery of indorsements until nearly year after issuing checks, nor making formal demand and suing for amounts paid until several months after discovery, held not guilty of laches.

Depositor *held* not chargeable with laches in not discovering that indorsements of her checks for stock in corporation were forged until nearly a year after issuing checks, when advised at stockholders' annual meeting that she was not a stockholder, nor in not making formal demand and commencing action against bank for money paid on such indorsements for five or six months after discovering forgery, where she notified bank without delay.

Appeal from Superior Court, Alameda County; James G. Quinn, Judge.

Action by Lois A. Atwell against the Mercantile Trust Company of California. Judgment for plaintiff, and defendant appeals. Affirmed.

Keyes & Erskine, Hartley F. Peart, and Charles V. Barfield, all of San Francisco, for appellant.

Thornton Wilson, of Oakland, for respondent.

SPENCE, Justice pro tem. The plaintiff and respondent, a depositor in the defendant and appellant bank, brought this action by filing a "Complaint for Deposits." Respondent alleged a balance due and unpaid of $1,050, which appellant refused to pay upon demand.

Appellant denied that any balance was due or unpaid, and alleged the disbursement of the entire deposits upon order of the respondent. Appellant further alleged that the action was barred by subdivision 3 of section 340 of the Code of Civil Procedure and that respondent was barred by laches.

Upon the trial, no question was raised by respondent concerning the payments made from her account except as to two checks totaling $1,050. These checks were both made payable to the Oakland Hospital Corporation; the first, in the sum of $500, being dated February 17, 1925, and the second, in the sum of $550, being dated February 18,

---

★Rehearing denied. Hearing denied by Supreme Court.

1925. Both of these checks were issued by respondent, and were thereafter paid by appellant bank upon forged indorsements. This action was commenced on August 13, 1926. The only defenses urged by appellant upon the trial were the defenses of the statute of limitations and laches. The trial court found against appellant on both defenses, and judgment was entered in favor of respondent for the sum of $1,050 and interest. Appellant appeals from this judgment and raises the same questions upon this appeal.

[1] Ordinarily there is no limitation upon the time within which a depositor may bring an action to recover money deposited with a bank. Section 348, Code of Civil Procedure. The Legislature, however, by amending subdivision 3 of section 340 of the Code of Civil Procedure, placed a limitation of one year upon actions by "a depositor against a bank for the payment of a forged or raised check." This latter section covers a special class of cases and is an exception to the general rule. If, then, the gravamen of an action is the payment of a "forged or raised" check within the meaning of the latter section, such section and the limitation therein prescribed would apply despite the fact that a plaintiff draws the complaint in the form of a "complaint for deposits." Union Tool Co. v. Farmers', etc., National Bank, 192 Cal. 40, 218 P. 424, 28 A. L. R. 1417. The controlling question to be decided on the issue of the statute of limitations is whether the payment of a check upon a "forged endorsement" constitutes payment of a "forged check" within the meaning of subdivision 3, § 340, Code of Civil Procedure.

This question has been passed upon in other jurisdictions under statutes using the words "forged or raised check." Section 326 of the Negotiable Instruments Law of New York provided: "No bank shall be liable to a depositor for the payment by it of a forged or raised check, unless within one year after the return to the depositor of the voucher of such payment, such depositor shall notify the bank that the check so paid was forged or raised." Consol. Laws, c. 38. This section has been held to have no application to checks bearing forged indorsements. Kleinman v. Chase Nat. Bank, 124 Misc. Rep. 173, 207 N. Y. S. 191. The court there said (124 Misc. Rep. 174), on page 193: "The commonly accepted meaning of the words 'a forged check' in the commercial world is a check upon which the maker's name is forged. It is manifest by a consideration of the reason for the enactment of section 326 of the Negotiable Instruments Law, as well as the commonly accepted meaning of the words 'forged check,' that the Legislature intended to limit the requirement to give notice to cases where payment is made on a check upon which the maker's signature is forged, and did not intend to extend the statute to include forged endorsements."

In Iowa a similar section (section 9266, Code of 1924) provided that "no bank shall be liable to a depositor for the payment by it of a forged or raised check unless within six months after the return to the depositor of the voucher of such payment, such depositor shall notify the bank that the check so paid is forged or raised." This section was likewise held inapplicable to forged indorsements. McCornack v. Central State Bank, 203 Iowa, 833, 211 N. W. 542, 52 A. L. R. 1297.

Counsel for appellant argues that the foregoing cases interpret sections dealing with rules of substantive law and not statutes limiting the time for the commencement of actions. This may be conceded. The New York and Iowa statutes affect the right rather than the remedy. However, no good reason appears for giving the phrase "forged or raised check" a broader interpretation when found in a statute of limitations than the interpretation to be given to that phrase when embodied in a rule of substantive law.

[2] The execution of a check and the execution of an indorsement are distinct. The first is the act of the maker and the second is the act of the payee. A check is complete as a check without an indorsement. A check is defined as a "bill of exchange * * * payable on demand." Section 3265 (a), Civil Code. An indorsement "must be written on the instrument itself or upon a paper attached thereto." Section 3112, Civil Code. The history of the development of the law relating to the duties and obligations between banks and depositors, briefly referred to in the above decisions, leads to the conclusion that the words "forged or raised" check, as used in these statutes and in our own statute, do not refer to a "forged indorsement." In earlier years great uncertainty existed as to whether any duty or obligation whatever fell upon the depositor to examine his vouchers and notify the bank that a check had been forged or raised. As the depositor could easily detect or discover that his signature had been forged or that the check had been raised, the reasonableness of a rule imposing some such duty became apparent. A flexible rule was adopted in most jurisdictions requiring a reasonably careful examination by the depositor, and further requiring the depositor to notify the bank within a reasonable time. This rule did not fix a definite time for the termination of liability of the bank nor for the commencement of an action by a depositor upon a forged or raised check. Statutory enactments then appeared to definitely fix such time. Some statutes, such as those in New York and Iowa, dealt with the substantive rights, and terminated the liability unless notice was given to the bank within a specified time. Others, such as the California statute, did not deal with the substantive rights, but merely affected the remedy by limiting the time within which actions might be

commenced. Both types of statutory enactments sought to fix a definite time, after which no claim could be asserted, based upon the alleged forging or raising of the check, which it was the duty of the depositor to detect.

[3] That no duty is or was imposed upon the depositor to discover forged indorsements is clear from the reasoning and authorities cited in the foregoing decisions. In the absence of actual knowledge of the fact that an indorsement has been forged, the depositor is entitled to assume that the bank has paid the check only upon a genuine indorsement. Our own Supreme Court has said on this subject:

"But a depositor is not bound to examine the endorsements on returned checks. He is bound within a reasonable time to ascertain the genuineness of the checks themselves (Janin v. London, etc., Bank, 92 Cal. 14, 27 P. 1100, 14 L. R. A. 320, 27 Am. St. Rep. 82), but as to endorsements, the rule and its reasons are correctly stated in Shipman v. Bank [126 N. Y. 318, 27 N. E. 371, 12 L. R. A. 791, 22 Am. St. Rep. 821], supra.

" 'The defendant's contract was to pay the checks only upon a genuine endorsement. The drawer is not presumed to know, and in fact seldom does know, the signature of the payee. The bank must, at its own peril, determine that question. It has the opportunity, by requiring identification when the check is presented, or a responsible guaranty from the party presenting it, of ascertaining whether the endorsement is genuine or not. When it returns the check to the depositor, as evidence of a payment made by his direction, the latter has the right to assume that the bank has ascertained the fact to be that the endorsement is genuine' [citing cases]." Los Angeles Inv. Co. v. Home Sav. Bank of Los Angeles, 180 Cal. 601, 611, 182 P. 293, 297 (5 A. L. R. 1193).

In interpreting the Iowa statute above set forth, the court said: "Prior to the enactment of the statute, we had held, in German Savings Bank v. Bank [101 Iowa, 530, 70 N. W. 769, 63 Am. St. Rep. 399], supra, that a depositor was under no duty to the bank as to the genuineness of an endorsement. We said: 'The check was returned with an apparent genuine endorsement of Quinlan. The fact that intervenor had paid the money thereon, and presumably had satisfied itself that the endorsement of Quinlan was genuine, as it was in duty bound to do, was a further reason why plaintiff should not, in the absence of knowledge to the contrary, have concerned itself as to the genuineness of the endorsement of Quinlan's name thereon. Furthermore, the plaintiff owed no duty to the defendant, or to the intervenor, as to the genuineness of the endorsement of Quinlan' [citing cases]. The statute does not, we think, change this rule in respect to the genuineness of the signature of endorsers." McCornack v. Central State Bank, 203 Iowa, 833, 846, 211 N. W. 542, 548, 52 A. L. R. 1297.

With reference to the New York statute quoted above, the court said: "If the legislature intended to modify this common-law maxim to the extent of imposing upon the depositor the onerous and unreasonable duty to detect within a year forged endorsements, it would have stated it explicitly. Such intended modification cannot be found in the express words of the statute, nor can it be fairly implied from the text. (North British & Mercantile Ins. Co. v. Merchants' Nat. Bank, 161 App. Div. 341, 146 N. Y. S. 720.) We are thus in accord with the view of the court below that section 326 had no application to payments made by a bank upon a forged endorsement, and the judgment against the defendant Chase National Bank is affirmed." Kleinman v. Chase Nat. Bank, 124 Misc. Rep. 173, 175, 207 N. Y. S. 191, 194.

[4] The enactment of the amendment of subdivision 3 of section 340 of the Code of Civil Procedure did not purport to change the substantive law relating to the duties and obligations of banks and depositors. It merely fixed a definite time within which the depositor could bring an action in those cases where the substantive law already imposed upon him the duty to discover that the check was forged or raised. If it be deemed appropriate to impose new duties upon the depositor with respect to detecting forged indorsements, or to extend the limitation of subdivision 3 of section 340 to include actions for payment by banks upon forged indorsements, that is a matter of legislative concern.

Counsel for appellant urges that the unauthorized indorsement and cashing of the checks in this case constituted forgery under the provisions of sections 470 and 476 of the Penal Code. That the indorsements were forged is conceded by respondent, and the trial court made findings to that effect. The question, however, is not whether forgery was committed in the indorsing and cashing of the check, but rather whether this is a case of a "forged or raised" check within the meaning of subdivision 3 of section 340 of the Code of Civil Procedure.

Counsel further urges that the case of Union Tool Co. v. Farmers', etc., Nat. Bank, 192 Cal. 40, 218 N. W. 424, 28 A. L. R. 1417, conclusively determines the question here involved. That case is clearly distinguishable. There was an alteration of the payee's name on the face of the checks as well as forged indorsements. The alteration of the payee's name on the face of the checks constituted forgery under section 470 of the Penal Code, and that case, therefore, involved *forged checks* as well as *forged indorsements.* The duty was upon the depositor to discover such alterations on the face of the checks. Any reference in the decision to the forged indorsements was incidental and not necessary to the decision. That case was considered and the distinction clearly brought out in the case of McCornack v. Central State Bank, 203 Iowa, 833, 846, 211 N. W. 542, on page 548 (52 A. L. R. 1297), where the court said: "The endorsement is no part of the check as made by the drawer, although it is, of course, contemplated that the payee must endorse it. But, since the maker is not required to know the signature of the payee, and has a right to issue the check payable to the order of one unknown to him, relying on the bank to pay only in accordance with his direction, a forged endorsement does not make the check a 'forged check' within the meaning of the statute. In Union Tool Co. v. Bank, supra, cited by appellant, there was, in addition to a forged endorsement, an alteration on the face of the check. We are of the opinion the action is not barred by the statute in question."

[5] In addition to the defense of the statute of limitations, it is further urged that respondent's claim is barred by laches. Appellant alleged in its answer "that plaintiff unduly delayed presenting and prosecuting the claim asserted herein, and by reason of such laches is barred from recovery in this action."

Respondent issued the two checks in February, 1925. They were intended to apply as payment for stock in the Oakland Hospital Corporation. It appeared from respondent's testimony that she decided to purchase the stock more as a matter of community service than as an investment. Her vouchers, including these checks, were returned in March, 1925. She did not receive any stock certificate and gave no attention to the matter until about the time of the stockholders' meeting in the latter part of January, 1926. She was then advised that she was not a stockholder, and that the corporation had no record of any purchase of stock by her. The checks had been cashed by a man named Wise, being indorsed "Oakland Hospital Corporation, J. M. Wise." Wise had no authority to cash the checks, and had forged the indorsements and apparently kept the proceeds. The card of authorized signatures filed at the bank by the corporation did not show the signature or name of Wise. Respondent notified the bank of the unauthorized indorsements in the latter part of January or first part of February, 1926. The checks had originally been cashed by the Oakland Bank and forwarded to the appellant bank. In subsequent conversations with an officer of the appellant bank, the question of whether respondent should look to the Oakland Bank or appellant bank was discussed. Respondent made formal demand upon appellant by check for $1,050 payable to cash, dated July 28, 1926, which check was not honored, but returned with the notation "Not sufficient funds." The complaint was filed August 13, 1926.

In support of appellant's claim of laches, the case of California Vegetable Union v. Crocker National Bank, 37 Cal. App. 743, 174 P. 920, is cited. That case did not involve forged indorsements and is not in point. It involved forged checks where the maker's name was forged by an employee upon over one hundred checks at various times covering a period of many months. The defense of laches might well be urged in that case, in view of the duty imposed upon the depositor in relation to checks upon which his name is forged. The absolute failure of the depositor in that case to make any examination of its statements and vouchers to detect the forgery of its name was the basis of the decision. In the present case there was no duty upon respondent to detect the forged indorsement, as shown by the authorities cited. Consequently she cannot be charged with laches before she discovered that the indorsements were forged in the latter part of January, 1926. Upon discovery of the forgery, she did notify the bank without delay. Although formal demand and the commencement of the action did not follow for five or six months, we believe under the circumstances that the trial court properly found that respondent had not unduly delayed presenting and prosecuting her claim.

Under the facts as shown by the uncontradicted testimony, we are of the opinion that the findings and conclusions of the trial court, to the effect that the action was not barred by the statute of limitations and that respondent was not guilty of laches, were correct.

The judgment is affirmed.

We concur: TYLER, P. J.; KNIGHT, J.

95 Cal. App. 378

SCHMIDT v. CAIN. (Civ. 3503.)

District Court of Appeal. Third District, California. Dec. 10, 1928.

1. **Evidence 🔑441(9)—Parol testimony as to warranty held not inadmissible as varying written contract, where writing specifically referred to prior verbal understanding.**

In action for goods sold and delivered, oral testimony relative to verbal understanding as to warranty *held* admissible as against contention that it varied written contract, where writing relied on as containing all terms of agreement specifically referred to prior verbal understanding.

2. **Evidence 🔑441(9)—Parol evidence cannot add warranty provisions to sale contract complete on face, but is competent to show contemporaneous agreement not varying written instrument.**

Where contract for sale of goods is reduced to writing, and on its face purports to be complete expression of whole contract, and contains no warranty, no such provisions can be added by parol evidence, but parol evidence of contemporaneous oral agreement is competent, if it does not vary or conflict with specific provisions of written contract.

3. **Evidence 🔑457—Testimony explaining expression "terms as usual—unless otherwise specified," as used in sales contract, held admissible.**

In action for goods sold and delivered, admission of parol evidence as to meaning of expression "terms as usual—unless otherwise specified," used in letter claimed to constitute contract between parties, *held* not error.

4. **Appeal and error 🔑1011(1)—Trial court's findings on conflicting evidence are conclusive, and reasonable inferences are indulged in support thereof.**

Findings of trial court on conflicting evidence are conclusive, and all reasonable inferences are to be indulged in support thereof.

5. **Appeal and error 🔑1010(1)—Reviewing court cannot interfere with trial court's findings, if supported by substantial evidence.**

Where findings of trial court are supported by substantial evidence, reviewing court cannot interfere, even though it might be of opinion that greater weight of evidence supports contrary conclusion.

6. **Appeal and error 🔑1071(6)—Failure to find on material issues is not reversible error, where findings, if made, would undoubtedly have been adverse to appellant.**

Failure to find specifically on certain material issues raised by pleadings is not ground for reversal, where such findings, if made, would undoubtedly have been adverse to appellant, under uncontradicted evidence.

Appeal from Superior Court, Los Angeles County; Albert Lee Stephens, Judge.

Action by G. F. Schmidt against W. H. Cain, doing business under the name of the W. H. Cain Gas Radiator Company. Judgment for defendant, and plaintiff appeals. Affirmed.

Ward Chapman and L. M. Chapman, both of Los Angeles, for appellant.

Spencer & Dennis, of Los Angeles, for respondent.

PRESTON, Justice pro tem. The plaintiff, G. F. Schmidt, brought this action to recover from defendant, W. H. Cain, the sum of $4,892.40, the purchase price of an article known as "No. 10 Glazed Back Walls," used in the manufacture of gas heaters, alleged to have been sold and delivered to defendant.

The case was tried by the court sitting without a jury, and judgment was entered in favor of the defendant. From this judgment plaintiff prosecutes this appeal.

The amended complaint is in three counts. The first count alleges the making of a contract on May 11, 1922; the delivery of the "glazed back walls" by plaintiff to defendant and the acceptance thereof; the demand for payment; and the refusal of the defendant to pay. The second cause of action is based upon a common count for goods sold and delivered. The third cause of action is based upon an account stated.

The answer denies that a written contract was made; denies that the defendant accepted any of said back walls; but admits that 456 back walls were delivered by plaintiff to defendant between the 20th day of October, 1922, and the 1st day of January, 1923. The answer likewise denies the allegations of the second and third causes of action, and then alleges, as a separate defense, that the plaintiff and defendant, on or about the 11th day of May, 1922, entered into a contract, whereby the plaintiff agreed to manufacture for defendant back walls for use by defendant as component parts of the gas heaters manufactured by defendant; that at the time said agreement was made, plaintiff expressly guaranteed that said back walls would not, when used for the purpose for which they were manufactured, break or crack, and would be satisfactory in every way; that the back walls delivered under said agreement failed to perform the functions or serve the purpose for which they were manufactured; and that, when tested by defendant, broke and cracked; that thereafter defendant informed plaintiff that the back walls so manufactured did not perform the purposes for which they were manufactured and were unfit for use; and that defendant offered to return all of said back walls to plaintiff, and that plaintiff refused to accept the same. Said answer further contained an offer to return the same to plaintiff.

Under the issues thus joined, and the evidence offered by both sides, the court found

---

🔑For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

the facts to be substantially as alleged by defendant, and rendered judgment accordingly.

[1] Appellant first contends that the court erred in admitting oral testimony as to the alleged warranty made by him.

Appellant offered in evidence the following letter, which he claims constitutes the written contract between the parties:

"Los Angeles, Calif., May 11, 1922.

"W. H. Cain Gas Radiator Company, 5217 Moneta Ave., Los Angeles, Calif.—Gentlemen: In accordance with my verbal understanding I had with you at your office on May 11th, I have entered your order for 500—No. 10 glazed back walls as per model left with you to be made in two colors from our brown and mottled green at a price of $10.00 apiece, f.o.b. my factory, Chicago, Ill. Crating to be done in most practical way and to be charged extra for same.

"Further 6,000 No. 3 radiants at 15c apiece to be packed in boxes of eleven (11).

"It is understood and agreed that as long as you buy from me annually at least 500 of said backs and 6,000 radiants, you will have the sole backs and bases now w—ed below right for selling these goods in the State of California. I have further used in connection with said backwall to be forwarded to you as quickly as possible for my pattern maker in Chicago—at a price of $275.00.

"Shipments of the back walls to be made within the next 90 days—the radiants to come forward with the pending shipment.

"Terms as usual—unless otherwise specified.

"Please return the enclosed copy with your signature for my records.

"Yours truly, G. F. Schmidt.

"Accepted:

"W. H. Cain Gas Radiator Co.
"W. H. Cain
"May 16/22."

Respondent was permitted, by way of defense, to introduce parol testimony of the terms and conditions of a "verbal understanding" between appellant and himself. This testimony was to the effect that appellant had guaranteed that the back walls to be manufactured and delivered *would not crack or break, would in all respects be fit for the purposes for which they were manufactured, and would be satisfactory to defendant in all particulars*, etc.; or, in other words, appellant warranted the back walls against cracking or breaking. Testimony was also introduced to the effect that said back walls did crack and break, and were unfit for the purposes for which they were manufactured.

We think that all this testimony was properly admitted.

In the writing itself, which appellant relies upon as containing all the terms of the agreement between the parties, their prior "verbal understanding" is specifically referred to. This language certainly indicates that there was another or additional understanding or agreement than that expressed in the writing between the parties, and the court had a right to know what that understanding or agreement was.

Appellant strenuously insists that the written instrument is a complete expression of the whole agreement, and that it contains no warranty that the back walls would not crack or break, and therefore no such warranty could be established by parol evidence.

[2] The law is, of course, well established that, where a contract of the character here involved is reduced to writing, and upon its face purports to be a complete expression of the whole contract between the parties, and contains no warranty, no such provisions may be added by parol evidence. Hogan v. Anthony, 52 Cal. App. 168, 198 P. 47; Remsberg v. Hackney Mfg. Co., 174 Cal. 799, 164 P. 792; American Steel Pipe Co. v. Hubbard, 42 Cal. App. 520, 183 P. 830; United Iron Works v. Outer H., etc., Co., 168 Cal. 81, 141 P. 917.

The law, however, is equally well settled that parol evidence of the terms and conditions of a contemporaneous oral agreement is competent and admissible, *which does not vary or conflict with the specific provisions of the written instrument.* Torrey v. Shea, 29 Cal. App. 313, 155 P. 820; Peterson v. Wagner, 52 Cal. App. 1, 198 P. 25; Greathouse v. Daleno, 57 Cal. App. 187, 206 P. 1019; Wolters v. King, 119 Cal. 172, 51 P. 35; Whittier v. Home Savings Bank, 161 Cal. 311, 119 P. 92; Jones on Evidence (3d Ed.) 668, §§ 439-440; Kellogg v. Snell (Cal. App.) 270 P. 232.

The testimony in question is not in conflict with any of the provisions of the writing. *The writing is entirely silent on the question of a warranty, but refers to a "verbal understanding,"* as a contemporaneous agreement upon which they rely. Therefore the rule contended for by appellant has no application here, because there was a collateral contemporaneous oral agreement containing terms and conditions, upon which the written instrument is entirely silent.

[3] Appellant also contends that the court erred in admitting parol evidence as to the meaning of the expression "Terms as usual—unless otherwise specified." There is no merit in this contention. No one could tell by reading the contract what the parties intended by this language. In such cases parol evidence is admissible for the purpose of ascertaining the real intention of the parties. United Iron Works v. Outer H., etc., Co., supra.

[4, 5] Appellant next contends that the conduct of the respondent after delivery of the goods was such as to constitute an acceptance and a waiver by him of any defense as to the quality thereof. There is sufficient evidence in the record to sustain this contention, but the court made a finding contrary

thereto. The court undoubtedly accepted the testimony of respondent as being a correct statement of the entire transaction, and his testimony amply supports the court's finding on this point. The findings of the trial court upon conflicting evidence are conclusive, and all reasonable inferences are to be indulged in support thereof. Treadwell v. Nickel, 194 Cal. 243, 228 P. 25; Wilbur v. Wilbur, 197 Cal. 1, 239 P. 332.

Appellant further contends that certain other findings are not supported by the evidence. We have examined the entire record, including all the evidence, with care, and we are of the opinion that all the findings are supported by substantial evidence. This being true, we cannot interfere with the conclusions reached by the trial court, even though we might be of the opinion that the greater weight of the evidence supports a contrary conclusion.

[6] Lastly, appellant contends that the trial court failed to find upon two material issues raised by the pleadings.

There does not appear to be any specific finding that respondent rejected the back walls, or that he offered to return them to appellant. However, we are at a loss to see how the court's failure to make these two specific findings can avail appellant anything, for the evidence is uncontradicted that respondent offered to return the back walls to appellant, and that appellant stated that he would not accept them, if returned. Therefore, if specific findings had been made, the same would undoubtedly have been adverse to appellant. Under such circumstances, failure to find specifically upon these two issues is not ground for reversal. Koblick v. Larson, 57 Cal. App. 462, 207 P. 929.

The judgment is affirmed.

We concur: FINCH, P. J.; PLUMMER, J.

---

95 Cal. App. 352

ROYAL REALTY CO. et al. v. HARVEY INV. CO. et al. (Civ. 3643.) ★

District Court of Appeal, Third District, California. Dec. 7, 1928.

Hearing Denied by Supreme Court Feb. 4, 1929.

1. Appeal and error 🔑931(8)—Appellate court will construe findings so as to uphold, rather than defeat, judgment.

Appellate court must, in reviewing findings, give them a liberal construction so as to uphold, rather than defeat, the judgment.

2. Appeal and error 🔑931(8)—Findings, when reviewed, must be reconciled to prevent conflict on material points, if possible.

In reviewing findings, all the findings are to be read together, and must be reconciled to prevent any conflict upon material points, if such reconciliation is possible.

3. Appeal and error 🔑197(4)—Objection to testimony as not within the issues cannot be raised for first time on appeal, where case was tried on theory that testimony was within issues.

Where it appeared, in an action for specific performance of contract for exchange of real property, that case was tried on theory that any representations as to income of property exchanged were within the issues, irrespective of the amount of such income, objection to testimony as to income based on ground that it was not within the issues cannot be raised for first time on appeal.

4. Appeal and error 🔑931(1)—In absence of direct attack, appellate court assumes that finding is based on sufficient evidence.

In absence of direct attack on a finding, appellate court must and will assume that it was based on sufficient evidence.

5. Specific performance 🔑121(8)—Finding, in action for specific performance of representation as to income of property, held sufficiently supported by evidence.

In action for specific performance of a contract for exchange of real property, finding that it was represented to the defendant that the net income of property sought to be exchanged by plaintiff was $8,000 a year, whereas the property had been operated at a loss, *held* sufficiently supported by evidence.

6. Exchange of property 🔑3(1)—Representations as to net income, not true in fact, related to existing material facts, having reasonable tendency to induce parties to contract to exchange of property to rely on them as representations of such facts.

Representations that property sought to be exchanged had produced a net income of $8,000 a year, whereas the property was operated at a loss, related to existing facts material to the transaction, and which had a reasonable tendency to induce other parties to the contract to consider the same and rely on them as representations of such facts.

7. Appeal and error 🔑1009(1)—Whether defendant relied on representations as to income of property sought to be exchanged held for trial court.

In suit for specific performance of contract for exchange of real property, where issue was whether plaintiff's assignor had misrepresented income from property sought to be exchanged, whether or not defendant relied on representations of income as made *held* question for trial court.

8. Specific performance 🔑121(8)—Finding on question of acreage of ranch property, planted to almonds, held supported by evidence, in action for specific performance.

In action for specific performance of contract for exchange of real property, where issue was whether plaintiffs had misrepresented income from property sought to be exchanged, finding as to acreage of ranch property sought to be exchanged, planted to almonds, *held* supported by evidence.

★Hearing denied by Supreme Court.

9. Appeal and error ⚷882(3)—Case having been tried below on theory that testimony was within issues, litigants cannot urge to the contrary for first time on appeal.

Where an examination of the record discloses that the parties introduced evidence on certain issues, and by their conduct plainly indicated that they considered the facts testified to as being legitimately within issues to be tried and found by the lower court, they will not be permitted to urge for the first time on appeal that such facts were admitted by the pleadings, and hence were not within the issues, and that no finding could be based on such testimony.

10. Trial ⚷397(5)—Findings of trial court necessarily defeating right of recovery, other findings were unnecessary.

Where trial court found for defendants on issues of misrepresentations made in entering into contract for exchange of real property, such findings necessarily defeated the right of recovery, and it was unnecessary that the findings dispose of any further issues, as all other issues thereby became immaterial.

11. Specific performance ⚷53—Fraudulent representations inducing person to enter into contract are defense in suit for specific performance.

Fraudulent representations by which person may be induced to enter into a contract constitute a defense, in an action for specific performance of the contract.

Appeal from Superior Court, Los Angeles County; Frederick C. Valentine, Judge.

Action by the Royal Realty Company and another against the Harvey Investment Company and others. From the judgment, plaintiffs appeal. Affirmed.

McAdoo, Neblett & O'Connor, Haas & Dunnigan, and William H. Neblett, all of Los Angeles, for appellants.

Hickcox & Thomson, Shapiro & Shapiro and Dana R. Weller, all of Los Angeles, for respondents.

Andrews & Andrews and Harry W. Hanson, all of Los Angeles, for defendants.

TUTTLE, Justice pro tem. This is an action for the specific performance of a contract for the exchange of real property, made between H. H. Helbush, assignor of plaintiffs, and defendant corporation, Harvey Investment Company. The contract consisted of a memorandum offer and acceptance. It provides for the exchange of a ranch at Paso Robles, Cal. (belonging to plaintiff York Realty Company) for two pieces of business property in the city of Los Angeles, belonging to defendant Harvey Investment Company. The said ranch was to be included in the transaction, subject to a $40,000 mortgage, due one year after date, at 7 per cent. In addition to putting in the ranch, Helbush was to pay the sum of $270,000 cash. Upon the conveyance of said ranch to defendant Harvey Investment Company and the payment to said defendant of the said sum of $270,000 cash, it agreed to convey to plaintiff Royal Investment Company, the parcel of Los Angeles realty at the corner of Washington and Flower streets, free and clear of all incumbrances, and another parcel in said city at the corner of Tenth and Flower streets, subject to a mortgage of $125,000, then of record. The parties agree that the consummation of the matter shall be handled through escrow instructions.

The complaint sets forth the contract and the escrow instructions delivered by each party to the bank, and describes in detail the steps taken by plaintiff in carrying out the terms of the said contract and which it is alleged show a full compliance with the terms and covenants thereof. It is further alleged that defendants Harvey Investment Company and Leo M. Harvey, with intent to trick, cheat, and defraud plaintiffs, made a pretended conveyance of the property at Tenth and Flower streets to Eugene L. Neustein and Rose Neustein on September 3, 1923, and that thereafter, and on September 12, 1923, said last-named parties conveyed said property to Joseph B. Dabney, and that all said parties paid nothing for the same, and each took the same with full knowledge of the rights of plaintiffs and their assignor, with intent to defraud them. Allegations of a similar tenor are made with reference to the lot at Washington and Flower streets; the grantees being George Ginsburg and Eva Ginsburg. It is also set forth that said last-named property was mortgaged by said grantees to one Murphy for $50,000, and that said Murphy took said mortgage in pursuance of said conspiracy. The said deed and mortgage were dated September 5, 1923. The relief asked is that defendant Harvey Investment Company be required to convey the said two parcels of land in the city of Los Angeles to plaintiffs, and that the various deeds and mortgages executed in furtherance of the said conspiracy to defraud be ordered delivered up and canceled.

The answer, after denying the allegation of the complaint, sets up by way of affirmative defense that the said contract was obtained through fraud. It is stated that plaintiff's assignor, H. H. Helbush, made false and fraudulent statements and representations in respect to the net annual income from the ranch property, and also concerning the acreage planted to almond trees. As the whole ground for appeal converges upon these two subjects claimed to have been misrepresented, we will quote the language of the amended answer in respect thereto:

"That defendants are informed and believe and upon such information and belief allege that the statement made by H. H. Helbush that 125 acres of said ranch were planted in almond trees of various ages was untrue, and that the total number of acres of said ranch planted in almond trees of any age, or all ages, was much less than 125 acres, to wit, 109.15 acres, and no more."

"He (H. H. Helbush) further stated and represented to said defendant that said ranch had been, for some years past, producing a net income annually in excess of ten thousand ($10,000.00) dollars."

"Defendants allege that the statement of H. H. Helbush that the ranch had produced a net income annually of ten thousand ($10,000.00) dollars for several years, were untrue, and allege that said ranch had been operated at a loss instead of profit during said years."

The findings of the trial court with reference to these allegations are as follows:

"That prior to the making of said contract of sale and exchange, both H. H. Helbush, the assignor of plaintiffs, and V. C. Simpson, as agent for said H. H. Helbush, stated and *represented to said Leo M. Harvey as an inducement to the making and entering into said contract by said Harvey Investment Co. that said real property offered in exchange by said H. H. Helbush had from 120 to 125 acres thereof planted to almond trees;* and that when Leo M. Harvey visited the ranch to inspect the same in company with Simpson that he was shown the almond orchard extending to the boundary fence of said property, but was not told that said *boundary fence included 14 acres of said land planted to almond trees that lay within the limits of the Rancho Paso Robles,* and were not included in the land described in said contract, and that said facts were known to said H. H. Helbush at the time and said 13 acres of land were expressly excepted from the deed executed by the plaintiff, the York Realty Co., purporting to convey the property to Harvey Investment Co., and deposited by said plaintiff in said escrow, as hereinbefore found; that said Leo M. Harvey believed said statements and representations as to the number of acres of said property offered to be conveyed to Harvey Investment Co. that were planted in almond trees and relied upon the same and reported the same and his belief therein to the board of directors of the defendant corporation Harvey Investment Co. and said board of directors believed said statements and representations and relied upon them and believing said statements and representations, and relying upon them authorized said Leo M. Harvey, as president of the corporation, to enter into said contract of exchange on behalf of said corporation; that believing and relying upon said statements and representations, and not otherwise, said Leo M. Harvey was induced to enter into and execute said contract of exchange; that the total acreage of said property, together with that part of the Rancho Paso Robles inside the fence line planted to almond trees, was 109.64 acres; that the total acreage of said property, as described in the deed executed by the plaintiff, York Realty Company to Harvey Investment Co., and deposited in said escrow and outside of the Rancho Paso Robles, planted to almond trees, was 96.64 acres; that said acreage planted to said almond trees that was excepted in said deed deposited in escrow by the York Realty Company had a market value at the time of the execution of said contract, of from $600.00 to $700.00 per acre.

"That said statements and representations made by said V. C. Simpson and H. H. Helbush to Leo M. Harvey as to the number of acres of said property that was planted in almond trees were false and untrue and said H. H. Helbush knew they were false and untrue when the same were made, and made them for the purpose of inducing said Leo M. Harvey to enter into and execute said contract of exchange on behalf of and as the president of the defendant, Harvey Investment Co. * * *

"That prior to the making of said contract of sale and exchange, both V. C. Simpson and H. H. Helbush, the assignor of plaintiffs represented and stated to Leo M. Harvey, as an inducement to the making and entering into said contract by said Harvey Investment Co., that said property offered to be conveyed to said Harvey Investment Co. by said H. H. Helbush in said proposed exchange, had an income of $8,000.00 per year and that said property had produced an income of $8,000.00 one year; that said Leo M. Harvey believed said statements and representations as to the income of said property and relied upon the same and reported the same and his belief therein to the board of directors of the defendant corporation, Harvey Investment Co., and said board of directors believed said statements and representations and relied thereon, and believing and relying upon said statements and representations, authorized said Leo M. Harvey, as president of the corporation, to enter into said contract of exchange on behalf of said corporation; that believing and relying upon said statements and representations and not otherwise, said Leo M. Harvey was induced to enter into and sign said contract of exchange, including said escrow instructions, on behalf of and in the name of said defendant, Harvey Investment Co.

"That said statements and representations were false and untrue, and said H. H. Helbush, plaintiff's assignor, knew they were false and untrue when they were made, and made them for the purpose of inducing said Leo M. Harvey to enter into and execute said contract of exchange on behalf of and in the name of said defendant, Harvey Investment Co. as the president thereof; that said property was acquired by the plaintiff, York Realty Company on or about the year 1920, and was owned, operated and controlled by said York Realty Company during the years 1921, 1922 and 1923; that during each and every of said years said property was operated at a loss, and the total net loss for said period was the sum of $14,138.19; that said H. H. Helbush knew said property had been operated and was being operated at a loss when said statements and representations were made by him and said V. C. Simpson, as aforesaid."

Judgment of nonsuit was entered as to defendants Dabney, Shapiro, and Murphy. This leaves only one parcel of Los Angeles realty before the court, to wit, the lot at the corner of Washington and Flower streets, and appellants urge that the trial court should have granted specific performance as to this lot, ordering the other party to pay $20,000 to balance the equities of the property left in the transaction.

The trial court entered judgment declaring the said contract of sale void, and this appeal is prosecuted from said judgment.

[1-3] The attack made by appellants is one directed solely at the findings, and the first contention is that the finding relative to the net income from the ranch is (1) not sufficient to support the judgment, and (2) that there is no evidence to support it. It is argued that, while the complaint alleges that it was represented that the net income was in excess of *$10,000*, the trial court finds that it was represented that the said ranch had a net income of *$8,000* per year, and that the said property had produced a net income of *$8,000* one year. The court further found that said ranch was operated at a loss during each year that it was owned by plaintiff York Realty Company, of which corporation one H. H. Helbush was president, and there is a further finding that the total amount of such loss, during said period (1920–21–22) was $14,138.19. Succinctly stated, appellants' position is that the finding of the court that the representation was made that the income was $8,000 for one year is a finding in favor of plaintiffs and does not support the judgment, because this finding expressly negatives and establishes the untruth of the allegation in the answer that Helbush made, and Harvey relied upon a representation that the annual net income from the ranch was in excess of $10,000. It is further contended that this finding is outside the issues, and is not raised by the pleadings.

It is the duty of an appellate court, in reviewing the findings, to give them a liberal construction so as to uphold, rather than defeat, the judgment. All the findings are to be read together, and must be reconciled to prevent any conflict upon material points, if such reconciliation is possible. Hotaling v. Hotaling, 193 Cal. 368, 224 P. 455, 56 A. L. R. 734. Appellant has apparently overlooked a further finding upon this subject, to the effect that the ranch was operated at a loss, as stated above. This finding is directly responsive to the allegations of the complaint, quoted supra. Giving a liberal construction to the finding questioned, it would appear that the issue presented to the trial court was the ultimate fact whether or not Helbush falsely represented to Harvey that the ranch produced a material income, when he knew it had been operated at a substantial loss during all the time it was operated by appellant York Realty Company, of which Helbush was manager. Furthermore, it does not appear that any objection was made at the trial to the testimony as to an $8,000 income, based upon the ground that it was not within the issues. As the case stands, it was tried upon the theory that any representations as to income were within the issues, irrespective of the amount of such income. Under such circumstances, this objection cannot be raised for the first time in this court. Horton v. Dominguez, 68 Cal. 642, 10 P. 186. If this objection had been made at the trial, the answer could readily have been amended to conform to the proofs. The contention of appellant presents, if we concede it has any force at all, an objection which is formal only, and lacking in merit so far as the substantial rights of the parties are involved.

[4] Is there any evidence to support the finding that it was represented to defendant Harvey Investment Company that the net income was $8,000 a year, and that the property had produced a net income of $8,000 one year? The trial court found that certain representations were made by H. H. Helbush, assignor of plaintiffs, and V. C. Simpson, his agent. No attack is made upon the finding as to the said agency, though appellant asserts that such agency did not exist. In the absence of a direct attack upon this finding, this court must and will assume that it was based upon sufficient evidence. There is testimony in the record upon this question of income. The witness Harvey, testifying to a conversation between him and Simpson, agent for Helbush, stated: "A. He told me it was a good income property; that the ranch produced about $10,000.00 a year, and when the young almond orchard would come into bearing it would produce more than that and it would be a good thing to get income property because I have the corner of 10th and Flower hardly bringing in anything. Q. What did he say about the income? How much was the income? A. He says it would net about $10,000.00 a year. He figured on a valuation of about $100,000.00. He said it will bring you in about 10 per cent. on your money."

There is also in the record a conversation between Harvey and Helbush, as follows: "Q. What else was said at that time about the ranch? The Court: By whom? Q. By Mr. Helbush? A. He said the income of the ranch was about $10,000.00. Q. For what year? A. He mentioned the year 1922."

In another place Simpson testified the income from the ranch had been $8,000 during any one year.

[5, 6] As we have before stated, the real question at issue was, Did plaintiffs' assignor misrepresent the income from said property to such an extent that defendant Harvey Investment Company was, by fraud, induced to enter into the contract of purchase? No question is raised as to the finding that the ranch was operated for years at a loss, during which time Helbush was manager of said corporation, and the further finding that Helbush knew this to be true.

We are satisfied that the record shows that the finding attacked is sufficiently supported by the evidence, and that the representations involved therein were asserted as existing facts, material to the transaction, and which had a reasonable tendency to induce defendant Harvey Investment Company to consider the same and rely upon them as representations of such facts. Harris v. Miller, 196 Cal. 8, 235 P. 981.

[7] The court found that defendant Harvey Investment Company entered into the contract believing the statements and representations to be true, and relying upon them to be true. It is urged that the evidence showed that these were not the facts. While it is true that Harvey visited the ranch and stayed there an hour or two, it was, after all, a question of fact for the trial court to decide, under all the facts and circumstances of the case, whether or not this defendant relied upon the representations made, and we do not feel disposed to disturb such a finding. The view we take of this contention is well expressed in the case of Quarg v. Scher, 136 Cal. 406, 69 P. 96, where the court says: "It is next insisted that the defendant saw the land and inspected it before making the contract, and having every opportunity to learn of the quantity of the land, he had no right to take the word of plaintiffs on the question of quantity; in other words, that the rule of caveat emptor applies to the case. This contention is not well founded; the defendant had a right to rely on plaintiffs' representation as to the quantity of land. The acreage of land is a thing that cannot be seen with the eye at a glance, but can only be ascertained with accuracy by scientific measurement, and when a vendor states to a vendee the amount of land in the tract which is the subject of the sale, such vendor will not thereafter be heard to say in a court of equity, the vendee had no right to believe him."

[8] It is next contended by appellant that the finding, quoted supra, upon the question of the acreage of the ranch property planted to almonds, is not supported by the evidence. In this connection witness Simpson, agent for Helbush, testified that Helbush made a written memorandum of the variety of trees to which the ranch was planted. Harvey, president of defendant Harvey Investment Company, testified that Simpson informed him that the ranch contained the following almond trees: "20 acres about two years old and 40 acres four years old and 65 acres twelve years old." This witness also testified that Helbush, at a conversation had in his office, made the statement that "there is about 123 to 125 acres of almonds." Witness Davis, for defendants, testified that he made a survey of the ranch, and that the acreage in almonds was 96.94, and that the parcel planted to almonds and lying within the Paso Robles ranch grant was 12.31 acres, and that the total of such planting lying within the fence lines of plaintiffs was 109.64 acres.

In explanation of the matter of discrepancy in the acreage planted to almonds, the following facts appear to be undisputed: Included within the fence lines of the ranch property there were 13 acres planted to almonds, to which neither of the plaintiffs nor their assignor ever had record title. These 13 acres were within the limits of another property, known as the "Rancho de Paso Robles Grant." The deed deposited in escrow by plaintiffs in pursuance of the contract of exchange expressly excepted this 13 acres in describing the property to be conveyed. At the trial, plaintiffs attempted to prove title by adverse possession to this 13-acre parcel. Assuming that the establishment at the trial of such title could be of any assistance to plaintiffs, we are at a loss to understand how such a title could be proved, when the record owners of the same were not before the court. They were not named as defendants in the action, nor served with process. Title to real property cannot be adjudicated in that manner, as there must not only be jurisdiction over the subject-matter, but jurisdiction over the person as well. The court further found that this 13 acres had a market value of $600 to $700 per acre, and this finding is not questioned.

We have carefully examined the record in connection with this finding as to the representations made upon the matter of acreage planted to almonds, and are of the opinion that the finding assailed is supported by the evidence.

[9, 10] It is finally urged by appellant that there is no evidence to support the finding on adequacy of consideration and on the justness and reasonableness of the contract, and that the finding upon these issues does not support the judgment. Typical of the argument relied upon by appellant as a ground for reversal in this connection is the following: "As can be seen from the above quoted paragraph from the complaint, the various values of the property were alleged as being those stated in the contract. The answer merely denies that these values stated in the contract constitute a just and adequate consideration. Therefore, it is denied that $100,000 is the value of the ranch. * * * The denial is in the form of a negative pregnant and admits the value of the ranch to be $99,999.99. * * * Such a finding (first referred to in

this paragraph) cannot be considered and will be disregarded." Numerous witnesses testified to the value of the ranch. One testified that it was worth between $45,000 and $50,000. No objection was raised to this testimony upon the ground that the facts were admitted by the pleadings, and the point is now raised for the first time. Where an examination of the record discloses that the parties introduced evidence upon certain issues, and, by their conduct, plainly indicated that they considered the facts testified to as being legitimately within the issues to be tried and found by the lower court, they will not be permitted to urge, for the first time here, that such facts were admitted by the pleadings and hence were not within the issues, and that no finding could be based upon such testimony. These final contentions of appellant do not, in our opinion, merit further discussion. Appellant, in the first paragraph of his argument of his opening brief, states his position as follows: "We contend that the judgment must be reversed because it depends for its support wholly upon these two findings of fraud (referring to the misrepresentations made as to income and acreage), which we further contend are not supported by the evidence." Furthermore, the trial court having found for defendants upon the issues of misrepresentations made in the entering into of the contract, such findings necessarily defeat the right of recovery, and it was unnecessary that the findings dispose of any further issues, as all other issues thereby become entirely immaterial. Smith v. Dubost, 148 Cal. 622, 84 P. 38; Sharp v. Pitman, 166 Cal. 501, 137 P. 234; Pyle v. Fossler, 200 Cal. 204, 252 P. 599.

[11] The conduct of defendants in proceeding to dispose of and incumber their property, before the time for performance of the contract had expired, is subjected to severe criticism at the hands of appellant. If the contract was in fact obtained through fraud, as it appeared to have been, respondents were within their rights in so treating it. While the action was for a specific performance, it is well settled that fraudulent misrepresentations by which a person may be induced to enter into a contract constitutes a defense in such an action. 23 Cal. Jur. 422. When the trial court found this defense to be sustained, all other issues raised by the pleadings became immaterial. (See authorities cited supra.) This disposes of the contention of appellant that, under the rule that a vendor need only deliver title at the time when he is called upon to perform, the misrepresentations made as to the acreage were not a defense. If the contract were obtained through fraud at its inception, no subsequent act of appellants alone could restore its validity. If fraud in the entering into the contract were not an issue, and there were no affirmative defense, the contention of appellants as to the question of performance would be of greater weight.

The judgment is affirmed.

We concur: FINCH, P. J.; HART, J.

---

95 Cal. App. 228

SYFERT v. SOLOMON. (Civ. 3636.) ★

District Court of Appeal, Third District, California. Dec. 3, 1928.

Rehearing Denied Jan. 2, 1929. Hearing Denied by Supreme Court Jan. 31, 1929.

1. Appeal and error ⟹891—In action for breach of marriage promise, tried before jury, appellate court cannot receive additional evidence showing plaintiff was married or make finding thereon.

Where action for breach of contract to marry was tried before jury, appellate court was not permitted to receive additional evidence to show plaintiff was married woman during period mentioned in her complaint, or to make finding thereon.

2. Breach of marriage promise ⟹14, 30—Action for breach of marriage contract, as regards damages, is tort action, in which exemplary damages may be recovered.

Action for breach of contract of marriage is classed as tort, as regards damages, and exemplary damages, if properly pleaded, may be recovered therein.

3. Breach of marriage promise ⟹30—Action for breach of marriage promise is "action for breach of obligation not arising from contract," within Code authorizing exemplary damages (Civ. Code, §§ 1572, subd. 4, 3294).

Action for breach of marriage promise, as regards damages, within discretion of jury, under Civ. Code, § 3319, is "action for breach of obligation not arising from contract," within provision of section 3294, authorizing recovery of exemplary damages for malice or fraud, as defined in section 1572, subd. 4.

4. Breach of marriage promise ⟹35—Instruction following complaint for breach of marriage promise on question of fraud, and authorizing additional damages, if jury found defendant deceived plaintiff, held proper.

In action for breach of contract of marriage, instruction following language of complaint on question of fraud, and authorizing additional damages if jury found defendant made promises of marriage without intent to perform them, and that he deceived and trifled with plaintiff's feelings, was proper.

5. Damages ⟹91(1)—"Malice," as basis for punitive damages, is wrongful act done intentionally, without just cause or excuse.

"Malice," as basis for recovery of punitive damages, is wrongful act done intentionally, without just cause or excuse.

[Ed. Note.—For other definitions, see Words and Phrases, First, Second, and Third Series, Malice.]

★Rehearing denied. Hearing denied by Supreme Court.

6. Damages 🔑151—Exemplary damages cannot be recovered, unless alleged.

No recovery of exemplary damages can be had, unless damages are alleged in complaint.

7. Breach of marriage promise 🔑35—Instruction on malice, and punitive damages based thereon held error, in action for breach of marriage promise, not involving issue of malice.

Where complaint for breach of marriage promise did not allege any facts which would constitute malice, which was not made issue through pleadings or otherwise, it was error for court to instruct jury on question of malice, and to instruct them that they might base verdict for punitive damages thereon.

8. Damages 🔑215(1)—Instruction that malice is state of mind held improper, since legal malice requires wrongful act.

Instruction that malice is state of mind, importing wish to vex, annoy, or injure another, *held* improper, since legal malice requires act done without legal right.

9. Breach of marriage promise 🔑35—Instruction conforming to complaint for breach of marriage promise, authorizing consideration of injury to feelings, length of engagement, loss of chance to become otherwise engaged, and good faith of defendant, in determining damage, held proper.

In action for breach of contract of marriage, instruction in conformity with charge of fraud in complaint, authorizing recovery of compensation for injury, if any, to plaintiff's feelings, and consideration of length of time engagement continued between parties, probable loss of chance to become engaged to third party, and general loss and damage to plaintiff, and whether defendant acted in good faith, intending to carry out contract, or whether he intended to induce plaintiff to give defendant her time and companionship for his own satisfaction, *held* proper.

10. Breach of marriage promise 🔑18—Complaint for breach of marriage promise, alleging sequent promises and breach on certain dates, stated one cause of action.

Complaint for breach of contract of marriage, alleging number of sequent promises to marry, but alleging that breach occurred on certain date and was repeated on subsequent date, contained but one cause of action, and hence it was error for trial court to instruct jury that they might predicate verdict on any of several promises mentioned in complaint, since jury was led to believe that at least four breaches of contract may have been committed, while complaint and evidence showed there was but one contract and one breach.

11. Limitation of actions 🔑46(6)—Time for commencing action for breach of marriage promise runs from date of breach, and action commenced within two years from breach was timely.

Under complaint for breach of contract of marriage, alleging several promises to marry, if considered together as constituting one contract, time for commencing action would run from date of breach, though statute of limitations may have barred recovery on one or more of promises, and action commenced within two years from date of breach was within time allowed by law.

12. Breach of marriage promise 🔑35—Instruction that contingent contract of marriage was void, referring to one promise under complaint alleging several promises constituting but one contract, was error.

Where complaint for breach of contract of marriage alleged several promises of marriage, which constituted but one contract, instruction referring to one promise, and stating contract was void if jury found parties entered into contract, performance of which was contingent on death of defendant's mother was error.

13. Limitation of actions 🔑200(1)—Requested instruction that limitations would not run until reasonable time to perform marriage contract alleged to be breached had elapsed, where no time was fixed held proper.

In action for breach of contract of marriage, composed of several promises of marriage constituting one contract, requested instruction, not singling out any particular promise, but stating that statute of limitation would not commence to run until reasonable time to perform contract had elapsed, where no time was fixed for performance, *held* proper.

14. Breach of marriage promise 🔑35—Instruction referring to particular promise as basis for verdict, under complaint alleging various promises of marriage constituting one contract, held incorrect.

In action for breach of contract of marriage, composed of several promises constituting one contract, instruction referring to particular promise as basis for verdict *held* incorrect.

15. Breach of marriage promise 🔑18—Complaint for breach of marriage promise, alleging several promises and breach on certain dates, and defendant's intention not to carry out promise, held not demurrable.

Complaint for breach of contract of marriage, alleging several promises to marry on different dates, and alleging refusal to marry on certain date, which was renewed on subsequent date, and charging that defendant made promises without any intention of carrying out same, but to gratify his desires, *held* not demurrable.

16. Breach of marriage promise 🔑18—Cross-examination of defendant, sued for breach of marriage promise, concerning sexual intercourse with plaintiff, held inadmissible, in absence of allegations constituting seduction.

In complaint for breach of marriage promise, cross-examination of defendant relating to various acts of sexual intercourse with plaintiff *held* inadmissible for any purpose, in absence of allegations in complaint constituting seduction.

17. Appeal and error 🔑930(1)—Jury will not be presumed to have disregarded improper testimony held competent by court.

In action for breach of marriage promise, jury will not be presumed to have disregarded improper testimony concerning defendant's acts of sexual intercourse with plaintiff, especially where court held such testimony competent.

Appeal from Superior Court, Los Angeles County; Charles S. Crail, Judge.

Action by Glena Syfert against Fred H. Solomon. Judgment for plaintiff, and defendant appeals. Reversed.

Hearing denied by Supreme Court: CURTIS and PRESTON, JJ., voting for a hearing.

Warren L. Williams, Seymour S. Silverton, and Anderson & Anderson, all of Los Angeles, for appellant.

Jones, Hoyt & Rifkind and Bicksler, Smith & Parke, all of Los Angeles, for respondent.

TUTTLE, Justice pro tem. This is an action to recover damages for breach of contract on the part of defendant to marry plaintiff. The trial was had before a jury, and damages in the sum of $40,000 awarded plaintiff. The appeal is from the judgment upon the verdict.

[1] Upon the oral argument appellant moved the court for permission to offer proof that respondent herein was a married woman during all the times mentioned in her complaint. The trial was had before a jury, and under such circumstances an appellate court is not permitted to receive additional evidence of this character, or to make any finding thereon. The complaint, filed March 2, 1924, alleges, in substance, the following facts:

That plaintiff, respondent herein, and defendant, appellant herein, became acquainted on or about September 8, 1916; that on or about *October 5, 1916*, there was a mutual promise and acceptance of marriage, no definite time therefor being fixed at that time. It is further alleged that, at all times since the making of said agreement of marriage, respondent herein, plaintiff below, was manager of appellant's dance hall; that she directed the affairs of said dance hall, and had charge of the finances thereof, and managed and looked after the same, during which time appellant, defendant below, realized therefrom a net profit of $500,000.

It is further alleged in said complaint that during the month of *January, 1917*, plaintiff requested defendant to carry out his agreement to marry her to which defendant replied that they would go to Santa Ana, Cal., and be married, but later said to plaintiff that they had better wait; that said parties discussed their marriage from time to time; that during the early part of November, 1918, when defendant's mother was ill and not expected to live, defendant stated to plaintiff that, if his mother died, he would immediately marry her.

Plaintiff further alleged that on November 30, 1918, in addition to her work as manager of appellant's place of business, she also took charge of the affairs and management of his home, and continued so to do until the 2d day of December, 1924; that defendant's mother died on or about April 19, 1920, and on *May 1, 1920*, plaintiff asked defendant to marry her, to which he replied that he would do so before long, but would not agree upon a definite date; that while respondent, plaintiff below, was ill, and on or about the 26th day of July, 1924, in the California Hospital in Los Angeles, California, the defendant, appellant herein, promised to marry her as soon as she was able to leave the hospital; that on the 17th day of September, 1924, and again on December 6, 1924, *respondent demanded of appellant that he marry her*, and that appellant did for the first time decline and refuse to marry her.

It is further averred in said complaint that the plaintiff, respondent herein, is now able, ready, and willing to marry the defendant, appellant herein; that she has given to him all of her love, care, attention, and services, and looked after, managed, and cared for his business and home. It is further averred, on information and belief, that defendant made such promises to marry the plaintiff without any intention on his part of performing or carrying out the same, and to gratify his desires and to induce the plaintiff to manage his home and business; further, that plaintiff was deprived of an opportunity to marry anybody else during the period of time she kept company with the defendant, and that defendant is worth a sum of money in excess of $500,000, and judgment was prayed for in the sum of $50,000 actual damages and $25,000 punitive damages.

Defendant below interposed a demurrer to and motion to strike from said complaint, which demurrer was overruled and the motion to strike denied; defendant answered, specifically denying said allegations, and pleaded, by way of affirmative matter: (1) Unchastity of plaintiff; (2) statute of frauds; (3) statute of limitations.

It will be observed that the complaint sets forth five separate promises to marry. The first promise is October 5, 1916, and the alleged breach was on December 6, 1924 (over eight years from the date of the first alleged promise). The respondent, at the time she first met appellant in 1916, was 28 years of age. She testified that she had previously lived in St. Louis; that, from the time she was 20 years of age until she was 28 years of age, she had been frequently in the company of one Zieggenheim; that she had had frequent sexual relations with him, and that he had provided her with clothing, jewelry, and had paid her board for a portion of said period; that, after said party had transferred his affections to another, she had left him and come to California. She also testified that she informed appellant of such facts at the time he asked her to marry him on or about October 5, 1916.

Plaintiff further testified that she had sexual relations with defendant a few days after they first met, and that this conduct persisted intermittently for almost eight years. She also testified that she was intimate with defendant prior to the first promise of marriage set forth in her complaint. During all this time defendant made her numerous presents, including a $900 fur coat and other wearing apparel.

The following instructions were given at the request of plaintiff:

"If you find from the evidence in the case that the plaintiff is entitled to recover and has sustained actual damages then the amount of such actual damages rests in the sound discretion of the jury, subject to the limitations contained in the other instructions given you and to the further limitation that the actual damages, if any found by you, are not to exceed the sum of fifty thousand dollars, as alleged in plaintiff's complaint; and if you further find that the defendant made the promises of marriage to the plaintiff, as alleged in plaintiff's complaint, not intending to keep the same, and that he deceived and trifled with plaintiff's feelings, then you in your discretion may allow such additional damages in favor of the plaintiff by way of aggravation or damages for any such conduct on his part in an amount to be determined by you, but not exceeding the sum as alleged in plaintiff's complaint."

"If you should find for the plaintiff under the evidence and these instructions, you must find some compensatory damages, but the matter of punitive damages is entirely in your discretion. You may allow them in case you find malice as heretofore defined, or you may refuse to find them, no matter how much malice you may find there was in the acts of the defendant complained of."

"In the event your judgment is in favor of plaintiff, then, in fixing the amount of damages you may give to the plaintiff compensation for injury, if any, to her feelings, affections and wounded pride as elements of damages sustained by her on account of the breach of said contract to marry; also the length of time the engagement continued between the parties, the probable loss, if any, of a chance to become engaged to a third party, and the general loss and damage, if any, sustained by plaintiff by reason of the fact that defendant did not carry out his contract. And in estimating the amount of damages to be allowed to plaintiff in the event you find she is entitled to recover, you may take into consideration the question as to whether or not the defendant in promising to marry her acted in good faith, intending at the time to carry out his contract, or whether such promise was made for the purpose of trifling with the plaintiff and enjoying her company and inducing her to give him her time and companionship, to the exclusion of other men for his own satisfaction and enjoyment without at the time intending to live up to such agreement; and if you find that the defendant did, under promise of marriage, so deceive and trifle with the feelings of the plaintiff, you may in your discretion award additional damages therefor; also the extent, if any, of plaintiff's devotion to and love of defendant, her lack, if any, of independent means, her loss of marriage, and her altered social condition, if any, caused by defendant's breach of contract."

It is contended by appellant that these instructions are erroneous, for the reason that they submit to the jury the question of exemplary damages, and that, under the pleadings in the action, such damages cannot be recovered. The only allegation of the complaint which could be a basis for the introduction of evidence and instructions upon the subject of punitive or exemplary damages is the following:

"That plaintiff is informed and believes and on such information and belief alleges that the defendant at the time he made said promises and agreements to marry this plaintiff, as herein set forth, the same were fraudulently made without any intention on his part of performing or carrying out the same and for the purpose of gratifying his own desires and to induce this plaintiff to look after, manage and care for his business and home interests, as hereinbefore set forth."

No attempt is made by plaintiff to allege seduction, nor is there any averment of malice upon the part of defendant. Actual fraud consists in "a promise made without any intention of performing." Civ. Code, § 1572, subd. 4. The definition of exemplary damages and the cases in which they are allowed are set forth in the Civil Code as follows: "In an action for the breach of an obligation not arising from contract, where the defendant has been guilty of oppression, fraud, or malice, express or implied, the plaintiff, in addition to the actual damages, may recover damages for the sake of example and by way of punishing the defendant." Civ. Code, § 3294. It is also provided in section 3319 of the same Code that "the damages for the breach of a promise to marry rest in the sound discretion of the jury."

In our own jurisdiction there is one case where the matter seems to have been discussed. Lanigan v. Neely, 4 Cal. App. 760, 89 P. 441. That case involved the question as to whether allegations in the complaint for breach of promise, which showed seduction, were a statement of a separate cause of action ex delicto; it being contended by defendant that such was the fact, and that the causes of action, ex delicto and ex contractu, had been improperly united. The appellate court, through Mr. Justice Hart, held that the allegations as to seduction were made for the purpose of showing aggravation of damages, and that only one cause of action for breach of contract was stated. In discussing the nature of an action for breach of contract, Mr. Justice Hart said: "It is said in some of the early cases that, although an action upon a breach" of contract "of promise of marriage is assumpsit in form, it has always, as to measure of damages, been classed with actions of tort. * * * And it must be admitted that the effect upon the complaining party resulting from the injury in cases of breach of promise, unaccompanied by seduction, although the wrong arises primarily through the breaking of a contract, so nearly approximates that resulting from acts of strictly a tortious character, that the former are differentiated from actions of tort more in the degree and extent of the injury than from any actual or intrinsic distinction."

While matters disposed of in the foregoing quotation may not have been strictly necessary to the decision, we are of the opinion that the essential principles therein stated are sustained and supported by the weight of authority found in the text-books, encyclopedias and cases from other jurisdictions. It is stated in 9 C. J. p. 381, § 100, on the subject of punitive or exemplary damages, that "an action for breach of promise is an exception to the rule that exemplary or punitive damages should not be allowed in actions on contract, and with regard to the measure of damages it has always been classed with actions of tort." In Sutherland on Damages, volume 3, p. 2897, describing the nature of this action, the author says: "While it is in form upon contract, and in truth based upon it and its breach, the damages are governed by principles which apply to actions for personal torts." Ruling Case Law, volume 4, states the rule to be "an action for a breach of the contract to marry, though in form an action of assumpsit, is in fact and always has been, since it was sustained at common law, in respect to an action for damages, really in the nature of tort. The weight of judicial opinion seems to be that this particular action forms an exception to the general rules which cover contracts, and that damages are not limited to the consequences of the breach."

The rule in New York is laid down in McKane v. Howard, 202 N. Y. 181, 95 N. E. 642, Ann. Cas. 1912D, 960, as follows: "As to the measure of damages, the action [breach of contract to marry] has always been classed with actions of tort, as libel, slander, seduction, criminal conversation," etc. In Illinois, the court states that "the general rule that exemplary or vindictive damages cannot be recovered in actions ex contractu does not apply to an action to recover damages for the breach of a contract to marry." Jacoby v. Stark, 205 Ill. 34, 68 N. E. 557. The case of Hivley v. Golnick, 123 Minn. 498, 144 N. W. 213, 49 L. R. A. (N. S.) 757, Ann. Cas. 1915A, 295, is a well-considered and exhaustive opinion in strict harmony with the foregoing authorities.

[2, 3] We conclude, therefore, that this action is, so far as the matter of damages is concerned, to be classed as a tort and that exemplary damages, if properly pleaded, may be recovered therein and that it is, in the matter of damages, an action for the breach of an obligation not arising from contract, as such words are used in section 3294 of the Civil Code.

[4] The first instruction quoted, supra, was correct. It merely follows the language of the complaint upon the question of fraud, and authorizes additional damages if the jury found those facts to be true.

[5-7] The second instruction quoted involves a more serious question. It authorizes the jury to find punitive damages in case they find malice. We have pointed out that the complaint alleges no facts which would constitute malice, which is a wrongful act done intentionally without just cause or excuse. Tingley v. Times Mirror Co., 151 Cal. 1, 89 P. 1097. No recovery of exemplary damages can be had unless such damages are alleged in the complaint. Tingley v. Times Mirror Co., supra; Bailey v. Dale, 71 Cal. 34, 11 P. 804; 8 Cal. Jur. p. 892, § 129. As malice was not made an issue in this case, either through pleadings or otherwise, it was error for the court to instruct the jury upon that question, and to instruct them that they might base a verdict for punitive damages thereon.

[8] The court also defined malice in an instruction to the jury as follows: "Malice is a state of mind, and imports a wish to vex, annoy or injure another person." As we have pointed out, legal malice is far more than a state of mind. There must be a wrongful act on the part of the person against whom the charge is made, and that act must have been done without legal right. One may have malice in his mind, but unless that malice is evidenced by some overt act, no recovery of damages can be had. One cannot be penalized for harboring evil thoughts.

These two instructions undoubtedly led the jury to believe that the issue of malice was before them. It was prejudicial to defendant for the court to intimate to the jury, as it did, that they might find punitive damages based upon this issue.

[9] The third instruction quoted in the first part of this opinion was correctly given, and it was based upon and followed substantially the charge of fraud as set forth in the complaint.

The following instruction is complained of: "If you find that the plaintiff and defendant became acquainted about the year 1916 and that commencing during that year and continuing until the month of December, 1924, the plaintiff and defendant on numerous occasions and continuing during said period made mutual promises and agreements to marry each other, then each or either of said agreements, if found to be valid by you under the instructions given in this cause, is sufficient for the purpose of supporting plaintiff's cause of action except the one which it is alleged was made that defendant would marry the plaintiff immediately after the death of his mother; and if you should find on account of any defense pleaded by the defendant that any or either of the earlier promises to marry as alleged in plaintiff's complaint were not binding because they were barred by the statute of limitations or because of uncertainty or alleged unchastity of the plaintiff the fact that any or either of such defenses might be good as against one or more of said earlier promises would not affect plaintiff's right to recover on account of a breach of a later promise of marriage which was not affected by either or any of said defenses, provided you believe said later promise was made as alleged."

It will be noticed that the plaintiff's complaint contains five separate promises of defendant to marry her. It is alleged that on October 5, 1916, the plaintiff and defendant mutually promised and agreed to marry each other, no definite date therefor being agreed upon at that time; in 1917, a renewal of the promise to marry, with no definite date being agreed upon; a promise to marry in the early part of November, 1918, upon the death of defendant's mother; a promise of marriage in May, 1920, said promise to be "before long," and a promise to marry on July 26, 1924, "as soon as plaintiff was able to leave the hospital." It will be noticed that with the exception of the promises of November, 1918, to wit, conditional upon the death of defendant's mother, and of July 26, 1924, upon plaintiff being able to leave the hospital, no definite date for the marriage was ever agreed upon.

It is claimed that the said instruction is faulty, because three of said promises to marry were void as a matter of law, and the jury should have been so instructed, and that the court erred when it instructed the jury that each or either of said agreements (except the one which was contingent upon the death of deceased's mother) is sufficient to support the cause of action. The only valid promise, appellant asserts, is the one of October, 1916.

[10] While the complaint alleges a number of sequent promises to marry, it will be observed that the breach is alleged to have occurred upon September 17, 1924, and to have been repeated upon December 6, 1924. We are inclined to the view, and here hold, that a reasonable construction of the complaint would be that it contains but one cause of action. "Although a contract to marry is evidenced by several promises made at different times, there is but a single contract and a breach thereof is but one breach of one contract." 9 C. J. 330. As stated in Garmong v. Henderson, 112 Me. 383, 92 A. 322: "A contract to marry is evidenced ordinarily by many promises at many different times. Such is the nature of it." "So that if defendant on March 10, 1910, and again on November 6, 1910, promised to marry plaintiff, to show that he also made the same promise in August, 1909, does not, on the face of it, show a separate and independent contract." "If these parties ever promised to marry each other, no matter how many times the promises were repeated, * * * altogether they constitute but one contract. If, then, the defendant finally refused to perform his part of the contract, it was but one breach and constituted but one cause of action." "Sometimes causes of action are confounded with the facts and circumstances which give rise to them."

Respondent quotes with approval from the case last cited, and states that "we believe that there could be but *one valid and existing contract* of marriage between the parties at the same time, but, as is also stated in said case, 'a contract to marry is evidenced ordinarily by many promises at many different times.'" It was error, therefore, for the trial court to instruct the jury that they might predicate a verdict upon any of the several promises mentioned in the complaint, as the jury were led to believe that at least four breaches of contract may have been committed by defendant, while the complaint and the evidence show there was but one contract and one breach.

[11] It is unnecessary to decide the question of the sufficiency of each of said promises. While one of said promises, considered alone, might not justify a verdict, it might still be evidence of the contract sought to be proven. So, even though the statute of limitations may have barred a recovery upon one or more of said promises, if they are considered as together constituting one contract, the time for commencing the action would run from the date of the breach. The complaint shows that the action was commenced within two years from the date of the breach, and within the time allowed by law.

What we have said with reference to the several promises constituting but one contract is based entirely upon the proper construction to be given to the complaint herein. The learned trial judge took what we hold to be an erroneous view of the complaint, when he instructed the jury that they might find for plaintiff upon any one of the alleged promises. If we accept his construction of the pleading, the instructions would still be error, because action upon one of the promises, at least (that of October, 1916), was barred by the statute of limitations.

[12] The court instructed the jury as follows:

"If you find from the evidence that the plaintiff and the defendant herein did enter into any contract of marriage, but that the performance of such or any such contract was contingent upon, the death of defendant's mother, then such contract, if any such was made upon any such contingency, was void and of no effect, and no recovery can be had by plaintiff upon any such contract even though you should find that any such was made."

The foregoing instruction, referring obviously to the promise of January, 1917, should not have been given. As we have pointed out, the pleadings clearly indicate, and counsel for respondent, who drew them, admits, that the several promises set forth therein constitute but one contract, and should not be considered separately.

[13] The instruction set forth on page 148 of appellant's brief correctly stated the law. No one promise was singled out by the court. The jury was simply told that, if they found that defendant had agreed to marry plaintiff, as set forth in the complaint, the statute of limitations would not commence to run until a reasonable time to perform the contract had elapsed, where no time was fixed for performance.

[14] The instruction found on page 149 of said brief was not correct, in that a particular promise was referred to as the basis for a verdict; whereas, as we have pointed out, the various promises should have been considered, in effect, as one. The same is true of the instruction found on page 152 of said brief.

[15] The demurrer to the complaint was properly overruled, and the motion to strike correctly denied, for the reasons we have indicated.

[16, 17] While defendant was upon the witness stand and under cross-examination, he was compelled, over proper objection, to relate various acts of sexual intercourse with plaintiff. The questions asked were not cross-examination. Such acts were committed in privacy and secrecy. In the absence of allegations in the complaint constituting seduction, such evidence is not admissible for any purpose. Smith v. McPherson, 176 Cal. 144, 167 P. 875, L. R. A. 1918B, 66; Wrynn v. Downey, 27 R. I. 454, 63 A. 401, 4 L. R. A. (N. S.) 615, 114 Am. St. Rep. 63, 8 Ann. Cas. 912. We cannot say how much effect this improper testimony had upon the minds of the jurors. It will not be presumed that they disregarded it, and the fact that it was held competent by the court would, at least, lead the jury to believe that they might consider the same in arriving at their verdict. "Innate chivalry of most jurors often prompts them to find in favor of a woman in an action of this kind, but they ought not to base the measure and recovery of damages sustained upon evidence of sexual intercourse alone, when she has not testified that her consent to the intercourse was induced by her reliance upon the defendant's promise" to marry. Stamm v. Wood, 86 Or. 187, 168 P. 73.

Numerous other assignments of error are made with respect to rulings upon evidence. We have examined these, and conclude that the trial court disposed of them correctly.

In view of the fact that certain testimony, prejudicial to defendant, was admitted, and certain instructions were erroneously given, we do not deem it would serve any useful purpose to pass upon the question of the excessiveness of the verdict. The record of another trial, if there is such, must necessarily differ from this one.

We are impelled to the conclusion that, through the errors we have pointed out, defendant was not afforded a fair trial, and that the judgment must be reversed; and such is the order.

We concur: FINCH, P. J.; HART, J.

---

95 Cal. App. 259

PEOPLE v. BURDG et al. (Cr. 1482.)

District Court of Appeal, First District, Division 1, California. Dec. 5, 1928.

1. Criminal law 🔑1159(3) — Conclusions reached by jury on conflicting evidence are controlling.

Conclusions reached by jury on conflicting evidence are controlling on appeal.

2. Homicide 🔑250, 254—Evidence held to sustain conviction of manslaughter and murder in the second degree of two defendants.

Evidence *held* to sustain conviction of wife of deceased for murder in the second degree and of her codefendant of manslaughter.

3. Criminal law 🔑877—That jury found one defendant guilty of murder in second degree and other of manslaughter only did not authorize setting aside convictions.

In prosecution for murder of two defendants, that one was found guilty of second degree murder and the other of only manslaughter did not authorize setting aside the verdict of second degree murder rendered against one defendant, where evidence was sufficient to sustain verdict against both defendants for the higher degree of crime had such verdict been rendered.

4. Indictment and information 🔑37—Information in prosecution for murder following statutory form held not defective (Pen. Code, § 951, as amended by St. 1927, p. 1043, and § 971).

Information in prosecution for murder, drawn in form prescribed by Pen. Code, § 951, as amended by St. 1927, p. 1043, *held* not defective because failing to show whether crime charged was alleged to have been committed by the joint act of defendants or whether one was charged as accessory and, if so, which one, especially in view of section 971.

5. Criminal law 🔑622(2)—Denying separate trial in murder prosecution held not abuse of discretion (Pen. Code, § 1098).

In prosecution of two defendants for murder, denying defendants separate trial *held* not shown to be an abuse of discretion under Pen. Code, § 1098, though prosecution introduced evidence of extrajudicial declarations made by respective defendants out of presence of the other, where court instructed that rights of absent party were not thereby affected.

6. Criminal law 🔑1144(15)—Presumption is that jury followed court's instructions.

Reviewing court must presume, in absence of contrary showing, that jury followed court's instructions.

7. Criminal law 🔑808½—Instructions on circumstances of mitigation in murder prosecution, in language of statute, held proper (Pen. Code, § 1105).

In prosecution for murder, giving instruction relating to burden of proving circumstances of mitigation, worded in language of Pen. Code, § 1105, *held* proper.

8. Criminal law 🔑829(10, 11)—Refusing instructions relating to extrajudicial statements and accomplices held not error, where covered by instruction given.

Refusing instruction relating to law of extrajudicial statements and law of accomplices *held* not error, where covered in substance by instruction given.

9. Criminal law 🔑699—Much is left to trial court's discretion in determining whether attorney improperly argues to jury.

Much must be left to discretion of trial court to say whether an attorney oversteps the boundaries of legal propriety in making argument to the jury.

10. Criminal law 🔑730(6)—District attorney's argument as to unsolved murder held not reversible error, in view of court's instruction to disregard.

In murder prosecution, district attorney's reference to unsolved murder *held* not to require reversal, where he was promptly restrained by trial court and jury was instructed to disregard all remarks relating to it.

Appeal from Superior Court, Fresno County; Denver S. Church, Judge.

Clifford Burdg was convicted of manslaughter, and Mollie Trau was convicted of murder in the second degree, and they appeal. Affirmed.

Edmond Chevalier, of San Francisco, and J. O. Traber, of Fresno, for appellant Burdg.

Julius Hansen and J. C. Saylor, both of Fresno, for appellant Trau.

U. S. Webb, Atty. Gen., and Emery F. Mitchell, Deputy Atty. Gen., for the People.

KNIGHT, J. The appellants, Clifford Burdg and Mollie Trau, were charged jointly with having murdered the latter's husband, Philip Trau, and upon trial the jury found Burdg guilty of manslaughter and Mrs. Trau guilty of second degree murder. The appeals, which are taken from the judgments of conviction, are separately presented.

[1, 2] Insufficiency of the evidence to sustain the verdicts is one of the grounds urged for reversal by both appellants. As will hereinafter appear, however, the evidence is sharply conflicting, and, such being the case, the conclusions reached thereon by the jury are controlling. The following are the facts: Trau, the deceased, and appellant Mollie Trau lived in Fresno, and up to the date of the alleged homicide had been married less than six weeks. Trau was a special patrolman and worked nights. Mollie Trau and Burdg had known each other for upwards of 15 years, testimony having been introduced to the effect that at one time they lived together as husband and wife; also that since her marriage Mrs. Trau had been meeting Burdg at the home of her sister, Stella Moore, in the absence of her husband. Burdg was connected with an illegal liquor enterprise operating just outside of Fresno, and during the evening preceding the homicide had been drinking in company with Mrs. Moore and her husband and Trau and his wife. Later, all five drove out to Burdg's place to obtain a gallon of liquor Trau had purchased from him, and while there Trau invited Burdg to spend the night at his house. On returning to town Trau got out of the machine where he worked and at his request the others drove to his house to await his return at 11:30 o'clock, when he would be home for supper. While they were waiting for Trau more liquor was consumed, and at 10:30 o'clock the Moores went home, leaving Burdg and Mrs. Trau in the house alone. Trau arrived about an hour later, and after eating supper and having a few drinks with Burdg, returned to work. His house consisted of a front bedroom, a dining room, and a kitchen, the doorway between the bedroom and the dining room being closed with curtains; and before leaving Trau stated that Burdg could sleep on the couch in the dining room, and that he would be home at the usual time, about 5 o'clock in the morning. However, he returned unexpectedly about 2:30 o'clock and soon after he entered the house was instantly killed. Admittedly, the only persons present at the time were the appellants. The immediate cause of his death was a gunshot wound in the neck. There were no traces of powder marks on his body, and testimony was introduced to the effect that the wound he received could not have been self-inflicted. On the same day that the homicide was committed the officers searched an alley on which Trau's home abutted, and the vicinity adjacent thereto, and found in the alley three loaded cartridges and a pint flask of whisky; and about

a month after the shooting the revolver with which the homicide was doubtless committed was found by a neighbor under on ash can in a back yard adjoining the alley. The revolver when found was "broken," and contained two shells, one loaded and the other discharged. The three cartridges previously found were of the same caliber as the revolver. The identity of the revolver was established as being one given to Trau by a friend about two months prior to the shooting, and Mrs. Trau admitted having kept it in a graphophone in the dining room. It had a black fiber handle, and when found under the ash can one side of the handle was broken and part of the barrel was "bulged out."

Immediately following the shooting Burdg fled to the home of a friend, named Williams, about three miles distant from Trau's house, arriving there a little before 4 o'clock. He told Williams that Trau had committed suicide, and phoned to his employer to the same effect. Soon afterwards Williams' hired man drove Burdg back to town, where he ate breakfast, and was then driven to the Moores. He told the Moores also that Trau had shot himself, and Moore accompanied Burdg back to Trau's house. Burdg waited outside while Moore went in the house, saw Trau's body lying on the floor, came out and told Burdg what he had seen, and then both drove back to the Moores. Soon afterwards Moore again accompanied Burdg back to Trau's house. Meanwhile Williams had notified the police, and they were at Trau's when Moore and Burdg arrived.

The police questioned Mrs. Trau and Burdg separately, and both declared that Trau had shot himself, but their respective stories were self-contradictory and differed materially from each other as to the particulars in which each claimed the act was committed. Finally, after further questioning by the police, Mrs. Trau, whose mind at first seemed bewildered, changed her story completely and made a statement, which, in substance, she repeated at the trial, wherein she charged Burdg with having shot her husband during a drunken quarrel over her. At the trial Burdg also flatly contradicted his former statement as to the circumstances attending the shooting and gave testimony indicating that Mrs. Trau had shot her husband.

In this regard Mrs. Trau stated to the police upon their arrival at the house that night, and before Burdg returned with Moore the second time, that Trau had shot himself with a pearl-handled pistol which she said was somewhere on the floor; but no such weapon was found. She stated also that no one besides herself and husband was present at the time of the shooting, but a little later said that a man named Burdg was there. She claimed, however, that she could give no description of Burdg nor tell of his whereabouts because, as she said, she had met him only once or twice. At the trial she admitted that she knew when Burdg fled from the house where he intended going. When questioned further by the police, however, Mrs. Trau changed her story entirely and declared that the circumstances leading up to and attending the shooting were as follows: She stated that a heated argument took place between the two men when Trau returned for supper at 11:30 o'clock, because he found Burdg seated beside her on the couch with his arm around her, during which argument Burdg told Trau that if he wanted to get his wife away from him he could do so by killing him; that after her husband went back to work she and Burdg resumed drinking, and that a little later Burdg forced her to an act of sexual intercourse; that she threatened to tell her husband and Burdg declared: "You won't get the chance to tell him; if you do I will kill him." Continuing, she said that when her husband arrived unexpectedly about 2:30 o'clock she was lying on the bed in the front room and Burdg was reclining on the couch in the dining room; that as her husband entered the front door she told him she wanted to speak to him, but he proceeded on through the house without stopping, and was followed into the kitchen by Burdg; that the two men began drinking and quarreling; that they cursed each other and scuffled, and she heard Burdg tell Trau that he loved her and "would have her, by God, if he had to kill him," immediately following which a shot was fired and Burdg rushed out of the kitchen through the house, past her, and out of the front door, concealing something under his coat. She said that thereupon she ran to the kitchen and found her husband lying on the floor wounded and unable to speak; that she dragged him into the dining room, but, being unable to lift him on to the couch, placed a pillow under his head, in which position the police found the body upon their arrival. She admitted, however, that she made no effort whatever to call help or summon medical aid before the police arrived. While questioning her the police searched the bed in the front room, and underneath the mattress they found Trau's pistol, cartridge belt, and flashlight, which he carried on his person when he entered the house. The presence of these articles in the bed tended to dispute her assertion that upon entering house her husband walked directly through to the kitchen where the shooting took place.

Burdg's two versions of the shooting were, in substance, as follows: When first questioned by the police he stated that he had seen Trau commit suicide under the following circumstances: That Trau was standing in the dining room near a sewing machine, when suddenly he reached over and took his pistol from underneath his coat, which he had previously laid on the sewing machine, and shot himself; that immediately following the shot blood spurted from a wound in his neck, and he fell to the floor. Thereupon Burdg said, he became frightened and fled. Later, during the same day, however, when taken back to the scene of the shooting by the police, it was clearly demonstrated to Burdg that his story of the shooting having taken place in the dining room could not be true because no blood stains whatever were found on the dining room floor near where he said Trau had fallen, but that there was much blood on the floor of the kitchen where Mrs. Trau said the shooting had occurred; moreover, as stated, there were no powder marks on Trau's body, and his pistol, which was found in the bed in the front room, had not been discharged.

At the trial, Burdg retracted the former statements made by him as to the shooting, and testified that he had not seen Trau commit suicide; and that the shooting had not taken place in the dining room, but had occurred in the kitchen under the following circumstances: He stated that twice during the night Trau and his wife had quarreled, first when Trau came home to supper, over the possession of the liquor, at which time Trau had taken his wife in the front room and spanked her; secondly, shortly before the shooting occurred, over the refusal of Mrs. Trau to go to bed, at which time Trau was in the kitchen, and Mrs. Trau and himself were in the dining room; that during this latter quarrel Mrs. Trau arose from the couch on which she had been reclining, and walked over to and stood by a graphophone in the dining room; that while she was standing there he saw Trau, who was still in the kitchen, reach over to a chair and grab his pistol from underneath his coat; that as he did so Mrs. Trau rushed toward the kitchen, saying: "Pinky (meaning her husband), drop that! Si (meaning Burdg), get out of the way;" that as she neared the kitchen a shot was fired; and that Trau fell to the kitchen floor with blood spurting from a wound in his neck.

Mrs. Trau claimed that when she made the false statements hereinabove set forth to the police she was intoxicated, and there is evidence tending to show that during the night she had been drinking. Burdg's explanation for changing his story was that at first he actually thought Trau had shot himself; that he "saw him grab for his gun and everything"; but that he had forgotten "about her running to him, or anything like that, until several days after." Continuing, he stated, "After I got back to the jail there and they showed me the graphophone and told me there was a gun in the graphophone and everything and I got to thinking it over and thinking the way she was talking about me, that I did it, when she absolutely knew I did not do it, and the way her sister was saying what she has said in the way it came out in the paper, I just got to wondering why they would get up and lie about it like that unless they had a cause for lying, and then I remembered her being at that graphophone, and the story I have told now. * * * At the time I didn't know she had a gun or anything else in the house, and I didn't believe for several days that there actually was a gun there until I got to figuring it over." He was then asked by his counsel: "Did you think of this last story that you have related on the witness stand here * * * all at one time?" To which he replied, "No, I was quite a while studying it out, that is what I meant; it come to me along gradually, just the way it was, I remember her at the graphophone and everything, and I remember her shoving me to the side and hollering for him to drop that gun, and I actually did think the man had shot himself when it happened." In addition to the foregoing facts and circumstances Burdg admits having run through the alley in his flight from the house, and that he may have "ditched" the flask of whisky which was later found there; and although he denied having had any quarrel with Trau, the evidence shows that following the shooting he bore a number of scratches and bruises about his forehead.

[3] It would appear, therefore, from the testimony of appellants themselves, as well as from the surrounding circumstances established independent thereof, that Trau was shot and killed unlawfully by either one or the other of the appellants, and because of the many contradictory and obviously false statements in which both apparently entangled themselves, the jury, in our opinion, was justified in concluding that neither told the whole truth about the matter, and that therefore, irrespective of the question of which of them actually fired the fatal shot, the other participated in the homicidal act, either actively or by aiding and abetting therein, and consequently was also guilty. And even though, as both appellants contend, it is not readily discernible from the evidence upon what theory the jury found one guilty of second degree murder and the other guilty of only manslaughter, it does not follow that the verdicts rendered are contrary to the evidence and the law, for the reason that manifestly the evidence would have been legally sufficient to sustain verdicts against both for the higher degree of crime, had such verdicts been rendered, and therefore the fact that the jury may have dealt more leniently with Burdg than the evidence would seem to warrant does not furnish legal grounds for setting aside the verdict of second degree murder rendered against Mrs. Trau, and certainly gives Burdg no just cause to complain.

[4] Appellant Burdg contends that the information is defective. It was drawn in conformity with the short form prescribed by section 951 of the Penal Code, as amended in 1927 (St. 1927, p. 1043), and appellant argues that it should have set forth circumstances

from which it could be ascertained whether the crime charged was alleged to have been committed by "the joint act" of appellants or whether one was charged as an accessory, and, if so, which one, citing section 950 of said Code. We find no merit in the point. The form of information here followed was approved by the Supreme Court in the recent case of People v. Coen, 271 P. 1074 [Crim. No. 3139, decided November 26, 1928]; and, furthermore, section 971 of said Code in terms abrogates all distinction between accessories before the fact and principals, and declares that all persons concerned in the commission of a felony, whether they directly commit the act constituting the offense or aid and abet in its commission, although not present, "shall hereafter be prosecuted, tried, and punished as principals, and no other facts need be alleged in any indictment or information against such an accessory than are required in an indictment or information against his principal"; and in harmony therewith the courts have held that allegations of the kind here contended for are unnecessary. People v. Rozelle, 78 Cal. 84, 20 P. 36; People v. Nolan, 144 Cal. 75, 77 P. 774; People v. Plum et al. (Cal. App.) 265 P. 322. Some suggestion is also made that said section 950, as amended, is violative of certain constitutional provisions, but appellant advances no argument to support such suggestion, and the constitutional provisions he cites apparently have no bearing upon the issue. In any event, the decision in the case of People v. Nolan, supra, effectively disposes of any such question.

Further contention is made that the court erred in refusing to direct the district attorney to elect whether he would proceed against appellants as principals or accomplices. But, as already pointed out, under section 971 of said Code, irrespective of what their status in law may be, they must be "prosecuted, tried and punished" as principals; consequently, in such cases no election by the district attorney is required or permitted.

[5, 6] Appellants requested and were denied separate trials; and both assign the making of the order of denial as error. Section 1098 of the Penal Code provides, however, that where two or more defendants are jointly charged, "they must be tried jointly, unless the court orders separate trials"; and in conformity therewith the courts have constantly held that on appeal the result of the exercise of such discretionary power will not be disturbed unless it clearly appears that such discretion has been abused. People v. Erno, 195 Cal. 272, 232 P. 710; People v. Perry, 195 Cal. 623, 234 P. 890; People v. Remington, 74 Cal. App. 371, 240 P. 526; People v. Booth, 72 Cal. App. 160, 236 P. 987; People v. Anderson, 59 Cal. App. 408, 211 P. 254. We find no circumstances in the present case from which it could be reasonably concluded that the ruling complained of amounted to an abuse of discretion. It is true, the prosecution was allowed to introduce in evidence at the joint trial extrajudicial declarations made by the respective appellants out of the presence of the other, but this situation of itself does not give defendants jointly charged the absolute right to separate trials, because if such were the rule then in no case could there be a joint trial when part of the evidence against the joint defendants consisted of extrajudicial statements; furthermore, in the present case, the record discloses that in admitting said declarations the trial court in each instance carefully and properly instructed the jury to the effect that the rights of the absent party were to be in no way affected thereby; and we must presume, in the absence of a contrary showing, that the jury followed those instructions. People v. Prather, 134 Cal. 436, 66 P. 589, 863. And answering the complaint that on joint trial one appellant was allowed to testify against the other, it is sufficient to say that if they had been separately tried a like condition could have arisen.

[7, 8] Nor do we find any error in the giving or the refusal to give the instructions enumerated by appellants. The one relating to the burden of proving circumstances of mitigation was worded in the exact language of section 1105 of the Penal Code and therefore was proper. People v. Caballero, 41 Cal. App. 146, 182 P. 321; People v. Grill, 151 Cal. 592, 91 P. 515; People v. Wilt, 173 Cal. 477, 160 P. 561; People v. Miller, 177 Cal. 404, 170 P. 817. Appellants' proposed instructions upon the law of extrajudicial statements were unnecessary because, as stated, during the course of the trial, whenever the court admitted such statements, the jury was fully instructed as to the law upon the subject. A number of instructions were also proposed by appellant Burdg and by the court refused, dealing with the law of accomplices, but such refusal was not error, for the reason that the substance of the proposed instructions was substantially covered in those given.

[9, 10] The making of certain statements by the district attorney during the course of his argument to the jury is assigned as misconduct; but we think the matters objected to are not of sufficient importance to require special attention. The range of discussion and argumentation of counsel before a jury is wide (People v. Molina, 126 Cal. 505, 59 P. 34), and much must be left to the discretion of the trial court to say whether an attorney is overstepping the boundary of legal propriety. Most of the matters complained of related to inferences which, in our opinion, could be fairly drawn from the evidence, and therefore constituted proper subject for argument; and when the district attorney started upon a discussion of an "unsolved murder," which he claimed had once taken place in the county, he was promptly restrained by the trial court and the jury instructed to disregard all remarks relating to it.

Finding no substantial error in the record, the judgments of conviction are affirmed.

We concur: TYLER, P. J.; CASHIN, J.

205 Cal. 776

WELLS v. B. E. PORTER ESTATE.★
(L. A. 5928.)

Supreme Court of California. Dec. 20, 1928.

Hearing Denied in Bank Jan. 17, 1929.

1. Landlord and tenant 🔑180(3)—Evidence held sufficient to support finding that lessee was unlawfully evicted from premises by lessor.

In action to recover damages for alleged eviction from land owned by defendant and leased to plaintiff, evidence *held* sufficient to support finding of unlawful eviction.

2. Landlord and tenant 🔑136—Notice by lessor that, unless lessee began work upon land within certain time, lease would be canceled, held to support inference that lessor waived provision requiring lessee to live on land.

Written notice by lessor to lessee that lease would be canceled unless lessee began active work upon leased land within certain time *held* to support inference that lessor waived provision of lease requiring lessee to live upon the tract.

3. Landlord and tenant 🔑136—Provision of lease requiring lessee to cultivate land as lessor directs must be reasonably construed.

Provision in lease requiring lessee to plow and cultivate land as lessor may direct must be given a reasonable construction.

4. Landlord and tenant 🔑180(4)—Value of crop that lessee could have grown on premises less cost of raising and harvesting held proper measure of damages for eviction.

Value of crop that might have been grown on leased premises during term of lease, less cost of raising and harvesting the same, *held* proper measure of damages in action by lessee for alleged eviction.

5. Landlord and tenant 🔑136—Lessee required to live on land need not be actually present on property during all of residence thereon.

Lessee required to live on leased premises need not actually be present upon the property during all the time of his residence thereon.

6. Trial 🔑397(5)—Findings on issues made by affirmative allegations of answer held unnecessary; findings upon issues made by amended complaint and denials of answer inconsistent with allegations of affirmative defense being sufficient.

Where findings of court upon all the issues made by amended complaint and denials in answers were inconsistent with allegations of affirmative defense, they were sufficient so as to make it unnecessary that particular findings as to issues made by affirmative allegations of answer be made.

Department 1.

Appeal from Superior Court, Los Angeles County; Elliot Craig, Judge.

Action by Jack Wells against the B. E. Porter Estate, a corporation. Judgment for plaintiff, and defendant appeals. Affirmed.

★Hearing denied in bank.

Denis & Griffith, of Los Angeles, for appellant.

Alonzo D. Hitchcock, of Van Nuys, for respondent.

CURTIS, J. This action was brought to recover damages for an alleged eviction of the plaintiff from 190 acres of land owned by defendant and held by plaintiff under lease from defendant. The lease was in writing, and covered a term of one year beginning November 1, 1923, and ending with the cropping season of the following year. It provided that defendant was to receive as rental of the leased premises one-third of all crops produced on the leased land. Plaintiff alleged that he was wrongfully evicted from said premises on the 14th day of February, 1924, and that he was thereby damaged in the sum of $12,500, which sum he alleged was the value of plaintiff's share of the crop of baby lima beans, which would have been produced upon said land during the term of said lease had he been permitted to continue in possession of the leased premises during the term of the lease. In its answer, the defendant denied specifically all the foregoing allegations, and affirmatively alleged the abandonment of said premises by the plaintiff and also the violation of the terms of the lease requiring him to live upon the leased property or to hire somebody to live thereon or take charge of the same during his absence. Defendant further alleged in its answer that plaintiff violated said lease by his failure at proper times and in a proper manner to cultivate said land in a good and husbandlike manner and by his failure to follow, as required by the terms of the lease, defendant's direction in that respect. The action was tried by the court without a jury. The facts were found substantially as alleged by plaintiff except as to the amount of the latter's damage, which the trial court found to be the sum of $1,994.96. The defendant has appealed.

[1] The main contention of appellant is that the evidence is not sufficient to support the finding of the trial court that the respondent was wrongfully evicted from said premises by the appellant. Immediately upon the execution of the lease, the respondent was let into the possession of a portion of the leased premises, but did not get possession of the entire tract until December 10, 1923. He removed his stock and farming implements upon the land and began work upon the same for the purpose of putting in a crop of baby lima beans. He plowed in some ditches that were upon the land and about 6 acres of the land itself which had been previously planted to kaffir corn, and disced about 60 acres of ground upon which the year before tomatoes had been grown. This work consumed about a month. There had been but a slight rainfall during the season, and it was difficult to work the land advantageously in the condition in which it was before the rains. It was not customary to begin planting beans in that locality until about the 1st of May. The officers of the appellant were urging the respondent to expedite the plowing of the land and the preparation of it for the planting of the season's crop. There were no buildings on the premises, and respondent had not occupied the premises as provided by the lease. His cookhouse was upon the premises leased from the appellant and located about 3 miles from the 190-acre tract, covered by the lease in question. His tools were upon the 190-acre tract, and his hay and livestock were kept across the road from the leased premises. No rain of any substantial amount fell until March 15, 1924. After said rain there was sufficient time in which to prepare said land for the planting of baby lima beans for that season. The respondent held possession of the property until February 14, 1924. On that day he left the premises for a few days, and on his return on February 19, 1924, he found them in the possession of a third person to whom the appellant had leased them. He also found a note from appellant dated February 14, 1924, reading as follows: "You are hereby notified that unless active work is commenced within forty-eight hours from date your lease will be automatically cancelled." In conversation the next morning after his return with the superintendent of appellant, he was told that he had no lease.

It was also shown that baby lima beans were generally grown in that section, and that, had respondent been permitted to carry out the terms of the lease regarding said real property, he would have planted the same to baby lima beans, which crop of beans when sold, according to the prices prevailing during that year, would have brought an amount of money which, after deducting all expenses incurred in raising and producing said crop, would exceed the judgment in this action.

[2, 3] We think this evidence sufficient to support the finding of the court that the respondent was unlawfully evicted from said premises by the appellant. There might be some question whether the respondent complied with that provision of the lease requiring him to live upon the leased premises. While his tools and farming implements were upon the leased land and he was personally in possession thereof and was clearing and plowing the same, his hay and live stock were kept across the street, and he resided upon premises owned by the appellant situated some 3 miles away from the leased premises. It does not appear, however, that the appellant ever objected to this departure by respondent from the terms of the lease. In fact, it might be inferred from the evidence that, as respondent was then living upon premises belonging to appellant and leased by it to respondent, appellant waived the provi-

sion of the lease requiring him to live upon the 190-acre tract. This is borne out by the written notice left by appellant at the home of respondent, notifying him that his lease would be canceled unless be began active work upon the leased land within 48 hours from the date of the notice. No complaint was made in this notice that respondent was not then living upon the leased premises. As the appellant took possession of the property soon after leaving this notice at respondent's home, it may well be assumed that appellant was acting thereunder and for the reason therein stated when it repossessed itself of the leased premises. As to the claim that respondent failed to comply with the terms of said lease requiring him to cultivate the leased land in a good and husbandlike manner, the evidence, to say the least, is conflicting. As recited above, the evidence shows that respondent began to plow and disc said land immediately upon being let into the possession thereof; that it was difficult to properly prepare said land for a crop until after the rains came. Before the rains came, the appellant evicted respondent and thereby prevented him from the further cultivation of the land. The rains came in March, and there was evidence that there was time after that date in which to prepare the land and make it ready for a crop of beans to be grown during that season. Some reliance is made by appellant upon that provision of the lease which requires the respondent at his own expense to "plow, culticate, seed, irrigate and hoe said land as lessor may direct." Appellant insists that this provision of the lease was breached by the respondent prior to the time the appellant repossessed itself of said land, and therefore that it was justified in its eviction of respondent. The evidence shows that officers and representatives of the appellant had on numerous occasions requested and urged the respondent to be more expeditious in the preparation of said land for the season's crop to be planted thereon, and in one instance at least had warned him that, if he was not more prompt in carrying out the terms of his lease, they would cancel it and lease the property to other parties. At the same time there was evidence which at least tended to show that respondent was doing all that could be reasonably required of him under the lease, and that, had he not been interfered with by appellant in the possession of said premises, he would have prepared the same and would have planted and grown a crop of beans thereon as contemplated and agreed by the parties at the time of the execution of the lease. The provision in the lease requiring the respondent to plow and cultivate the land as the lessor may direct is to receive a reasonable construction. It is not to be understood as giving to the lessor an arbitrary right to direct every act of the lessee in the raising of a crop upon said lands, and then for a violation of such direction give to it the right to terminate the lease and thereby deprive the lessee of all the fruits of his labor performed under the lease. The trial court evidently determined that the respondent had performed all the reasonable directions given by appellant regarding the plowing and cultivation of said land, and in our opinion there was sufficient evidence before it to justify such a determination.

[4] A further contention is made by appellant that the trial court erroneously adopted as the measure of damage the value of the crop that might be grown on said premises during the term of said lease, less the cost of raising and harvesting the same. This method of measuring damages sustained by a tenant by reason of a breach of the lease by the landlord has been frequently approved and adopted by this court. Rice v. Whitmore, 74 Cal. 619, 16 P. 501, 5 Am. St. Rep. 479; Schumann v. Karrer, 184 Cal. 50, 57, 192 P. 849. We have been cited to no instance in which this court has refused to follow the rule enunciated in these cases. The case of Crow v. San Joaquin, etc., Irr. Co., 130 Cal. 309, 62 P. 562, 1058, cited by appellant, does not apply, as that action was not to recover damages under a lease of real property, but was brought under the Act of March 12, 1885 (Stats. 1885, p. 95), making it the duty of a company administering water as a public use to supply any one with water from its system making a demand therefor and tender in money of the established rates. Just why the rule should be different in a case of that character from that following in actions under a lease of real property may not be apparent, but it is clear that the latest enunciation of this court, as shown by the case of Schumann v. Karrer, supra, supports the action of the trial court in the present action in following the rule of prospective profits.

[5, 6] It was not error on the part of the trial court to overrule appellant's demurrer for uncertainty to respondent's amended complaint. The respondent may have been absent from the leased premises when the appellant took possession of them and still have been residing upon said premises. Residence upon property by a person does not necessarily imply that such person is actually present upon the property during all of the time of his residence thereon.

Appellant claims that the findings do not cover all the issues made by the pleadings, and particularly those arising under its affirmative defense. The court found expressly upon all the issues made by the amended complaint and the denials of the answer. These findings are inconsistent with the allegations of appellant's affirmative defense. They therefore were sufficient, and it was unnecessary to make particular findings as to the issues made by the affirmative allegations of the answer. Saxon v. Buckeye Mfg. Co., 34 Cal. App. 200, 207, 167 P. 174; Kendrick v. Gould, 51 Cal. App. 712, 716, 197 P. 681.

The judgment is affirmed.

We concur: SEAWELL, J.; PRESTON, J.

---

206 Cal. 18

THOMAS et al. v. TOPPINS. (L. A. 9628.)

Supreme Court of California. Dec. 24, 1928.

Continuance ⟹20(1)—Judgment ⟹143(15)—Refusal of continuance for attorney's illness, and refusal to set aside default subsequently entered, held not abuse of discretion.

Refusal of trial court to grant application for continuance, on ground of illness of defendant's attorney, and refusal to vacate default judgment entered by default, after the refusal of continuance, *held* not abuse of discretion, where application for continuance was not made until the morning of the trial and defendant, after attorney's illness began and after refusal of plaintiff's counsel to allow continuance, appeared to have had sufficient time to provide for attendance of other counsel.

In Bank.

Appeal from Superior Court, Orange County; B. West, Judge.

Action by P. K. Thomas and another against Maggie Toppins. Judgment was entered for plaintiffs by default. From an order denying defendant's motion to vacate judgment, defendant appeals. Affirmed.

Bruns & Mooney, of Los Angeles, for appellant.

Clyde Bishop, of Santa Ana, for respondents.

PER CURIAM. This appeal was submitted to the court upon a hearing to show cause, the respondents having presented and filed no brief. The appeal is from an order denying a motion to vacate and set aside a judgment rendered and entered by the trial court upon the failure of the defendant and her counsel to appear at the time fixed for the trial thereof. The facts, as disclosed by the record, show that on August 11, 1926, the date fixed for the trial, the secretary of defendant's attorney appeared to request a continuance thereof, upon the ground of the illness of defendant's said attorney, which request the trial court, under the circumstances then presented to it, refused. The cause then proceeded to trial without the presence of defendant or her attorney, and, upon evidence then taken, the trial court proceeded to render judgment in the plaintiffs' favor. Thereafter, and on the 3d day of September, 1926, the defendant moved to vacate and set aside said judgment, upon the ground of the excusable neglect of the defendant and her counsel, upon the hearing of which motion it was made to appear that on July 19, 1926, and after said cause had been set for trial, the attorney for defendant had become ill, and that thereupon he had caused a request to be made of counsel for the plaintiffs that the trial of the cause be continued to a later date, which favor the plaintiffs' counsel refused to grant. The application for a continuance was not made to the court until the morning of the trial, and was denied by the trial court apparently for the reason that defendant or her counsel had ample time after the latter's illness began, and after the latter was advised that plaintiffs' counsel would not consent to a continuance by reason thereof, to provide for the attendance of other counsel at the trial. We are unable to say, upon the face of the record before us, that the trial court abused its discretion in denying the defendant's belated application for a continuance, or that it was in error in refusing to vacate and set aside its judgment upon the defendant's motion therefor, based upon no other or further facts and circumstances than those which were present at the time the defendant's motion for a continuance of the cause was denied.

The order appealed from is affirmed.

---

206 Cal. 98

JONES v. BALBOA MOTOR CORPORATION. (L. A. 9508.)

Supreme Court of California. Dec. 27, 1928.

1. **Licenses ⟹39—Corporation could take no legal subscriptions for stock after date specified in permit issued by commissioner.**

Corporation could take no legal subscriptions of stock after date set forth in permit issued by corporation commissioner.

2. **Corporations ⟹83—Purchaser could rescind contract for purchase of stock, where corporation did not comply with condition of sale by obtaining number of other subscriptions agreed upon within time specified.**

Purchaser could rescind contract for purchase of stock, where one of conditions of sale was that seller would obtain bona fide subscriptions for 12,500 shares of stock, and should have paid on account thereof the sum of $125,000 in cash or notes on or before four months from date, and seller obtained subscriptions for not more than 600 shares within time agreed upon.

Department 2.

Appeal from Superior Court, Orange County; R. Y. Williams, Judge.

Action to rescind contract for the purchase of corporate stock by H. O. Jones against the Balboa Motor Corporation. From a judgment for plaintiff, defendant appeals. Affirmed.

H. H. Harris, of Los Angeles, for appellant.

Hill, Morgan & Bledsoe and A. S. Montague, all of Los Angeles, for respondent.

LANGDON, J. This is an appeal by the defendant from a judgment against it for $10,473.25, in an action brought by plaintiff to rescind a contract for the purchase and sale of certain shares of stock in the defendant company.

The evidence presents some conflicts, but the findings of the trial court are supported by the evidence, and are to the following effect: That on or about the 25th day of August, 1924, plaintiff agreed to buy, and defendant agreed to sell to the plaintiff, 1,000 shares of the capital stock of the Balboa Motor Corporation for the sum of $10,000, payable by the delivery by plaintiff to the defendant of five certain bonds, described in the findings and of the par value of $10,473.25. These bonds were delivered to the defendant on August 25, 1924, in full payment for said shares of stock. It was also agreed as one of the conditions of said sale that, unless bona fide subscriptions for 12,500 shares of said stock should have been obtained from responsible subscribers, and there should have been paid on account thereof the sum of $125,000 in cash and notes on or before four months from date, that said agreement between plaintiff and defendant should be deemed to have been canceled and rescinded, and then, and in that event, the said bonds or the par value thereof should be returned to the plaintiff on demand, and it was further agreed that, until said subscribers were so obtained and the said cash and notes so received, the said consideration so agreed to be paid by the plaintiff should be impounded as required by the terms of the permit issued by the corporation commissioner of the state of California to the said defendant.

The said defendant did not receive bona fide subscriptions for 12,500 shares of its capital stock from responsible subscribers, and there was not paid on account thereof the sum of $125,000 in cash or notes within said four months from the said 25th day of August, 1924, and the total bona fide subscriptions received by defendant during said period did not exceed 600 shares, and the said consideration so paid by the plaintiff was not impounded by the defendant.

The sale of said stock was made by the defendant to the plaintiff under and in accordance with a permit issued by the corporation commissioner of the state of California on the 7th day of April, 1924, and the requirements of said permit were in part as follows:

"Each subscription for said shares shall be upon the express condition that unless bona fide subscriptions for 12,500 shares shall have been obtained from responsible subscribers, and there shall have been paid on account thereof the sum of $125,000 in cash and notes, on or before the 15th day of October, 1924, such subscription may by such subscriber be, and thereupon shall be, deemed to have been rescinded.

"That the full amount of each cash payment shall be paid and all notes delivered to said applicant; and that each cash payment, less the commission authorized herein, and the notes, and a statement showing the full name and address of each subscriber, and the number of shares subscribed for by each subscriber, shall immediately be paid and delivered by the applicant to, and held as an escrow by, a depositary to be first selected by the applicant and approved by said commissioner. If on or before the date set forth on paragraph 1 of this condition there shall have been deposited with such depositary from such subscriptions the net sum of $100,000 in cash and notes, it shall be paid and delivered by the depositary to the applicant upon its demand therefor and the written order of said commissioner; otherwise, all rights of applicant to sell and issue shares under paragraph 2nd hereof are suspended, and each note executed by a subscriber and the amount of cash paid by him, less the commission herein authorized and paid, being the amount of cash so deposited with said depositary, shall be returned to him upon his demand therefor and his subscription shall be cancelled."

On or about the 26th day of November, 1924, the plaintiff notified the said defendant of his intention to rescind said agreement of purchase, and demanded the return of said bonds, or the par value thereof, and at the same time tendered to said defendant the certificates representing the 1,000 shares of the capital stock of the defendant corporation previously issued to the plaintiff, and subsequent to the 25th day of December, 1924, the plaintiff made a similar tender of said capital stock, and demanded the return of said bonds, or the par value thereof, but the defendant refused to deliver said bonds to plaintiff, and refused to pay to said plaintiff the par value thereof.

It is contended that the plaintiff did not deal with the Balboa Motor Corporation, but that he bought privately owned stock. While there is some testimony in the record to sustain this contention, the preponderance of the evidence is clearly in accord with the findings of the trial court upon this subject.

[1, 2] It is also urged that while the permit granted by the corporation commissioner allowed only until October 15, 1924, for the completion of the sale of the stock mentioned therein, the contract of the plaintiff was conditioned upon the sale of said amount of stock within four months from the date thereof (August 25, 1924), and under such contract the defendant was not in default in November, 1924. However, the court has found that the plaintiff tendered back the stock subsequent to December 25, 1924, and it is clear that at that time the defendant was in default under its contract with the plaintiff, for it could take no legal subscriptions of stock after October 15, 1924, the date set forth in the permit, and it appears from the evidence and from the findings of the trial court that only about 600 shares had been sold at that date.

The plaintiff, therefore, recovers, under his pleadings and proof, because of the breach of the contract between himself and the defendant company. He is not relying upon any breach of the conditions of the corporation commissioner's permit, and the case of Domenigoni v. Imp. Live Stock & Mortgage Co., 189 Cal. 467, 209 P. 36, relied upon by appellant, is not in point.

The judgment is affirmed.

We concur: RICHARDS, J.; SHENK, J.

---

206 Cal. 13

SACRE v. IMPERIAL WATER CO. NO. 3 et al. (L. A. 9894.) ★

Supreme Court of California. Dec. 22, 1928.

Rehearing Denied Jan. 21, 1929.

1. Appeal and error ⚷907(3)—Appeal being on judgment roll, Supreme Court assumes that evidence sustained finding on which judgment was based.

Appeal being on judgment roll, where it was found that certain defendants, sued to determine ownership of shares of capital stock in mutual water company, were owners thereof, and that stock was not appurtenant to plaintiff's land, Supreme Court must assume that evidence in case fully sustained the findings on which judgment was based, that such defendants were purchasers of stock in question, and that plaintiff had no interest other than that which might inferentially arise from fact that he was owner of the land to which the stock certificate referred.

2. Appeal and error ⚷907(3)—Appeal being on judgment roll, Supreme Court assumes lower court had before it evidence sufficient to support more explicit finding than made, where necessary to support judgment.

Appeal being on judgment roll, Supreme Court must assume, where necessary to support judgment for defendants, not only that evidence fully sustained findings that plaintiff, suing to determine ownership to shares of capital stock in mutual water corporation, was not the owner thereof, but that trial court had before it stated facts which would have justified more explicit finding that severance had been created between said stock certificate and land to which it referred, or that the plaintiff, while remaining owner of land, had either failed to acquire or had ceased to have any interest in the stock certificate.

In Bank.

Appeal from Superior Court, Imperial County; Franklin J. Cole, Judge.

Action by Lou M. Sacre against the Imperial Water Company No. 3 and others. Judgment for defendants, and plaintiff appeals. Affirmed.

Harry W. Horton, of El Centro, for appellant.

H. H. Myers, of Calipatria, for respondents.

PER CURIAM. This appeal was submitted upon an order to show cause, the respondents having presented and filed no brief. The appeal is on the judgment roll. The action was instituted by the plaintiff to determine the ownership of 150 shares of the capital stock of the defendant Imperial Water Company No. 3, as represented by stock certificate No. 423. The plaintiff alleged that the Imperial Water Company was at all the times mentioned in said complaint a mutual water company organized for the purpose of owning and operating a system of irrigation canals and distributing water for irrigation and domestic purposes to its stockholders upon lands irrigable from its canals, upon which said stockholders have located sufficient stock of said company entitling them to water; and that by the by-laws of the corporation it was provided that water should only be furnished and sold to owners of its capital stock, and that such stock shall be appurtenant to the land described in the certificate. The plaintiff further alleges that the real property of which he alleges himself to be the owner is described in said certificate No. 423, and that it is, therefore, appurtenant to plaintiff's said land, and, as a consequence, he is entitled to have his title thereto quieted. The defendants Chalupnik and Sharon deny that the plaintiff is the owner of said shares of capital stock of said corporation, or that the same is appurtenant to the plaintiff's said land or any portion thereof. The trial court found that the said corporation was a mutual water company, and that its by-laws contained the provision set forth in plaintiff's complaint, and that the plaintiff was the owner of the tract of land referred to in the certificate for said shares of stock. The court, however, further found that said stock was purchased and paid for by the defendants Chalupnik, and that they were the owners thereof, and that the aforesaid stock was not appurtenant to plaintiff's said land. Judgment was thereupon ordered and entered in favor of the defendants, and from such judgment this appeal was taken.

[1, 2] The appeal being upon the judgment roll, we must assume that the evidence in the case fully sustained the findings of the trial court, to the effect that the defendants Chalupnik were the purchasers and owners of the stock in question, and that the plaintiff had no interest therein other than that which might inferentially arise from the fact that he was the owner of the land to

---

★Rehearing denied.

which said certificate of stock referred as being the land to which the water right represented thereby was appurtenant. We must assume, therefore, that the trial court had before it a state of facts which would have justified a more explicit finding that a severance had been created between said stock certificate and the land in question, whereby the plaintiff, while remaining the owner of the land, had either failed to acquire or had ceased to have any interest in said stock certificate. This being so, and the plaintiff having chosen to rely upon the judgment roll, we are unable to say therefrom that the aforesaid finding of the trial court was not justified by the evidence before it. If so justified, said finding is sufficient to uphold the judgment in the defendant's favor.

The judgment is affirmed.

---

206 Cal. 22

COLEY v. HECKER et al. (Sac. 3992.)

Supreme Court of California. Dec. 26, 1928.

1. Appeal and error 🔑916(3)—Allegations of complaint must be taken as true on appeal from order denying demand for change of place of trial.

On appeal from order denying demand for change of place of trial, allegations of complaint must be taken as true.

2. Libel and slander 🔑139—Owner of slandered title may sue in county where realty is situated as involving determination of interest in property and injury to property (Code Civ. Proc. § 392).

Under Code Civ. Proc. § 392, owner of slandered title may bring action in county where real property is situated on theory that action is one in which determination of owner's right or interest therein is properly adjudicated, and since slander of title is injury to real property.

3. Venue 🔑5(4)—Venue of action to recover damages for filing judgment after obtaining stay bond on appeal and to remove lien created held properly brought in county of realty (Code Civ. Proc. §§ 392, 674).

Where defendant filed abstract of judgment after enforcement of judgment had been stayed by giving of undertaking on appeal prior to filing judgment which became lien on realty of plaintiff in county of realty under Code Civ. Proc. § 674, action for damages for slander of title by filing of judgment, essence of which was the removal of lien, was properly brought in county in which realty was situated under section 392.

4. Quieting title 🔑50—Damages for injury to realty held incident to action to remove cloud wrongfully cast on property by filing judgment after enforcement was stayed.

Damages for injury to real property are incident to action to remove cloud cast on plaintiff's property by filing of abstract of judgment, enforcement of which had been stayed by giving of undertaking on appeal prior to filing of judgment; damages being proximate result of alleged wrongful act.

5. Action 🔑53(1)—Action for damages for malicious conduct is not split because dual relief may be properly or improperly sought.

That damages are demanded for maliciously doing act from which injury is necessary consequence does not split action into separate causes of action merely because dual relief may be properly or improperly sought, especially in actions sounding in trespass.

6. Libel and slander 🔑130—"Slander of title" includes both spoken and written means by which right of property may be invaded.

Term "slander of title" includes both spoken and written means by which right of property may be invaded, and right of action exists, irrespective of means by which title is traduced.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Slander of Title.]

7. Libel and slander 🔑130—Property right may be invaded by language concerning it, and such language is actionable.

Right in property may be invaded by language concerning property, and, when invasion occurs, language which affects property is actionable.

8. Venue 🔑5(5)—"Injury to property," action for which may be brought in county in which property is situated, is not limited to physical injury to realty (Code Civ. Proc. § 392).

Under Code Civ. Proc. § 392, term "injury to property," action for which may be brought in county in which real property is located, is not limited to physical interference with or physical injury to real property.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Injury to Property.]

9. Trespass 🔑10—Trespass to realty may be committed by indirect injuries as well as by direct and forcible injuries.

Trespass to realty may be committed by consequential and indirect injuries as well as by direct and forcible injuries.

10. Libel and slander 🔑130—Libel to property by malicious recording of judgment held continuing, permanent notice to world of judgment lien against property.

In action involving libel of title to property by malicious recording of abstract of judgment falsely asserting interest in property and decreasing its value, libel constituted continuing, permanent notice to world that judgment lien rested on property, and was communicated to entire purchasing public.

11. Libel and slander 🔑139—Petition for damages by malicious recording of judgment held to state action for slander of title and not abuse of process.

Petition to recover damages for malicious recording of abstract of judgment falsely asserting interest in property after enforcement of judgment had been stayed by giving undertaking on appeal *held* not to state action for abuse of process rather than slander of title, and did not require venue of action in county of defendant's residence rather than in county in which property was located.

In Bank.

Appeal from Superior Court, San Joaquin County; D. M. Young, Judge.

Action by J. A. Coley against Barbara Hecker and another. From an order of the Supreme Court of San Joaquin County denying demand for change of place of trial, defendants appeal. Affirmed.

For former opinion, see 268 P. 626.

Dean Cunha, of San Francisco, for appellants.

George F. McNoble, Stanley M. Arndt, and McNoble & Arndt, all of Stockton, for respondent.

PER CURIAM. A hearing in bank was ordered in this cause after a decision thereof by department 1 of this court. Upon a further consideration of the cause upon such hearing we are satisfied with the decision of the department, and hereby adopt the same as the decision of the court in bank. Said decision reads as follows:

This appeal is from an order denying the demand of appellants for a change of the place of trial from the county of San Joaquin, in which county the action was commenced, to the place of the residence of the respective appellants, to wit, the city and county of San Francisco. It is the contention of respondent that the action is one to remove a cloud upon his real property and for the determination of an interest in said real property, situate in said county of San Joaquin, and that the venue is, under the provisions of section 392, Code of Civil Procedure, where said real property is situated.

The only papers offered upon the hearing in support of the motion were the complaint and the demurrers of the respective appellants, general and special.

[1] In considering the appeal, the allegations of the complaint must be taken as true. The allegations of the complaint are to the effect that respondent was the owner of a large number of lots, pieces, and parcels of land situate in said county of San Joaquin; that on May 18, 1925, and while he was and continued to be such owner, one Barbara Hecker recovered in the superior court of the city and county of San Francisco a judgment in the sum of $12,925.73 and costs against him and his cosurety, J. L. Craig, upon an appeal bond jointly executed by them, with one Walter F. Hogan as principal. On May 19, 1925, respondent and said Craig took an appeal from said judgment by filing in the office of the county clerk of the city and county of San Francisco a notice of appeal, and entering into a written undertaking on appeal in the sum of $26,000 to stay the execution of said judgment with two sureties, and on said day notified appellants herein that said undertaking had been filed. On May 21, 1925, said appellants served upon respondent, J. A. Coley, and his cosurety, J. L. Craig, notice of exception to said sureties. Five days thereafter, to wit, May 26, 1925, said respondent, Coley, and Craig served upon appellants notice of justification of sureties, and filed said notice on the same day in the office of the county clerk of said city and county of San Francisco. The time therein fixed for justification was May 28, 1925. On the day last above mentioned one of the original sureties and a third person, who was substituted in place of the other original surety, appeared and justified before a judge of the superior court of said city and county of San Francisco upon a written undertaking, as required by law, in the sum of $300 for costs, and in more than double the amount named in said judgment, to wit, the sum of $26,000. Said undertaking was then and there, in the presence of Harry I. Stafford, the agent and attorney for appellant Barbara Hecker, regularly approved by said judge of the superior court. Said appellants were, on said May 28, 1925, regularly notified that said undertaking staying execution had been filed, and that said sureties had justified, and that said bond had been approved by said judge of the superior court.

It is next alleged that on the day following the filing of said stay bond, to wit, May 29, 1925, appellants, acting maliciously, and with the evil purpose of vexing and annoying respondent, and slandering the title to all lands owned by him in the county of San Joaquin, and clouding the title thereto, recorded in the office of the county recorder of San Joaquin county an abstract of judgment in said action, well knowing that said abstract of judgment was inoperative, and of no legal effect, by reason of the filing of said undertaking in said city and county of San Francisco, and that said appellants well knew said abstract of judgment, when filed by them, would be a cloud upon, and a slander against, all the lands owned, or which might thereafter be owned, by respondent situate in said county of San Joaquin. It is further alleged that the recordation of said abstract of judgment decreased the value of said real property and rendered it unmarketable to the damage of respondent in the sum of $26,000.

As an additional damage, respondent alleged that appellants, in recording said abstract of judgment, were moved by malice and a desire to oppress him, and as a penalty therefor he prayed for punitive and exemplary damages in the sum of $25,000. The prayer of the complaint is that appellants be required to set forth the nature of their claims; that it be decreed and adjudged that appellants have no interest or estate in said lands situate in San Joaquin county, and that respondent's title be decreed to be valid in all respects; that appellants be enjoined from asserting any title thereto adverse to respondent; that the recordation of said abstract of judgment recorded in the county of San Joaquin be canceled, and declared null and void, and for general relief.

The first and principal point presented by appellants is that, respondent having joined a real and personal action, to wit, an action to quiet title to real property with an action to recover for slander of title, did thereby lose his right to hold the case in the county where the real property was situate. This contention is based upon the claim that an action for the recovery of damages for slander of title sounds in personal action, and does not bring the venue within the purview of section 392, Code of Civil Procedure. Said section provides:

"Actions for the following causes must be tried in the county in which the subject of the action, or some part thereof, is situated, subject to the power of the court to change the place of trial, as provided in this code:

"1. For the recovery of real property, or of an estate or interest therein, or for the determination in any form, of such right or interest, and for injuries to real property; * * *

"3. For the foreclosures of all liens and mortgages on real property."

[2, 3] We think the language of the section clearly justifies the construction that the owner of the slandered title is given the right to bring and maintain the action in the county where the real property is situated, upon the theory that the action is one in which the determination of the owner's right or interest therein is properly adjudicated, and for the additional reason that slander of title is an injury to real property. It is difficult to discern a single consideration which may be assigned as the legislative reason for the adoption of the Code section as to the venue of actions affecting the ownership of an interest in real property that may not with equal force be applied to actions to recover damages for injury for the false and malicious disparagement of the owner's title by another, a wrong which has by use become a recognized phase of the law known as "slander of title." By the filing of the abstract of judgment, duly certified by the county clerk of the city and county of San Francisco, said judgment became a lien upon all the real property of the respondent, not exempt from execution, situate in said county of San Joaquin. Section 674, Code Civ. Proc. The enforcement of the judgment had been stayed by the giving of an undertaking on appeal prior to the time said abstract of judgment was filed by appellants, a fact, according to the allegations of the complaint, well known to them, and which was not stated in said abstract of judgment. Prima facie a lien exceeding the sum of $26,000 at once fastened itself upon respondent's San Joaquin county real property. As another ground supporting the intention of the Legislature to cover by said section 392, supra, and fix the venue of all actions wherein title to real property may be affected, it is provided that an action to foreclose liens upon real property must be tried in the county in which the real property is situate. To remove the lien, which constitutes the essence of the injury complained against, the venue of the action would necessarily be in the county in which the real property affected thereby is situate.

[4, 5] Damages for injury to the real property are but an incident to the action to remove the cloud wrongfully cast upon respondent's real property by the filing of said abstract of judgment. It is the proximate result of an alleged wrongful act. The fact that damages are demanded for maliciously doing an act from which an injury is the necessary consequence does not split the action into two separate causes of action merely because dual relief may be properly or improperly sought. And this is especially true where the cause of action sounds in trespass. Gomez v. Reed et al., 178 Cal. 759, 174 P. 658.

[6, 7] The phrase "slander of title" is a figure of speech in which the title is personified. In the instant case, the phrase seems to be an anomaly as applied to a situation which, strictly speaking, is a libel upon the title, inasmuch as the damage was accomplished by the recordation of a written document, and no spoken words were uttered. However, the term "slander of title" includes both spoken and written means by which the right of property may be invaded and a right of action exists, irrespective of the means by which the title is traduced. This is so because a property right has been invaded—an injury to real property has been sustained. "Persons may have a right in or to a thing—the right of property—and this right may be invaded by language concerning the thing. When this invasion occurs the language which affects a thing is actionable." Edwards v. Burris, 60 Cal. 157, and authorities cited; Fearon v. Fodera et al., 169 Cal. 370, 148 P. 200, Ann. Cas. 1916D, 312.

[8] It is appellants' contention that, by the term "injury to property," as used in section 392, supra, it was intended to include only physical interference with, or physical injury to, real property, such as waste, or some sort of physical trespass committed upon the lands, and that the term was not intended to be as broadly applied as its meaning would seem to imply. In addition to the construction which we feel constrained to place upon said section, and which is supported by the construction given to practically the same language by the Supreme Court of Louisiana in Labarre v. Burton-Swartz, etc., Co., 126 La. 982, 53 So. 113, to the effect that slander of title is an actual intrusion upon one's prop-

erty, and is in the "nature of a trespass, a real action to protect property," our conclusion is further fortified by eminent authority holding that a libel written or published in disparagement of title is in the nature of an action to trespass on the case. "The term 'injury to real property' is in itself a wider and less technical term than 'trespass to real property.' As applied to questions of venue, it has been declared to embrace every wrong which in legal contemplation is an injury to real property, not only the direct and forcible injury, but consequential injuries, and threatened injuries to land, and even a mere nonfeasance, as permissive waste." 40 Cyc. 74; 17 R. C. L. 454.

[9] The trend of decisions of this court is generally in accord with the doctrine, whenever the question has come before it, that trespasses may be committed by consequential and indirect injuries as well as by direct and forcible injuries. Appellants cite Monk v. Ehret, 192 Cal. 186, 219 P. 452, as a case supporting by analogy the view that the term "injuries to real property" should be interpreted as affecting a physical injury to real property only. Monk v. Ehret had to do largely with "injuries to persons," considered with reference to a Code amendment adopted to meet a situation brought about by the increasing use of motor vehicles, as in said case pointed out, and was intended to apply to a trespass based upon false imprisonment. We are satisfied that the Monk Case is not in conflict or inconsistent with the conclusion reached in the instant case.

[10] Burkett v. Griffith, 90 Cal. 532, 27 P. 527, 13 L. R. A. 707, 25 Am. St. Rep. 151, liberally quoted from by appellants, cannot be regarded as an authority ruling the facts of the instant case. In Burkett v. Griffith, supra, the slander consisted of false and malicious statements made by the defendant concerning certain property of the plaintiff. It is therein said that:

"In order to show that the words uttered have caused injury to the plaintiff, it is generally necessary to aver and show that they were uttered pending some treaty or public auction for the sale of the property, and that thereby some intending purchaser was prevented from bidding or competing. * * * If the plaintiff has merely a general intention to sell, or if the words uttered do not reach any intending purchaser, or if they do not prevent any sale, * * * the plaintiff does not suffer any damage from their utterance."

There the words were merely spoken and were transitory, but in the instant case the libel was recorded in the office of the county recorder where the land was situate, and constituted a continuing, permanent notice to the world that a judgment lien to the extent of more than $12,000 rested upon respondent's real property. In the instant case the libel or slander was communicated to the entire purchasing public. The allegation of the complaint that the malicious recording of said abstract of judgment falsely asserting an interest in said property decreased the value of said real estate and rendered it less marketable is obviously true.

[11] Appellants further contend that the recording of the abstract of judgment, if it gives rise to any cause of action, is one for malicious abuse of process, and consequently is a personal action, the venue of which is at appellants' place of residence. We think there is no merit in the contention that the facts alleged state an action for the abuse of process rather than slander of title. It was the filing, maliciously and falsely, of a document which clouded the title of respondent that caused the injury. The effect would be the same had said document been a forged deed, rather than an unauthorized abstract of judgment. In either event, no question of abuse of process would be involved.

The order is affirmed.

---

205 Cal. 782

BLALOCK v. DUNGER. (Sac. 4106.)

Supreme Court of California. Dec. 20, 1928.

1. Trial ⚷397(1)—Issue as to recovery of possession of real property held triable before jury as matter of right, making findings regarding issue unnecessary (Code Civ. Proc. § 592).

Where trial by jury as to recovery of possession of property was not waived, that issue was triable before jury as matter of right, under Code Civ. Proc. § 592, making findings as to that branch of case unnecessary.

2. Judgment ⚷201—Findings of referee, order of reference as to accounting being general and unlimited, were sufficient upon which to base judgment (Code Civ. Proc. § 644).

Where order of reference as to accounting in action to recover possession of real property and for an accounting involving accounting of merchandise business conducted on property was general and unlimited, findings of referee under Code Civ. Proc. § 644, were sufficient upon which to base judgment of court.

3. Appeal and error ⚷1037—That affidavit of service did not aver residence of plaintiff's attorneys if irregular held harmless, where it raised inference as to residence.

Affidavit of service not making specific averment where attorneys for plaintiff resided, if irregular, *held* to work no harm, where it was sufficient to raise inference that they resided in certain city.

Department 2.

Appeal from Superior Court, Tulare County; J. A. Allen, Judge.

Action by Ugene U. Blalock against Walter L. Dunger, also known as W. L. Dunger, and others. Judgment for plaintiff, and defendants appeal. Modified and affirmed.

C. W. Braswell, of Long Beach, for appellants.

Ugene U. Blalock, of Porterville, pro se.

SHENK, J. The plaintiff brought this action to recover possession of certain real property and for an accounting involving the conduct of a merchandise business on the property. The issue of the right to the possession of real property was submitted to a jury, which returned a verdict for the plaintiff. The court made a general order of reference as to the issues involved in the accounting. Thereafter the referee made and submitted his report to the court, finding that all of the defendants were indebted to the plaintiff in the sum of $226.21. No exceptions were taken to the findings of the referee, and judgment was entered on the verdict for the possession of the real property and for the plaintiff against all of the defendants for the amount found by the referee to be due to the plaintiff. All of the defendants appeal from the judgment.

[1, 2] It is contended by the defendants (1) that no findings of fact and conclusions of law were made and filed by the court; (2) that the judgment is a departure from the pleadings; and (3) that the proof of service of the cost bill was insufficient.

Trial by jury as to recovery of possession of the real property was not waived. Consequently that issue was triable before the jury as matter of right (section 592, Code Civ. Proc.), and no findings were necessary as to that branch of the case. Reiner v. Schroeder, 146 Cal. 411, 80 P. 517. The order of reference as to the accounting was general and unlimited. Under this state of the record the findings of the referee were sufficient upon which to base the judgment of the court. Section 644, Code Civ. Proc.; Weavering v. Schneider, 52 Cal. App. 181, 198 P. 418.

The plaintiff concedes that the judgment is erroneous and unsupported in so far as it orders a recovery of the sum of $226.21 as against all of the defendants. The judgment as to that sum should be had from the defendant Walter L. Dunger only. Modification of the judgment in that respect, therefore, becomes necessary. The judgment for costs in the trial court should, however, run against all of the defendants.

[3] Service of the cost bill in the sum of $571.20 was by mail. The affidavit of the service was made by a stenographer in the office of the attorneys for the plaintiff at Porterville. The then attorneys for the defendants resided at Lindsay. There was no specific averment in the affidavit of service that the attorneys for the plaintiff resided at Porterville. But there was sufficient in the affidavit upon which to infer that the attorneys for the plaintiff resided at Porterville. It is not claimed by the defendants that the memorandum of costs was not received by them in due course of mail, and the irregularity, if any, worked no harm to the defendants.

The judgment is modified by limiting the recovery of the sum of $226.21 to the defendant Walter L. Dunger, the costs in the trial court to be recovered from all of the defendants. As so modified, the judgment is affirmed, each party to bear his own costs on appeal.

We concur: RICHARDS, J.; LANGDON, J.

205 Cal. 771

DARROW v. HOULIHAN et al.
(L. A. 10753.)

Supreme Court of California. Dec. 20, 1928.

1. Brokers ⚷63(1)—Broker securing acceptance of exchange offer was entitled to commission, where defendants abandoned transaction, unless exchange agreement was secured by fraud.

Under defendants' agreement to pay broker commission upon his securing acceptance of proposition to exchange, and under agreement that if either party failed to carry out his part in contemplated exchange broker should receive commission on aggregate exchange value of property from defaulting party, broker was entitled to commission on securing written acceptance of defendants' offer, where defendants abandoned transaction, unless agreement of exchange was secured by fraud.

2. Evidence ⚷434(11)—Parol evidence that written exchange agreement was induced by fraudulent representations held admissible in broker's action for commission.

Parol evidence that agreement of exchange in its inception was tainted with fraud, and that its execution was induced by fraudulent representations, *held* admissible in broker's action for commission, despite written contract.

3. Brokers ⚷65(1)—Broker's false representations regarding incumbrances on property to be exchanged did not preclude recovery of commission, where defendants abandoned transaction before time specified for the other's conveyance.

That broker falsely represented to defendants that property to be exchanged was incumbered with mortgage of $2,000, due in about six months, did not preclude recovery of commission, where exchange agreement provided that the other party had 60 days to comply with its provisions and defendants abandoned transaction on day following acceptance of exchange agreement without giving broker 60 days in which to procure necessary incumbrances to be executed.

In Bank.

Appeal from Superior Court, San Bernardino County; Benjamin F. Warmer, Judge.

⚷For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

Action by M. F. Darrow against J. P. Houlihan and another for real estate broker's commission. From a judgment for defendants, plaintiff appeals. Reversed.

Superseding opinion, 268 P. 455.

Duckworth & Harrison, T. W. Duckworth, and Ben Harrison, all of San Bernardino, for appellant.

W. F. Lewis, of Redlands, for respondents.

WASTE, C. J. Plaintiff prosecutes this appeal from an adverse judgment entered in an action brought to recover $600 broker's commissions alleged to be due him for his services in attempting to effect an exchange of properties between defendants and W. S. and Lillian M. Little. On August 19, 1924, the defendants in writing authorized the plaintiff to negotiate an exchange of their property for that of the Littles, the offer to remain open for a period of ten days. It was stipulated in the agreement that each of the exchanging parties was to assume an "indebtedness" of $2,000 on the property received in the event the exchange was consummated. The exchange value of the respective properties was fixed at $6,000. A period of 60 days from the acceptance of the offer was to be allowed the Littles for the furnishing of a deed and certificate of title. The writing provided for the payment to plaintiff of the regular brokerage commission when he had secured an acceptance of the proposition to exchange on the specified terms. It was further provided that plaintiff might act as agent for and receive a commission from the Littles. The final stipulation of the writing was that in the event defendants' offer of exchange was accepted by the Littles, and either party should thereafter fail to comply with the terms of the agreement, the regular brokerage commission on the aggregate exchange value of the properties was to be paid by the defaulting party. Plaintiff seasonably secured the Littles' written acceptance of and consent to the terms and conditions of the offer. On the day following such acceptance the defendants refused to consummate the exchange, though the Littles had, in the meantime, placed their papers in escrow.

By way of defense to this action for commissions on the aggregate exchange value of the properties, defendants aver that plaintiff, prior to the making of their written offer of exchange, falsely represented to them that the property of the Littles was incumbered with a mortgage of $2,000, due in about six months, when in truth the incumbrance was in the form of a trust deed, payable at the rate of $25 a month, upon which there remained $1,000 unpaid.

[1] Unless the agreement of exchange was secured by fraud, the plaintiff was entitled to the agreed commission upon securing the Littles' written acceptance of defendants' offer, even though the exchange were never actually consummated. Jauman v. McCusick, 166 Cal. 517, 522, 137 P. 254; Backman v. Guadalupe Realty Co., 78 Cal. App. 347, 352, 248 P. 296; Watson v. Duarte, 62 Cal. App. 52, 55, 215 P. 1039; Kells v. Pearson, 56 Cal. App. 502, 506, 205 P. 888; Goodrich v. Turney, 44 Cal. App. 516, 520, 186 P. 806; Jennings v. Jordan, 31 Cal. App. 335, 337, 160 P. 576. This conclusion flows from the agreement to pay plaintiff a commission upon his securing the Littles' "acceptance" of the "proposition to exchange." The parties by the employment of this particular language, as well as that appearing in the final paragraph of the written offer, wherein it is provided that plaintiff in the event either party should fail to carry out his part in the contemplated exchange was to receive the agreed commission on the aggregate exchange value of the properties from the defaulting party, very clearly and definitely gave expression to their intention that plaintiff was not to lose or forfeit such compensation by virtue of the failure of the parties to consummate the transaction. As stated in Jauman v. McCusick, supra, defendants "agreed to pay a commission for securing a specific agreement. Such agreement having been secured [they were] liable under the precise terms of [their] contract."

[2] The trial court permitted the defendants to introduce parol evidence in support of their separate defense in which it was alleged that the agreement of exchange, in its inception, was tainted with fraud, and that its execution was induced by fraudulent representations. Such evidence was admissible in support of that theory despite the written contract. Watson v. Duarte, supra, page 55 of 62 Cal. App. (215 P. 1039); Colt v. Freitas, 76 Cal. App. 278, 284, 285, 244 P. 916; Mooney v. Cyriacks, 185 Cal. 70, 80, 195 P. 922; Whiting v. Squeglia, 70 Cal. App. 108, 114, 232 P. 986; Odson v. Swanson, 70 Cal. App. 279, 282, 233 P. 354; Blackwell v. Thomasson (Cal. App.) 258 P. 724; American Nat. Bank of San Francisco v. A. G. Sommerville, Inc., 191 Cal. 364, 371, 216 P. 376.

[3] It is equally well settled, however, that fraud, unproductive of injury, "will not justify a rescission, nor support an action either for rescission or damages. * * *" Spreckels v. Gorrill, 152 Cal. 383, 388, 92 P. 1011, 1014. Although the trial court found, upon substantial evidence, that the plaintiff, by virtue of certain false representations, had induced the defendants to sign the written offer of exchange, such finding does not necessarily prove fatal to the plaintiff's recovery. It is not shown, nor have the defendants attempted to show, that had the 60-day period allowed to the Littles by the exchange agreement to comply with its provisions been permitted to elapse the defendants would not have received that for which they had bargained and upon the exact terms and con-

ditions specified. The respondents assert in their brief that "appellant as broker was to adjust the values by procuring the necessary incumbrances to be executed before the exchange was actually to be consummated." How, it may be asked, was plaintiff to perform these services asserted to have been required of him when the defendants by their immediate and premature abandonment of the agreement to exchange put it beyond his power to do so? It is no sufficient answer to say that plaintiff should have alleged in his complaint an excuse for nonperformance rather than performance upon his part of all conditions precedent. It cannot now be said that the Littles' property would not have come to the defendants within or at the expiration of the period fixed in the agreement, subject to a mortgage incumbrance in the sum of $2,000. The plaintiff, if he had not been precluded by defendants' abandonment of the transaction, might have made, with the assistance of the Littles, all necessary adjustments prior to the expiration of the period fixed by the exchange agreement.

For the foregoing reasons the judgment is reversed.

We concur: SHENK, J.; RICHARDS, J.; SEAWELL, J.; LANGDON, J.; CURTIS, J.; PRESTON, J.

205 Cal. 784

GEORGE H. TAY CO. v. BREMSER et al.

(Sac. 4118.)

Supreme Court of California. Dec. 20, 1928.

Mechanics' liens 🔑281(3)—Evidence held to support finding that purchaser of materials was owner's agent (Code Civ. Proc. § 1183).

In action for foreclosure of mechanic's lien, evidence *held* to support finding that plumbing company purchasing supplies from plaintiff was contractor or subcontractor and owner's agent, under Code Civ. Proc. § 1183.

Department 2.

Appeal from Superior Court, Sacramento County; John F. Pullen, Judge.

Action by the George H. Tay Company against M. H. Bremser and others for the foreclosure of a mechanic's lien. From a judgment for plaintiff, defendant M. H. Bremser appeals. Affirmed.

Ralph H. Lewis, of Sacramento, for appellant.

John C. March, of Sacramento, and Walton C. Webb, of San Francisco, for respondent.

SHENK, J. This is an appeal from a judgment for the plaintiff in an action for the foreclosure of a mechanic's lien.

At the time mentioned herein the plaintiff was in the plumbing supply business. The defendant Bremser was the owner of the real property located at 2908 G street in the city of Sacramento. Shortly prior to January, 1926, Bremser entered into a contract with one Pattiani for certain repairs and improvements on said property. From January 2 to April 8, 1926, the plaintiff sold to one Hardt certain plumbing fixtures and supplies, which it is conceded were installed in the building of the defendant Bremser. Hardt was transacting business under the name of General Plumbing Company. Two issues were presented to the trial court. The first was whether the lien of the plaintiff was filed in time, and the second whether Hardt purchased the plumbing material as the agent of the owner. The court resolved both issues in favor of the plaintiff.

On the appeal it is not contended that the evidence was insufficient to support the finding that the notice of lien was timely filed. The sole question for our determination is whether the evidence was sufficient to support the finding that Hardt was the agent of the owner as contemplated by section 1183 of the Code of Civil Procedure. It is conceded by the parties that if Hardt was merely a materialman, who was not in law the agent of the owner, the purchase by Hardt of plumbing material and supplies from another, such as the plaintiff in this case, would give the latter no right to a lien. It is also conceded that if Hardt was in the position of a subcontractor the lien of the plaintiff would be effectual.

We think the evidence was sufficient to support the finding that Hardt was either a contractor or a subcontractor. The permit issued by the city authorizing the work and labor to be done was taken out under the name of F. T. Hardt, as plumbing contractor, and A. W. Pattiani, as building contractor. An assistant plumbing inspector of the city testified that during the progress of the plumbing work he went upon the job and directed one of Hardt's employees who was then and there engaged in plumbing work to do certain work in a manner satisfactory to the inspector. There was additional evidence that Hardt was the plumbing contractor and not merely a materialman. Under this showing the finding of the court that Hardt was the agent of the owner may not be disturbed.

During the course of the trial the court was endeavoring to ascertain, by questions propounded to counsel, the relationship of the several parties to the action. The appellant has singled out an answer of counsel for the plaintiff, in response to a question by the court, from which it is sought to show that the plaintiff, through its counsel, admitted that Hardt was a "material jobber" and was not engaged to install the plumbing. The concession that Hardt was a "material jobber" would not alone, when the entire record is considered, be sufficient upon which to base the conclusion that the plaintiff had stipulated itself out of court on this vital point. The trial court obviously did not deem the answer of counsel as having such effect. Counsel for the plaintiff has at all times disclaimed any such intention, and we cannot ascribe to his so-called admission any such disastrous result.

The judgment is affirmed.

We concur: RICHARDS, J.; LANGDON, J.

206 Cal. 7

BROWN v. BROWN. (L. A. 9825.)

Supreme Court of California. Dec. 21, 1928.

1. Divorce 🔑247—Court could order that alimony payments cease on certain date.

In divorce suit, trial court had power to order that monthly payments of alimony allowed cease on certain date.

2. Divorce 🔑286—Supreme Court must assume on appeal on judgment roll alone that evidence was sufficient to sustain trial court's finding respecting alimony.

Trial court's discretion to award or refuse to award alimony in divorce action being one to be exercised in view of evidence presented in each particular case, Supreme Court must assume on appeal on judgment roll alone that evidence was sufficient to sustain finding.

In Bank.

Appeal from Superior Court, Los Angeles County; Walter S. Gates, Judge.

Action for divorce by Louise A. Brown against Paul H. Brown. From a judgment allowing alimony to plaintiff only until a certain date, plaintiff appeals. Affirmed.

Bicksler, Smith & Parke, of Los Angeles, for appellant.

Hardy, Elliott & Aberle, of Los Angeles, for respondent.

PER CURIAM. [1, 2] This appeal was submitted upon an order to show cause, no respondent's brief being on file and none having been presented or filed pursuant to said order. The action was for divorce. The cause was tried upon its merits. At the conclusion of the trial the court made its findings of fact and conclusions of law in the plaintiff's favor, wherein it awarded her the custody of the minor children, and in so doing directed the defendant to pay to the plaintiff for the support of said children the sum of $60 per month "subject to the further order of this court to modify, diminish or increase the allowance as the needs of said children may require." The trial court in a further finding directed an allowance of alimony to plaintiff in the sum of $40 per month "until the 1st day of January, 1928, on which last named date the payment of said alimony for the support of the plaintiff shall forever cease." The plaintiff appealed from this latter order as to alimony which was in terms carried into the interlocutory decree. The appeal is taken from the judgment roll alone and is based solely upon the ground that the limitation which the trial court imposed upon the payment of alimony to the plaintiff was one which it had no power to make. There is no merit in this contention nor in this appeal based solely thereon. The discretion of the trial court to award or refuse to award alimony in a divorce action is one which is to be exercised in view of the evidence presented in each particular case. In this case no evidence is presented, the appeal being upon the judgment roll. We must therefore assume that the evidence was sufficient to sustain the finding of the trial court, and it is evident that the findings were sufficient to support the judgment.

The judgment is affirmed.

205 Cal. 764

ANDREWS et al. v. WALDO.

STEINBERG v. SAME.

(L. A. 8963.)

Supreme Court of California. Dec. 20, 1928.

1. Brokers 🔑57(2)—Acceptance providing cash payment 30 days after notice of owner's readiness to convey and mortgage payable "on or before" date specified held variance from offer requiring cash payment and custom requiring payment at expiration of period.

Where brokers were given exclusive agency to sell land at specified price, payable half in cash and balance secured by first mortgage, and brokers' evidence showed that it was customary to cause mortgages to run for full period specified therein, but acceptance of proposed purchaser provided that term of mortgage should be for "on or before three years" from date thereof, and gave purchaser 30 days after notice from owner of ability and readiness to convey by delivery of deed and certificate of title to make required cash payment, brokers were not entitled to commissions, since they failed to procure purchaser on terms specified.

2. Brokers 🔑49(1)—"Sales deposit receipt" held mere "counter offer" and not "acceptance" of owner's terms as respects brokers' right to commission.

"Sales deposit receipt," procured from proposed purchaser by brokers, not purporting on its face to be acceptance of owner's written offer embodied in exclusive brokerage contract nor to be contract executed by brokers under their power of attorney to sell property for owner, but contemplating that owner should sign it before it became operative, *held* mere counteroffer as respects brokers' right to commission for procuring it.

3. Customs and usages ⚷14—Contrary provisions of contract prevail over known usage (Civ. Code, § 1655).

Under Civ. Code, § 1655, parties who contract as to a subject-matter concerning which known usages prevail incorporate such usages into their agreement by implication only if contract manifests no contrary intention.

In Bank.

Appeals from Superior Court, Los Angeles County; T. A. Norton, Judge.

Separate actions by Charles G. Andrews and other against C. L. Waldo and by Jacob Steinberg against C. L. Waldo. Judgment of nonsuit rendered by the superior court in the first case was reversed with instructions by the District Court of Appeal (265 P. 532), and judgment granting defendant's motion for nonsuit in second case was affirmed (265 P. 536). On hearing in the Supreme Court en banc. Judgments of superior court affirmed.

S. T. Hankey, Wood, Janeway & Pratt, and Janeway, Beach & Pratt, all of Los Angeles, for appellants.

William B. Brown, Edmond Nichols, Franklin J. Cole, Walter H. Sprague, and Cole & Sprague, all of Los Angeles, for respondent.

SHENK, J. This is an appeal from a judgment of nonsuit in an action for a real estate commission.

On April 17, 1923, the defendant was the owner of certain real property on South Flower street in the city of Los Angeles. On that day he signed what is called an "Exclusive Agency Contract," wherein he listed said property with the plaintiffs and employed them as his exclusive agents for a period of 30 days to negotiate for sale and to sell said property at the price of $60,000, payable "30,000 cash; balance evidenced by a note for $30,000 secured by a first mortgage, interest at 7% per annum, payable quarterly." By this written instrument the defendant further agreed "to sell said property to such purchaser as the agent may procure within the time, for the price and upon the terms aforesaid, and to convey said property to such purchaser by good and sufficient grant deed and to furnish guarantee or continuation guarantee of title thereon," showing title to be in the defendant free and clear of incumbrance except current taxes not yet payable. In the event the plaintiffs should procure a purchaser "as above provided," written notice thereof was to be given to the defendant on or before May 17, 1923, and the defendant agreed to pay the plaintiff the sum of $2,000 as a commission on account of such sale. The last paragraph of the agreement is as follows: "Said agent is hereby appointed the attorney in fact of the undersigned owner, with full power to execute, in the name and on behalf of the undersigned, an agreement of sale of said property with any purchaser obtained within the time, for the price and upon the terms aforesaid, and said agent may retain its said commission out of moneys coming into its possession on account of the purchase price."

On May 17, 1923, the Charles G. Andrews Company, plaintiffs herein, as agents, signed a document called "Sale Deposit Receipt," which in part stated: "Received from Jacob Steinberg the sum of Five Hundred Dollars ($500.00) as deposit and part payment on account of the purchase from C. L. Waldo of the following described property [describing it] this day sold to said Jacob Steinberg which said property said purchaser agrees to buy for the sum of Sixty Thousand Dollars ($60,000), payable as follows: Thirty Thousand Dollars ($30,000) cash (including the amount herein receipted for), upon the execution and delivery of good and sufficient deed covering said property to Jacob Steinberg," together with certificate of title, etc. The receipt then provided that the balance of the purchase price should be evidenced by a note in the sum of $30,000 payable "on or before 3 years from its date" and secured by a first mortgage on the property. Time was made the essence of the contract, and it was further "understood and agreed that the sale of the property, upon the terms herein set forth, shall be agreed to, and accepted by the owner within five (5) days from this date, or the deposit herein receipted for shall be refunded to said purchasers immediately thereafter upon demand. If the price and terms herein set forth are accepted by the owner of said property within said specified time, said owner shall have reasonable time for having guarantee of title to said property made or brought down to date. * * * If the purchaser does not complete the purchase as hereinbefore provided within 30 days after notice from the owner of his ability and readiness to convey said property as herein provided, then the said deposit at the election of said owner shall be forfeited, and it shall thereupon be paid, less the commission of the undersigned agents, to the owner." Insurance and rents were to be prorated and interest credited to close of escrow. The paper was signed by the plaintiffs as "agent." Below the plaintiffs' signature was the following: "I hereby agree to purchase the real property above mentioned and described upon the terms and conditions above set forth. Dated May 17, 1923. (Signed) Jacob Steinberg, purchaser." Below Steinberg's signature was the following: "I hereby agree to sell the real property above mentioned and described at the price and upon the terms set forth in the foregoing instrument and agree to execute and deliver a good and sufficient deed conveying said property to said purchaser in accordance with the provisions thereof. * * *" Immediately thereafter was a line provided for the signature of the owner.

On May 17, 1923, the plaintiffs by letter notified the defendant that they had sold the property to Mr. Steinberg "in accordance with the terms of the agency contract." On the same day the agent of the plaintiffs exhibited to the defendant the "Sales Deposit Receipt" and requested him to sign it on the line provided for the signature of the owner. The defendant refused to sign the contract on the ground that the terms embodied therein did not comply with the terms of the "Exclusive Agency Contract" theretofore signed by him. His refusal to accept or sign the contract was confirmed by him by letter dated May 19, 1923, on the ground that said contract did not comply with the requirements of the listing contract. Again on May 28 the defendant notified Steinberg that the "Sales Deposit Receipt" did not comply with the terms of the contract signed by the defendant and that particulars wherein it did not comply would be received from the defendant's attorney, whose name and adress were given.

Thereafter and on May 24, 1923, the plaintiffs brought this action against the defendant for $2,000 commission. On July 9, 1923, Steinberg brought an action against the defendant for $10,000 damages for breach of contract to sell and convey the property. After issue joined, the causes came on for trial at the same time. Counsel for the parties were the same in both cases. It was stipulated that both causes should be tried together and that all evidence received should be considered as received in either or both where material or relevant to the issues involved therein. Evidence was produced on behalf of the plaintiffs. When the plaintiffs in both cases had rested counsel for the defendant in the present case moved for a nonsuit on the ground that the plaintiffs had failed to prove their case. A ruling on the motion was reserved by the court. Thereafter further evidence was produced both on behalf of the plaintiffs and the defendant. Whereupon the defendant renewed his motion for a nonsuit in the present cause and also moved the court for a nonsuit in the Steinberg Case. The court denied the motion in the Steinberg Case. Findings of fact and conclusions of law and judgment for the defendant were signed and filed in that case. The motion for a nonsuit in the present case was granted. Appeals were taken by the plaintiffs in both cases. In the Steinberg Case, the court found that the terms of the contract known as the "Sales Deposit Receipt" signed by the Andrews Company were not in compliance with the terms of the contract called the "Exclusive Agency Contract," and further found on sufficient evidence as to the value of the property that Steinberg had not been damaged by the defendant's alleged breach of contract, and further found that the defendant was not guilty of bad faith in the transaction. On appeal, the judgment in the Steinberg Case was affirmed on the ground that the finding of the court with reference to the value of the property and consequent failure to prove damage was sustained by the evidence. Steinberg v. Waldo (Cal. App.) 265 P 536. Concurrently the District Court of Appeal (265 P. 532) reversed the judgment in the present case on the ground that the terms of the "Sales Deposit Receipt" were in compliance with the terms of the "Exclusive Agency Contract"; that under the evidence on behalf of the plaintiff in the present case, the defendant was guilty of bad faith in refusing to conclude the transaction, and directed the trial court on the record presented on appeal to prepare findings in favor of the plaintiff in accordance with the views expressed by the District Court of Appeal and to enter judgment in favor of the plaintiff for the sum prayed for, with interest from May 17, 1923, and costs, referring in its action to the authority granted to courts on appeal by section 956a of the Code of Civil Procedure, as added by St. 1927, p. 583.

[1] We think the motion for a nonsuit was properly granted. The contract signed by the defendant was a definite offer in writing to sell the property and authorizing the plaintiffs to enter into a binding contract of sale with a purchaser in the name of the defendant. There was much evidence on the part of the plaintiffs as to custom and usage in real estate transactions, and it was endeavored to prove that the terms of the "Sales Deposit Receipt" not found in the "Exclusive Agency Contract" were in accordance with such usage and custom. But in this respect the proof failed of its purpose in at least two respects: First, the evidence showed that it was customary to cause a mortgage such as the one here to be executed to secure the balance of the purchase price to run for a full period of three years and that the definiteness of the period operated to the benefit of the mortgagee in the salability of the note and mortgage. By the terms of the "Sales Deposit Receipt," the term of the note and mortgage to be executed by Steinberg was to be "on or before three years" from their date. Secondly, the contract signed by the defendant specified payment of "$30,000 cash." The contract signed by Steinberg as the proposed purchaser was intended by its terms to give him 30 days from and after notice from the defendant of the latter's ability and readiness to convey the property by delivery of a deed and certificate of title. In other words, Steinberg was to have 30 days after notice from the defendant that the escrow was ready to be closed within which to make the cash payment. There was no evidence that it was

customary to allow the purchaser 30 days after notice from the owner that the escrow was ready to be closed to put up the cash payment. The defendant testified, when called as a witness by the plaintiffs under section 2055 of the Code of Civil Procedure, that the provision of the "Sales Deposit Receipt" delaying the cash payment was the principal reason why he refused to sign that document. Steinberg did not offer to make the cash payment except as specified in the "Sales Deposit Receipt" until many days after the time limit fixed by the "Exclusive Agency Contract" had expired. The reasons advanced by the defendant at the time for his refusal to sign the "Sales Deposit Receipt" were sufficient, we think, to justify the conclusion that he was acting in good faith in the matter and to negative any inference of bad faith which might arise from the evidence on behalf of the plaintiff or from the evidence as a whole.

[2] Further, the "Sales Deposit Receipt" was not, and did not purport on its face to be, an acceptance of the written offer of the defendant as embodied in the "Exclusive Agency Contract." Nor did it purport to be a contract executed by the plaintiffs under their power of attorney and binding on the defendant. In effect it constituted a counter proposition which by its terms was to be agreed to and be signed by the defendant before it should become operative.

[3] When the trial court granted the motion for a nonsuit in the present case, it also granted the motion of defendant's counsel to strike from the record certain evidence relating to custom and usage as to the terms of real estate sales contracts. This ruling is assigned as reversible error. It may not be disputed that parties who contract as to a subject-matter concerning which known usages prevail incorporate such usages into their agreements by implication. Luckehe v. First National Bank of Marysville, 193 Cal. 184, 223 P. 547; Brown v. Central Land Co., 42 Cal. 257, 260; 25 Cal. Jur. p. 420. But by express Code provision stipulations which are necessary to make a contract conformable to usage are implied only in respect to matters concerning which the contract manifests no contrary intention. Section 1655, Civ. Code. In other words, where the known usage and the contract are in conflict the contract prevails. The court was in error in striking out all evidence of usage as to matters not covered by the written contract, but the error will not justify a reversal of the judgment. All of the evidence stricken is in the record before us. If the motion to strike had been denied, the court would have been warranted in granting the motion for a nonsuit by reason of proof of terms in the "Sales Deposit Receipt" which were contrary to usage and because of failure of proof justifying the inclusion in said contract of the provision with reference to the delay in the cash payment.

From a careful examination of the record we are satisfied that the plaintiffs failed to prove that they provided a purchaser ready able, and willing to purchase the property within the time and upon the terms specified by the defendant in his written contract.

After the hearing was granted in this court briefs were filed by the respective parties especially bearing upon the scope and effect of section 956a of the Code of Civil Procedure as amended in 1927. This discussion became pertinent because of the conclusion expressed by the District Court of Appeal, with reference to the facts found on the trial, reversing the judgment and directing the trial court to make findings in accordance with the facts found by the District Court of Appeal and to enter judgment for the plaintiffs on such findings.

Our determination of the appeal removes from the case the question of the power of the court on appeal under section 956a of the Code of Civil Procedure.

The judgment is affirmed.

We concur: WASTE, C. J.; RICHARDS, J.; SEAWELL, J.; CURTIS, J.; TYLER, Justice pro tem.; PRESTON, J.

---

205 Cal. 730

VINCENT v. BERRY et al. (Sac. 4081.)

Supreme Court of California. Dec. 15, 1928.

1. Waters and water courses ⚿152(11)—Judgment precluding taking of water from streams emptying into "or feeding" stream held objectionable, in view of stipulation.

In action to establish prescriptive rights to water, where stipulation provided that defendants should not take water from named creek or any water course emptying into it, judgment restraining defendants from taking water from any water course emptying into "or feeding" the named creek *held* improper as to defendant whom it was not intended to prevent from taking subsurface or percolating waters.

2. Waters and water courses ⚿152(11)—Judgment restraining defendant from using water, except on land specified, when stipulation permitted use on his lands or elsewhere, should have been made more certain.

Where, in action to establish prescriptive rights to water, stipulation provided that particular defendant might use water on his land or elsewhere, and judgment so provided, but also restrained defendants from using water on real property other than that specified, it should have been more certain as to such defendant's right to use the water elsewhere than on his own land.

Department 1.

Appeal from Superior Court, Tulare County; J. A. Allen, Judge.

Action by H. C. Vincent against Mrs. Belle Berry and others. From a judgment for plaintiff, defendant A. E. Stegeman and others appeal. Judgment modified as against named defendant, and appeals of other defendants dismissed.

Siemon & Garber, of Bakersfield, for appellants.

Guy Knupp, of Porterville, Power & McFadzean, of Visalia, and C. L. Claflin, of Bakersfield, for respondent.

PRESTON, J. Plaintiff brought this action to establish his prescriptive rights to the use for nonriparian purposes of a certain quantity of the waters of Poso creek, Tulare county, and he named as defendants some 20 or more persons who either owned riparian lands or claimed as appropriators, both above and below his property. A number of the defendants defaulted. The rights of all parties who appeared were finally fixed and determined by a written stipulation filed in the action. Judgment was entered either pursuant to such defaults or to the terms of the stipulation, and, as far as the appealing defendants are concerned, respondent concedes that said judgment must find its support solely in said stipulation of the parties. Three of the four appealing defendants have failed to urge their claims, as they concede that as to them the judgment has sufficient support in said stipulation. Hence there is here before us only the contention of appellant Stegeman that as to him certain provisions of the judgment are broader and more extensive than the terms of the stipulation, and consequently the judgment should be modified to conform to the provisions of the stipulation. The parties do not differ as to the intent and purport of the stipulation as to appellant, but they differ only on the question as to whether the judgment faithfully follows the agreement of the parties.

[1] First, appellant complains that whereas the stipulation provides: "None of said defendants * * * shall * * * take from said Posey Creek, or from any branch thereof, or from any creek, spring, or natural water course emptying in said Posey Creek, any amount of water in excess of the quantities hereinbefore specified * * *," the judgment prohibits and restrains him from so taking water from any creek, spring, or natural water course emptying into or feeding said Poso creek. In other words, in the judgment appear the words "or feeding," which are not contained in the stipulation. Appellant fears that this clause in the judgment might be so construed as to deprive him of the right to use any subsurface or percolating waters which find their way into Poso creek or its tributaries. Respondent concedes that no such restraint was intended by the prohibition placed upon diversion from said creek, and submits that the judgment would not support such a construction of the clause. That is, respondent claims that the words "emptying into" and "feeding" are synonymous as used in the judgment, and the addition of the word "feeding" adds nothing to its injunctive force, nor does it in any way extend its terms or make it more inclusive or burdensome than the stipulation. But we think appellant's fears under this situation may be well founded, for other defendants specially surrendered their rights to claim subterranean and percolating waters in said watershed of Poso creek, and, in defining such surrender, these underground waters were referred to as waters "feeding" said stream.

[2] Secondly, appellant complains that, whereas the stipulation permits use of the water on the land of appellant, or "elsewhere," the judgment contains two clauses restraining him from using the water for any purpose or upon any real property other than that therein specified, thus prohibiting him from changing the place of use of said water. Respondent here likewise concedes that there was no intention of the parties that appellant should be limited in the place of use of said diverted water, and denies that the judgment could be so construed, as the provisions complained of contain the qualifying clauses "other than herein provided" and "other than the use herein specified," and it is therein specified that appellant may use the water upon the said real property, or elsewhere, even though other of the defendants are limited in their use to certain described parcels of land. We can see little reason for confusion on this score, as the judgment follows the stipulation. But no reason exists for not making the meaning doubly certain.

The two following provisions are therefore subjoined to the last paragraph of said judgment, and are hereby made a part thereof and a limitation thereon, to wit: "Provided, that as to the defendant, A. E. Stegeman, his heirs, successors and assigns, nothing herein shall be construed to restrict or curtail any right or claim he may or might otherwise have as the proprietor of the land herein described in or to the underground or percolating waters which drain into said Poso Creek or into any of its branches or tributaries; provided, also, that nothing herein shall be construed to restrict any right the said defendant may or might have to change the place or method of diversion or the place or manner of use of said waters decreed him in as full and ample a manner as any prescriptive owner thereof might lawfully do."

The appeals of defendants A. E. Guhl, J. F. Burton, and Anna M. Burton are hereby dismissed.

The judgment as modified is affirmed, appellant to recover costs.

We concur: CURTIS, J.; SEAWELL, J.

206 Cal. 3

HESTER v. O'DARA. (L. A. 9201.)

Supreme Court of California. Dec. 21, 1928.

Costs ⚷260(4)—Appeal from $26 judgment for trespass in removing garden plants and digging sewer trench held spite appeal, warranting $100 penalty.

Appeal from judgment awarding $26 damages, for trespass in removing garden plants from, and digging sewer trench across, plaintiff's land, *held* so evidently a spite appeal as to warrant imposition of $100 penalty, in view of amount involved and sufficiency of evidence quoted in appellant's brief to justify court's findings as to value of plants and damage by digging of trench.

In Bank.

Appeal from Superior Court, Los Angeles County; J. P. Wood, Judge.

Action by Charles W. Hester against Mary O'Keefe O'Dara. Judgment for plaintiff, and defendant appeals. Affirmed.

Chas. R. McCarty and Frank C. Scherrer, both of Los Angeles, for appellant.

Hugh E. Macbeth, of Los Angeles, for respondent.

PER CURIAM. This appeal was submitted upon an order to show cause, the respondent having presented and filed no brief. The action was one for damages for trespass, based upon two causes of action set forth in the plaintiff's amended complaint. By the first cause of action the plaintiff complained of a trespass on the part of the defendant upon property of which the plaintiff was in peaceable possession, consisting in the invasion of said premises by the defendant and the taking up and removal of certain garden plants therefrom, to the damage of the plaintiff in the sum of $500. The other count alleged a like invasion of said premises upon a different date, resulting in the digging of a hole or trench for sewer pipe across the same, without the consent of plaintiff and to his damage in the sum of $500. The answer of the defendant consisted in a denial of the foregoing averments of the complaint. The trial court found in favor of the plaintiff upon the first cause of action, but found that his damage amounted to but the sum of $25. Upon the other cause of action the trial court also found in plaintiff's favor, but assessed the damage at $1. From the judgment for these two amounts, the defendant has prosecuted this appeal. The sole question presented is as to the insufficiency of the evidence to support the foregoing findings of the trial court. The whole burden of the appellant's contention seems to be that there was no sufficient evidence of the value of the plants destroyed. The evidence which the appellant quotes in her brief sufficiently negatives this contention, and also sufficiently negatives the appellant's contention as to the insufficiency of the evidence to justify the findings of the trial court as to the plaintiff's damage in the sum of $1, caused by the digging of the sewer hole. This appeal, in view of the total amount involved therein is so evidently a spite appeal, resulting from a neighborhood quarrel, that it should be penalized, and all other similar appeals discouraged, as frivolous and entirely lacking in substantial merit.

The judgment herein is affirmed, and a penalty of $100 is imposed upon the appellant for taking and prosecuting a frivolous appeal.

---

206 Cal. 4

RAWSON v. J. C. FORKNER FIG GARDENS, Inc. (L. A. 9626.)

Supreme Court of California. Dec. 21, 1928.

1. Venue ⚷7—As regards venue, contract was made where last act required for completion of execution was performed (Const. art. 12, § 16).

As regards venue of suit on contract under Const. art. 12, § 16, contract must be held to have been made where last act required for completion of its execution was performed.

2. Venue ⚷7—Where contract sued on was made and was to be performed in F. county and defendant corporation was located there, defendant could have venue changed to F. county (Const. art. 12, § 16).

Where last act required for completion of execution of contract was performed in F. county and contract was by its terms to be performed in F. county, and it was in that county where its obligation or liability arose and where its breach occurred, and defendant corporation's present place of business was located in F. county, but plaintiff commenced action on contract in L. county, defendant was entitled to change of venue to F. county, under Const. art. 12, § 16.

In Bank.

Appeal from Superior Court, Los Angeles County; William C. Doran, Judge.

Action to recover broker's commission on sale of real property by W. D. Rawson against J. C. Forkner Fig Gardens, Inc. From an order denying a motion for a change of venue, defendant appeals. Reversed.

Hill, Morgan & Bledsoe, and A. S. Montague, all of Los Angeles, for appellant.

Fred Mansur, of Los Angeles, for respondent.

PER CURIAM. This appeal was submitted upon an order to show cause; the respondent having failed to present or file a brief herein. The order appealed from was an order denying a motion for change of place of trial from the county of Los Angeles to the county of Fresno; the motion therefor having been based upon the ground that the action had been commenced in the wrong county and having been duly made at the time of the presentation and filing of the defendant's demurrer. The action was one for money claimed to be due from the defendant corporation to plaintiff as commissions for the sale of certain real property under a written contract executed between the parties to this action, a copy of which contract was attached to the complaint. The property in question was located in the county of Fresno. The principal place of business of the defendant corporation was in the county of Fresno. The contract in question related to services to be performed by the plaintiff in the county of Fresno, and when the same was to be executed it was signed by the president of the defendant corporation and also by the plaintiff in the city of Los Angeles, and was thereupon delivered to a bank in Los Angeles for transmission to a branch of said bank in the city of Fresno for the purpose of having said contract further executed, as required by the by-laws of said corporation through the attestation thereof by the secretary of said corporation and the affixing of the corporate seal. These latter acts, completing the execution of the contract, were performed in the city of Fresno and at the office and principal place of business of said corporation located therein. The provisions of the contract not having been performed, according to the averments of the plaintiff's complaint, he commenced this action, for the commissions claimed to be due thereon, in the county of Los Angeles; whereupon the defendant duly moved for a change of place of trial to the county of its residence, and it is from the denial of said motion that this appeal is taken.

[1, 2] The law with relation to the place of trial of actions of this character, wherein a corporation or association is made defendant, is set forth in section 16 of article 12 of the state Constitution, which declares that "a corporation or association may be sued in the county where the contract is made or is to be performed, or where the obligation or liability arises or the breach occurs; or in the county where the principal place of business of such corporation is situated, subject to the power of the court to change the place of trial as in other cases." The contract in question must be held to have been made where the last act required for the completion of its execution was performed. Hammond v. Ocean Shore Development Co., 22 Cal. App. 167, 133 P. 978; Fitzhugh v. University Realty Co., 46 Cal. App. 198, 188 P. 1023. This, as we have seen, was in the county of Fresno. The contract was, by its terms, to be performed in the county of Fresno, and it was in that county also where its obligation or liability arose and where its breach occurred. The principal place of business of the defendant corporation was also located in the county of Fresno and not elsewhere. It thus appears that every condition set forth in the foregoing provisions of the Constitution was complied with in so far as these related to the commencement of an action of this character against a corporation. The defendant was thus entitled upon the face of his motion and demand therefor to a change of place of trial to the county of Fresno, and the trial court was in error in its denial of the defendant's motion for such change of venue.

The order is reversed.

---

206 Cal. 20

MONTGOMERY v. BECK et al. (L. A. 10047.)

Supreme Court of California. Dec. 24, 1928.

1. Quieting title ⚷30(1)—Default of named defendant does not bar intervention, in action to quiet title, by one claiming title adverse to all parties.

One claiming title adverse to both plaintiff and defendants, in action to quiet title, cannot be deprived of right to intervene by default of one or all of named defendants.

2. Quieting title ⚷30(1)—Denial of leave to intervene in action to quiet title, after permitting amended cross-complaint setting forth judgment against defaulting defendant, held reversible error.

Where trial court granted applicant, for leave to intervene in action to quiet title, leave to present amended cross-complaint definitely setting forth, as basis of right to intervene, judgment against defaulting defendant decreeing applicant to be owner of premises, and plaintiff presented no objection to form or sufficiency of such amended pleading, trial court's denial of application was abuse of discretion requiring reversal.

In Bank.

Appeal from Superior Court, Los Angeles County; Edwin F. Hahn, Judge.

Action by Ernest Montgomery against S. Beck and others, in which W. D. Ashbaugh applied for leave to intervene. From an order denying the application, the applicant appeals. Reversed.

Winslow P. Hyatt, of Los Angeles, for appellant.

J. Everett Brown, of Los Angeles, for respondent.

PER CURIAM. This appeal was submitted upon an order to show cause, the respondent having presented and filed no brief herein. This action was one to quiet title to certain real property. One of the defendants named therein was the Los Angeles Realty Syndicate, a defunct corporation, jurisdiction over which was obtained by service of process upon one of the former directors and then existing trustees thereof. The trustees were not made parties to said action, and they permitted said defunct corporation to be in default, and the default thereof upon the proof of such service was entered in the action. Thereafter the appellant W. D. Ashbaugh made application for leave to intervene in the action, alleging himself to be the owner of the premises in question as the successor in interest of said defunct corporation, and in his amended complaint, in support of his application, he set forth the foundation of his title and ownership of said premises as consisting in a judgment obtained by him against said Los Angeles Realty Syndicate prior to the institution of the present action, decreeing him to be the owner of said premises.

[1] The plaintiff's opposition to said application for intervention was twofold, consisting, first, in the contention that the default of said defunct corporation, having been duly entered before the making of said application for leave to intervene constituted a sufficient ground for the denial of the same. There is no merit in this contention. An intervener claiming title to property adverse to both the plaintiff and the defendant named in an action to quiet title cannot be prevented, as to his right, to intervene therein by the fact that one or all of the named defendants may have suffered a default. Morgan v. Bonynge, 157 Cal. 295, 107 P. 312; Townsend v. Driver, 5 Cal. App. 581, 90 P. 1071.

[2] The second ground of opposition to the appellant's asserted right to intervene was based upon certain affidavits filed in opposition thereto, based upon the rather insufficient averments of the applicant's original cross-complaint in intervention. Upon the presentation thereof, however, the trial court granted the said applicant leave to present an amended complaint, which definitely set forth, as the basis of his right to intervene, the judgment obtained by him against the Los Angeles Realty Syndicate prior to the institution of the present action, decreeing him, as against said defunct corporation, to be the owner of the premises in question. No objection having been presented by the plaintiff as to the form or sufficiency of said amended complaint in intervention, it is apparent that it sufficiently stated such an adverse interest in, and ownership of, the premises as should have entitled the applicant to an order permitting him to intervene in this action, and the denial by the trial court of his right so to do must be held to be such an abuse of discretion as will compel a reversal of its order made herein in so far as the same purported to deny to the appellant leave to file his answer and cross-complaint in intervention. It is not necessary to consider that portion of said order which consisted in a denial of the application for an order setting aside the default of the Los Angeles Realty Syndicate, since, irrespective of the entry of such default, the applicant had, as we have seen, a right as an adverse claimant of said premises to appear and intervene herein.

The order is reversed.

---

206 Cal. 15

HESS et al. v. SAUSSER et al. (L. A. 10060.)

Supreme Court of California. Dec. 22, 1928.

1. Landlord and tenant ⚷184(1)—Assignees of lease on building, furnishings of which were mortgaged to secure rent, could not avoid foreclosure on ground original lease was not transferred.

In suit against assignees of lease for foreclosure of mortgage given on furnishings for purpose of securing rent, defendants who received assignment of lease under separate instrument *held* not entitled to avoid foreclosure, though assignment was accomplished without delivery of original lease.

2. Pleading ⚷126—Denial in pleading that notice was served on particular day admits service upon any other day which would allow sufficient time.

Mere denial in pleading that notice was served on particular day amounts to an admission of service upon any other day which would allow a sufficient time for compliance with its terms.

3. Landlord and tenant ⚷184(1)—That assignee of lease did not remember receiving notice of default held insufficient proof of denial of receipt thereof, in suit to foreclose mortgage for rent.

Evidence that assignee of lease did not remember receiving notice of default in payment of rent *held* not to constitute sufficient denial of receipt of notice, in suit by lessor to foreclose chattel mortgage on furnishings, which was given as security for rent.

In Bank.

Appeal from Superior Court, Los Angeles County; Stanley Murray, Judge.

Action by Elizabeth Hess and another against A. F. Sausser, Hal Sausser, and others. Judgment for plaintiff, and defendants named appeal. Affirmed.

Chas. H. Adkins, of Los Angeles, for appellants.

Chas. G. Young and William Gilroy, both of Los Angeles, for respondents.

PER CURIAM. This appeal was submitted upon an order to show cause, the respondents having presented and filed no brief herein. The action was one to foreclose a chattel mortgage upon certain furnishings of an apartment house building which had been leased by plaintiffs to certain lessees named Brown, who had executed a chattel mortgage to secure the payment of rent. The Browns sold the furnishings and assigned their interest in the lease to one Mrs. Hennessey, who in turn sold the furnishings and assigned her interest in the lease to Mrs. Aspinwall, but did not deliver the original lease to her for the reason that it had been pledged by Mrs. Hennessey as collateral security for the payment of a note. Mrs. Aspinwall sold the furnishings and executed an assignment of the lease to the defendants and appellants herein, but also did not deliver the original lease for the reason above stated. The defendants and appellants took possession of the property and held the same up to the time of the commencement of this action, and it is admitted that at the time of the institution thereof the defendants and appellants were in default in the payment of rent in the sum of $2,350. They filed an answer containing certain denials, and the cause came on for trial upon March 11, 1927, when judgment was rendered for plaintiffs and against the appellants for the aforesaid amount of overdue rent and for the foreclosure of the mortgage; whereupon the defendants Sausser appealed from such judgment.

The first point made by the appellants is that their demurrer to the complaint should have been sustained for the reason that the complaint failed to set forth the terms and conditions of the chattel mortgage or the substance thereof. The complaint does not contain the chattel mortgage in full, but refers to the record thereof for a full statement of its terms. The complaint purports to set forth sufficient of the terms and conditions of the chattel mortgage to support an action for the foreclosure thereof, and we are satisfied that it does so sufficiently to avoid a demurrer.

[1] The second contention of the appellants is that the original lease, though admittedly assigned to the appellants by a separate instrument, was not delivered to them, and that for that reason they were not liable for the terms and penalties thereof, which provide for a foreclosure of said chattel mortgage on default in the payment of rent. There is no merit in this contention, nor do the authorities which are cited by the appellants in any degree sustain it. Admittedly, the assignment of said lease was delivered to the appellants, and this would suffice for a transfer of whatever interest in the original lease was covered by the assignment, without the delivery of the original document.

[2, 3] The third and final contention of the appellants is that the plaintiffs failed to sufficiently prove the service of a sufficient notice to pay rent in order to place them in such default as would entitle the plaintiffs to a foreclosure of their mortgage. There is no merit in this contention for two reasons: First, that the answer of the defendants to the averments of the complaint alleging the service of such notice constitutes on its face an insufficient denial thereof, since a mere denial that a notice was served upon a particular day amounts to the admission of its service upon any other day which would allow a sufficiency of time for their failure to comply with its terms; and the second reason is that the evidence offered on the part of the appellants fails to constitute a sufficient denial of the receipt of such notice, the testimony of the appellant Sausser amounting to no more than a statement that he did not remember receiving the written notice, a copy of which was exhibited to him. We therefore find no merit in the several contentions of the appellants upon this appeal.

The judgment is affirmed.

---

205 Cal. 757

In re KELLEHER'S ESTATE.

POMEROY v. McAULIFFE et al.

(S. F. 12846.)

Supreme Court of California. Dec. 20, 1928.

1. Wills 🔑671—Provision of will giving executors equal shares in residue of estate "for carrying out bequests" held to mean as remuneration for services and not in trust.

Provision of will giving to executors thereof equal shares in residue of the estate "for carrying out of the foregoing bequests" *held* to mean as remuneration for carrying out the directions contained in the other portions of the will, and not to create a trust to pay legacies, debts, and expenses.

2. Wills 🔑523, 862—Bequests to executors given equal share in residue of estate held not to class, and, one executor dying before testator, half of residue was intestate.

One of executors, who was given equal share in residue of estate by testator's will, having died before testator did, *held* that, the bequest not being to executors as a class, the testator died intestate as to one-half the residue of the estate, so that testator's next of kin were entitled thereto.

3. Executors and administrators 🔑271—Debts and expenses of administration held properly charged to intestate half of residue.

Debts and expenses of administration of estate *held* properly charged to intestate one-half of the residue of the estate.

4. Wills 🔑858(1)—Lapsed legacies fell into residue; bequest to executors of residue of estate not being circumscribed or limited to definite amount.

Though testator listed in his will all of the property he then owned and gave to executors residue for services rendered under the will, *held* that certain lapsed legacies fell into residue; bequest of residue to executors not being circumscribed by clear expressions in the instrument limiting legacies to executors to certain amounts.

5. Executors and administrators 🔑292—Executor given half of residue of estate for services need not complete administration before asking for partial distribution of property to him (Code Civ. Proc. § 1616).

Where executors were given the residue of the estate for their services after payment of certain bequests, executor administering the estate after the death of other executor *held* not required to complete administration before asking for partial distribution of property to him, since, under Code Civ. Proc. § 1616, it is provided that partial allowance may be made on account of statutory fees of an executor; fact that fees were fixed by will itself making no difference.

6. Executors and administrators 🔑111(1)—Fees for attorneys' services in administration of estate, not being personal charge against executor, are payable like other administration expenses.

Fees for attorneys' services being a proper expense of administration of the estate are payable like the other expenses of administration, and are not a personal charge against executor.

In Bank.

Appeals from Superior Court, City and County of San Francisco; Frank H. Dunne, Judge.

Petition by Richard T. Pomeroy, individually, and as executor of the will of Mathew Kelleher, deceased, for a partial distribution of the estate, opposed by Nano Dennehy McAuliffe and others. Order granting the petition in part, and all parties appeal. Affirmed.

See, also, 259 P. 437, 54 A. L. R. 913.

George E. Stoker and McNair & Stoker, all of San Francisco, for appellant Pomeroy.

Livingston & Livingston, John C. Quinlan, and Coffey & Coffey, all of San Francisco, (Mathew Tobriner, of San Francisco, of counsel), for respondent and heirs at law.

LANGDON, J. This is an appeal from an order granting in part, the petition of Richard T. Pomeroy, individually and as executor of the will of Mathew Kelleher, deceased, for partial distribution of said estate. Said petition was opposed by certain persons claiming to be the next of kin and heirs at law of said decedent.

All parties, the petitioner and the various persons who opposed his petition, have appealed from said order. They have stipulated that their appeals may be consolidated and heard upon one record.

[1] The main controversy centers about the construction to be placed upon the following residuary clause of the will of deceased: "I appoint as my executors Richard T. Pomeroy Millstreet Co Cork and William Reardon Millstreet Co Cork and I give them in equal shares the residue of my property for the carrying out of the foregoing bequests."

William Reardon, one of the executors named, predeceased the testator. Richard T. Pomeroy, the other executor named, came to San Francisco from Ireland to have the will admitted to probate and to procure his appointment as executor thereof. The will was admitted to probate, and Mr. Pomeroy was appointed executor and qualified as such on September 26, 1921.

By the aforesaid decree of partial distribution, the probate court construed the above-quoted residuary clause to mean that decedent gave the residue of his property to the named executors as a recompense for their services in acting as executors. This construction was in accord with the contention of petitioner, Pomeroy. The next of kin have appealed from this part of the decree; their contention being that decedent intended by said clause to give the residue of his property to his executors in trust to pay legacies, debts, and expenses of administration.

In its construction of the residuary clause, we are in accord with the trial court. We think that, when the will, as a whole, is considered, it is clear that the phrase, "for the carrying out of the foregoing bequests," means as a remuneration for carrying out the directions contained in the other portions of the will. The testator did not give the entire estate to the executors "for carrying out the foregoing bequests," but he gave them only the residue after provision had been made out of his property for certain specific legacies, monuments, etc. The contention of the heirs implies that the will made a double provision for the payments of the legacies and other expenses directed to be incurred by the executors—one in the specific clauses pertaining to these matters and the other in the residuary clause.

[2] By its decree, the probate court also held that, by reason of the death, prior to the death of decedent, of the named executor William Reardon, decedent died intestate as to an undivided one-half of the residue of his estate, that decedent's next of kin were entitled to take such intestate half, and that petitioner Pomeroy was entitled to take the remaining half as compensation for his services as executor.

In so holding, the probate court accepted the contention of the next of kin. Petitioner, Pomeroy, has appealed from this part of the decree, his contention being that the residuary bequest was a gift to a class, to two persons jointly, as compensation for their services in performing the duties of an office which was necessarily joint; that he is the survivor of that class and alone has performed the duties and therefore is entitled to the entire residue. In this holding we are also in accord with the ruling of the probate court. The question involved seems to be governed by the rule announced in Estate of Murphy, 157 Cal. 63, 106 P. 230, 137 Am. St. Rep. 110. In that case the court construed the following residuary clause in a will: "All the rest of my property * * * shall go to, and be equally divided among the four children of my late sister * * * that is to say: I give, devise and bequeath all the rest of my * * * property * * * share and share alike, to Timothy J. Flynn, William D. Flynn, Mary Jane Logan and Kate I. Prendergast." In that case, as in the instant case, the residue was to persons in a designated class, but the persons were specifically named. The court there said:

"As to a gift to a class the rule is stated as follows: 'In legal contemplation a gift to a class is a gift of an aggregate sum to a body of persons uncertain in number at the time of the gift, to be ascertained at a future time, who are all to take in equal or some other definite proportions, the share of each being dependent for its amount upon the ultimate number.'"

"Tested under this rule there is nothing in the devise which would indicate that the intention of the testator was that the devisees should take as a class, or in any other way than as individuals, and under our code provision as tenants in common. There is nothing on the face of the devise indicating any uncertainty in the number of persons who were to take the property, or that they were to be ascertained at a future time, or that the share of the residuary estate which the devisees were ultimately to have was to be determined as to the amount by the number of those who would survive the testator. All the persons who are to take were specifically named and the share of each was designated. * * * It is true that the testator uses language in the clause of his will which would, if it stood alone, amount to a devise to a class. This would be the result if the devise had been to 'the four children of my late sister Catherine' without further words. But here the terms of the bequest—the designation of the number of the children, followed by a repeated and express devise to them by name and in an equal share, cannot be ignored so as to make the other words in the will constitute a class."

[3] The probate court further held, by its decree, that all debts of decedent and all expenses of administration of his estate should be charged against the intestate half of the residue, giving to the executor his one-half undiminished by any debts or expenses. The next of kin have appealed from this part of the decree.

While the rule would seem to be otherwise in many jurisdictions, in California, because of certain statutory provisions, it has been held, in Estate of Hall, 183 Cal. 61, 190 P. 364, that it is not necessary to deduct the charges against the estate before the residue is ascertainable, and that portions of the residue undisposed of by the will must be used for the payment of charges before resort may be had to the residuary legacies effectually devised or bequeathed.

[4] It is also contended by the next of kin that certain lapsed legacies do not fall into the residue of the estate in this case, contrary to the usual rule, because of the peculiar language of the will. It is argued that, because the testator listed in his will everything he then owned, that his act in listing his assets indicates he had a specific fund in mind which he intended for his residuary legatees, and consequently such fund could not be augmented by lapsed legacies. We cannot agree with this contention. The rule is stated in the Estate of Upham, 127 Cal. 90, 59 P. 315:

"Where the residuary bequest is not circumscribed by clear expressions in the instrument, and the title of the residuary legatee is not narrowed by special words of unmistakable import, he will take whatever may fall into the residue, whether by lapse, invalid disposition, or other reason." In O'Connor v. Murphy, 147 Cal. 148, 81 P. 406, the matter was discussed in the following language:

"It is not enough that it appears from a clause of the will, simply that the testator intended to make a particular devise of a portion of his estate which, however, for some reason, failed to be effectual; because, if that were the rule, it would apply to every lapsed or invalid bequest, and the residuary clause could never be effectual to carry it.

"On the contrary, it must appear unequivocally that it was the intention of the testator, not only to make a particular devise, but it must further appear from the terms of such devise, or from other provisions of the will, that it was the intention of the testator, that the residuary clause should not in any event carry such bequest should it become inoperative for any reason. The intention to include all ineffectual bequests in the residuary clause is presumed; the intention to exclude must appear from appropriate language evidencing that intention, or by clear implication."

[5, 6] There is only one other question involved upon the appeals, and that is the contention of the next of kin that petitioner, Pomeroy, should have completed his administration of the estate before asking for a distribution of any of the property to himself. It is contended that, if the residuary bequest be considered as compensatory, it presupposes a complete performance of the duties of the executor. We think the contention untenable. The facts of this case present an unusual

situation. None of the next of kin, appealing here, are close relatives of the testator. He apparently left neither mother or father, brother or sister, uncle or aunt, or first cousin. The only bequest in the will to any one within any of these classes lapsed because of the death of the legatee before the death of the testator. When petitioner, Pomeroy, arrived in San Francisco to probate the will, he found that the property of decedent had been transferred to a third person shortly before the testator's death under a trust instrument, and protracted litigation resulted to recover the property for the estate upon the theory that it had been transferred at a time when decedent was of unsound mind. The litigation was carried to this court upon appeal, and the decision thereof appears in Pomeroy v. Collins, 198 Cal. 46, 243 P. 657. Incidentally, the executor had to defend another action instituted by one Helen H. Walsh to admit to probate a certain letter as a holographic codicil to the will of decedent. Estate of Kelleher (Cal. Sup.) 259 P. 437, 54 A. L. R. 913. In the meantime, certain proceedings had been commenced to determine heirship, under section 1664, Code of Civil Procedure. That proceeding, although instituted in 1924, was undetermined at the time the appeal herein was taken. It appears that the executor has proceded as far as he may with the probate proceedings, and is delayed indefinitely in the matter of final distribution until the determination of heirship which is necessary for the distribution of the intestate portion of the estate. In the meantime, he has spent many years untangling the various complications growing out of the situation, and it seems but equitable that he should have the benefit of at least a portion of the property to which he is entitled. The trial court reserved out of the share of said executor sufficient property to pay for the services of a possible administrator with the will annexed in the event petitioner should for any reason be unable or unwilling to complete the final steps of the administration of his trust, so no possible injustice can be done to anyone by the present partial distribution. Section 1616, Code of Civil Procedure, provides for partial allowance on account of statutory fees of an executor, and we see no reason for a different rule when the fees are those fixed by the will itself.

The fees for attorney's services, being a proper expense of administration, are payable like the other expenses of administration, and are not a personal charge against the executor.

The order appealed from is affirmed.

We concur: WASTE, C. J.; SEAWELL, J.; RICHARDS, J.; SHENK, J.; CURTIS, J.; PRESTON, J.

---

205 Cal. 715

GRAVES v. ARIZONA CENT. BANK et al.

(Sac. 4141.)

Supreme Court of California. Dec. 14, 1928.

1. Mortgages 🔑593—"Equity of redemption" is interest in realty, subject to ordinary rule of conveyances thereof.

"Equity of redemption" is an interest in real property, and ordinary rule of conveyances of realty applies thereto to same extent as to any other estate.

[Ed. Note.—For other definitions, see Words and Phrases, First, Second, and Third Series, Equity of Redemption.]

2. Mortgages 🔑593—Mortgagor's conveyance of equity of redemption to mortgagee must rest on sufficient consideration.

Conveyance of equity of redemption by mortgagor to mortgagee must rest on sufficient consideration.

3. Frauds, statute of 🔑119(1)—Vendor may be estopped to rely on defense that conveyance by him was not in writing (Statute of Frauds).

Vendor may be estopped by circumstances to rely on defense that conveyance made by him was not in writing, as required by statute of frauds (Civ. Code, § 1624, subd. 5).

4. Mortgages 🔑593—Mortgagee's cancellation of debt and protection of mortgagor from liability for further payments under contract to purchase land held sufficient consideration for oral transfer of equity of redemption.

Mortgagee's cancellation of mortgage debt, protection of mortgagor from liability for further payments under contract to purchase land, and making of numerous payments to vendor, on strength of mortgagor's oral transfer of equity of redemption to mortgagee, constitute sufficient consideration therefor.

5. Mortgages 🔑29—Purchaser's assignment of interest in land as security for loan impressed lien on everything that would have passed by grant of property (Civ. Code, § 2926).

Under Civ. Code, § 2926, purchaser's assignment of interest in land before completion of payments, though intended as security for loan, impressed a lien on everything that would have passed by grant of property.

6. Estoppel 🔑27(1)—Purchaser assigning interest in land as security for loan and orally transferring equity of redemption to assignee, who canceled indebtedness, made payments to vendor, and took possession, held estopped to assert title as against assignee.

Purchaser assigning interest in land as security for loan and subsequently transferring equity of redemption to assignee by oral agreement in consideration of latter canceling indebtedness to him, protecting purchaser from liability for further payments under contract of sale, and making payments to vendor, *held* estopped to assert title, equitable or otherwise, as against assignee, who had more than technical possession of property under such transfer and could compel specific performance of contract or quiet title as against purchaser.

7. Execution 🔑111 — Judgment creditor can reach no interest in land that judgment debtor could not reach (Code Civ. Proc. § 688).

Under Code Civ. Proc. § 688, judgment creditor can reach no interest in land that judgment debtor himself could not reach by appropriate action.

8. Attachment 🔑178—Judgment 🔑780(3)—Neither judgment nor attachment impresses lien on judgment debtor's interest in land under contract to purchase it.

Neither judgment nor attachment sued out in action against judgment debtor impresses any lien on latter's interest in land, if any, under contract to purchase it.

9. Payment 🔑31—Oral agreement that conveyance, in form unconditional, of purchaser's interest in land under sale contract, be considered absolute in lieu of debt to grantee, extinguishes debt.

Oral agreement that conveyance, in form unconditional, of purchaser's interest in land under contract of sale, be considered absolute in lieu of debt to grantee, is extinguishment of debt.

10. Appeal and error 🔑1010(1)—Judgment on court's findings supported by evidence must be affirmed.

Court's findings having proper support in the evidence, judgment thereon must be affirmed.

Department 1.

Appeal from Superior Court, Glenn County; H. S. Gans, Judge.

Action by John H. Graves against the Arizona Central Bank, a corporation, and another. Judgment for plaintiff, and defendants appeal. Affirmed.

George R. Freeman, of Willows, for appellants.

W. T. Belieu, of Willows, for respondent.

PRESTON, J. This is an action to remove a cloud from the title to real property claimed by the plaintiff and to that end to enjoin the defendant bank, as judgment creditor, and the sheriff, respectively, from proceeding with an execution sale of said property upon a judgment obtained by defendant bank against one O. E. Squier. We find no merit in the appeal, and the judgment must be affirmed.

The court was warranted in finding the facts to be substantially as follows: In 1919 the Superior California Farm Lands Company and said Squier entered into a contract of sale and purchase of some 80 acres of land in Glenn county for a consideration of approximately $12,000, to be paid in annual installments. Thereafter, and up to February 16, 1925, said Squier had paid about $4,000 on the purchase price. On said last-mentioned date said Squier borrowed from plaintiff some $1,500 and as security for the loan delivered a written assignment executed by himself and his wife to said plaintiff, which assignment on its face was unconditional and no defeasance was executed by plaintiff. It is admitted, however, by him, that at the time the assignment was so taken and received it was intended to be as security. Thereafter, however, about the month of July, 1925, said Squier, acknowledging his inability to make further payments under said contract or to repay said loan, surrendered his equity of redemption to plaintiff with the intent to give him the full title to his equitable estate therein. This agreement between these parties was oral. Thereafter, however, plaintiff entered into possession of said property and paid on account of said contract to the vendor various sums of money, aggregating some $2,000 or more, and, in addition to that, paid certain taxes, assessments, and water charges in connection with the operation thereof and otherwise acted openly as the owner and possessor of said property. Later, and on January 18, 1927, defendant bank obtained a judgment in the superior court of Glenn county against said Squier for the sum of approximately $1,900. A writ of execution was thereafter sued out, addressed to the sheriff of said county, and on February 9, 1927, after levying same upon the lands here in dispute, an execution sale of said property was noticed. Thereupon plaintiff filed his complaint herein, praying for an injunction restraining said sale upon the ground that he was the owner of said property and that to allow the sale to proceed would be to cloud his title thereto. On trial of the action, the court found plaintiff to be the owner of said property and to have been such on and prior to the levy of said execution, and further found that the existence of such a sale against said property would be a cloud upon the title thereto, and granted the relief prayed for. The propriety of this action on the part of the court below under these circumstances is involved in this appeal.

[1-3] "The only point in this action is as to whether the respondent is a mortgagee, or the absolute owner, of Squier's equitable interest in the property," is appellant's characterization of the sole issue under consideration. It is true that equity of redemption is an interest in real property and that the ordinary rule of conveyances of real property applies to the same extent as to any other estate therein. Bradbury v. Davenport, 114 Cal. 593, 46 P. 1062, 55 Am. St. Rep. 92. It is also well settled that a conveyance of such equity of redemption by the mortgagor to the mortgagee must rest upon sufficient consideration. Bradbury v. Davenport, supra; Phelan v. De Martin, 85 Cal. 365, 24 P. 725. It may also be conceded that the mortgagee is

not the owner of the mortgaged premises and has no title to be clouded by a sale of the mortgagor's interest therein under execution, but these concessions do not determine the question before us. At the same time, it must be admitted that circumstances frequently arise which will estop the vendor to rely upon the defense that the conveyance made by him was not in writing as required by the statute of frauds. Civ. Code, § 1624, subd. 5. This is recognized in the case of Bradbury v. Davenport, supra. It is also recognized in numerous other cases in this state, a few of which are as follows: Brown v. Town of Sebastopol, 153 Cal. 704, 96 P. 363, 19 L. R. A. (N. S.) 178; Pearsall v. Henry, 153 Cal. 314, 95 P. 154, 159; Schubert v. Lowe, 193 Cal. 291, 223 P. 550; Kinsell v. Thomas, 18 Cal. App. 683, 124 P. 220; Rundell v. McDonald, 62 Cal. App. 721, 724, 217 P. 1082.

[4-6] The possession of the property by the respondent under the oral transfer was more than technical, and such cases as Hambey v. Wise, 181 Cal. 286, 184 P. 9, and Wood v. Anderson, 199 Cal. 440, 444, 249 P. 862, are not controlling. Moreover, the claim of estoppel to rely upon the statute of frauds does not rest upon the question of possession alone. The question of consideration for the oral transfer is met by the fact that respondent canceled the indebtedness of Squier to him and also protected him from liability upon the further payments under said contract of sale and purchase, and moreover respondent prejudiced himself by numerous payments to the vendor upon the strength of said oral agreement. The conveyance made by Squier to respondent, although intended as security, impressed a lien upon everything that would have passed by a grant of the property. Civ. Code, § 2926; Commercial Bank v. Pritchard, 126 Cal. 600, 605, 59 P. 130. Sufficient facts therefore appear to estop said Squier from asserting any title to said property, equitable or otherwise, as against the claim of respondent. The respondent could compel a specific performance of the contract under this showing or could in fact quiet his title against Squier.

[7, 8] It is, of course, elementary that appellant can reach no interest in said property that the judgment debtor himself could not reach by appropriate action. Section 688, Code Civ. Proc.; Bank of Ukiah v. Petaluma Savings Bank, 100 Cal. 590, 35 P. 170; Rowley v. Davis, 34 Cal. App. 184, 192, 167 P. 162. Neither the judgment nor the attachment which was sued out in this action impressed any lien upon the interest, if any he had, of the judgment debtor. Belieu v. Power, 54 Cal. App. 244, 201 P. 620; Poindexter v. Los Angeles Stone Co., 60 Cal. App. 686, 214 P. 241.

[9] The contention of appellant that the evidence shows that the mortgage debt was not canceled by respondent creates no more than a conflict at most in the evidence, for it appears that no promissory note was issued and the conveyance, being in form unconditional, an oral agreement that it be considered absolute in lieu of the debt is an extinguishment thereof. Hence the finding of the court in this respect has support in the record.

[10] Inasmuch as the findings made have proper support in the evidence, appellant shows no legal ground upon which to base a complaint against the judgment of the lower court.

Judgment affirmed.

We concur: CURTIS, J.; SEAWELL, J.

95 Cal. App. 586

ROMANO v. SEIBT et ux. (Civ. 5232.)★

District Court of Appeal, First District, Division 1, California. Dec. 19, 1928.

Rehearing Denied Jan. 18, 1929. Hearing Denied by Supreme Court Feb. 14, 1929.

1. Reformation of instruments ⚷32—Contract requiring broker's authorization to be withdrawn in writing might be reformed despite owner's lack of diligence in discovering provision.

Provision inserted in written authorization to sell land by broker, providing that authorization to be ended after 90 days must be withdrawn in writing, which provision was unknown to owner and concealed by broker from the owner, might be reformed to express the true intention of the parties, notwithstanding that owner might have discovered the provision at the time he executed the contract had he exercised higher degree of diligence.

2. Reformation of instruments ⚷25—Mere failure to read instrument with sufficient attention to perceive error or defect will not prevent reformation.

Mere failure of party to read an instrument with sufficient attention to perceive an error or defect in its contents will not prevent its reformation, at the instance of the party executing it thus carelessly.

Appeal from Superior Court, City and County of San Francisco; T. I. Fitzpatrick, Judge.

Action by R. E. Romano against Carl Seibt and wife. Judgment for defendants, and plaintiff appeals. Affirmed.

Albert Picard, of San Francisco, for appellant.

Robert B. Gaylord, of San Francisco, for respondents.

CASHIN, J. An appeal by the plaintiff, a real estate broker, from a judgment entered for the defendants in an action to recover a commission.

Defendant Carl Seibt, on July 6, 1923, executed to the plaintiff an authorization in

---

★Rehearing denied. Hearing denied by Supreme Court.

writing for the sale by the latter of certain real estate situated in San Francisco. The writing provided for the payment of a commission of $400 to the broker in case of sale either by him or by the owner within the period fixed by the authorization. The writing by its terms provided that it should remain in force "irrevocable for ninety days from date hereof and thereafter until withdrawn * * * in writing. * * *" The property was not sold by the plaintiff, nor was a purchaser found by him, but the sale was made by the owner through another broker. While the sale was made after the 90-day period, the claim for commission is based upon the fact that there had been no previous withdrawal in writing of plaintiff's authorization.

[1] As defenses to the action and as grounds for a reformation of the instrument, it was alleged that the wife of defendant Seibt, who was joined as a defendant, neither executed the writing nor authorized its execution by her husband; further, that the agreement between the parties was that the authorization should remain in force for 90 days and no more; that the authorization was drawn by plaintiff, who represented to Seibt that the same contained the above provision; that the instrument was read to said defendant by plaintiff, with the exception of that portion providing that it should remain in force after the 90-day period, that is, until withdrawn in writing; that relying upon the statement of the plaintiff as to its provisions, which he believed to be true, defendant Seibt did not read the writing but signed the same through a mistake as to its contents.

The court found the allegations above to be true; that the writing did not express the true agreement of the parties in so far as it made necessary a notice of termination after the 90-day period, and in that respect should be reformed. Judgment was entered for defendants accordingly.

The findings of the court are fully supported by the evidence, but appellant claims that defendant Seibt was negligent in failing to read the instrument and was not justified in relying upon the plaintiff's statements as to its contents. In support of this contention plaintiff relies upon the following cases, namely: Knox v. Modern, etc., Shop, 68 Cal. App. 583, 229 P. 880, and Kimmell v. Skelly, 130 Cal. 555, 62 P. 1067.

In the first case the trial court found that the parties by mutual agreement rescinded a paragraph of the contract before a sale was made by the owners, which finding was without support. The owners also claimed that they failed to read the contract before it was signed, and were not aware of a clause therein similar to the one in question. There was, however, no concealment or misrepresentation by the broker, and the court held that the owners were negligent in failing to inform themselves of the contents of the writing, and could not avoid liability on the ground that they were mistaken as to its terms.

A similar situation was presented in the second case, where it was held that the party complaining had under the circumstances no right to rely upon the statements of the other parties to the transaction.

[2] But the case at bar differs from the above in that, according to the evidence and findings, the plaintiff not only inserted the clause in question contrary to the agreement of the parties, but concealed the fact that it was contained in the writing. Under such circumstances, the provision might be avoided by the defendant, notwithstanding he might have discovered it at the time the contract was executed had he exercised a higher degree of diligence. Wilson v. Moriarty, 77 Cal. 596, 20 P. 134; Wenzel v. Shulz, 78 Cal. 222, 20 P. 404; Smith v. Occidental, etc., Steamship Co., 99 Cal. 462, 471, 34 P. 84. Moreover, as held in Los Angeles Co. v. New Liverpool Co., 150 Cal. 21, 87 P. 1029, the mere failure of a party to read an instrument with sufficient attention to perceive an error or defect in its contents will not prevent its reformation at the instance of the party who executes it thus carelessly.

The facts fully justified the conclusions of the trial court, and the judgment is accordingly affirmed.

We concur: TYLER, P. J.; KNIGHT, J.

---

95 Cal. App. 375

In re LONARDO. (Cr. 1521.)

District Court of Appeal, First District, Division 2, California. Dec. 10, 1928.

1. Habeas corpus 🔑85(2)—Petitioner's uncontroverted evidence, showing absence from Ohio at time of homicide, required discharge from custody under extradition warrant for return to Ohio.

Uncontroverted evidence, offered in behalf of petitioner in habeas corpus proceeding, showing that he was in San Francisco and not in Ohio at time of murder charged to have been committed by him in state of Ohio, *held* to require petitioner's discharge from custody under warrant of rendition and extradition executed by Governor at request of Ohio authorities.

2. Habeas corpus 🔑92(2)—Petitioner held entitled, in habeas corpus, to secure release from custody under extradition warrant, to try question whether he was fugitive.

Petitioner, in habeas corpus proceedings to secure release from custody under warrant of extradition for his return to another state under criminal charge, *held* entitled to try question whether he was fugitive within meaning of

United States Constitution and extradition statutes.

Application by Dominic Lonardo, also known as Joseph Piazza, for writ of habeas corpus prayed to be directed to the Chief of Police, City and County of San Francisco, to secure petitioner's release from custody as a fugitive from justice. Writ granted, and petitioner discharged.

James F. Brennan, of San Francisco, for petitioner.

Matthew Brady, Dist. Atty., and Joseph A. Garry, Asst. Dist. Atty., both of San Francisco, for respondent.

KOFORD, P. J. This is an original habeas corpus proceeding. Petitioner is held in custody by the chief of police of the city and county of San Francisco and two police agents from the state of Ohio under a warrant of rendition and extradition executed by the Governor of the state of California. This warrant was issued upon the request and affidavit of the prosecuting attorney of Cuyahoga county, Ohio, accompanied by a certified copy of an indictment from the state of Ohio charging petitioner with having committed a certain murder in that state on or about December 31, 1920. The affidavit, besides merely formal matters, included the bare statement that the person charged by said indictment with the crime of murder "is a fugitive from justice."

[1, 2] The petitioner alleges that he is not a fugitive from the justice of the state of Ohio on said charge of murder, and that he was not in the state of Ohio at any time during the 31st day of December, 1920, nor for a period of more than one month prior, nor more than one month thereafter, but was at all such times within the state of California. He presents affidavits of ten residents of San Francisco to the effect that he was in San Francisco at the time before and after the date of the Ohio murder. These witnesses, or most of them, testified in the superior court to the same effect in a habeas corpus proceeding prosecuted there for the same purpose as this one. The transcript of the testimony of these witnesses was produced upon the return of this writ in this court and admitted as evidence by stipulation.

No testimony was offered on behalf of respondent. He relies upon the Governor's warrant and upon the cross-examination of the petitioner's witnesses. It is claimed that the cross-examination of these witnesses so far overcomes their direct testimony that this court should believe none of it, but decide in favor of and in accordance with the presumption arising from the Governor's action that the petitioner is a fugitive from the justice of the state of Ohio and that he has fled therefrom. The cross-examination at most shows that some of the witnesses might be mistaken about dates and that others might be falsifying; but it is far from convincing us that the direct testimony of these witnesses is not worthy at the least of considerable credence.

Weighing the evidentiary force of the showing made for and against the petitioner, we conclude that the petitioner is not proven to be a fugitive from the justice of the state of Ohio. Although this court upon the hearing of this writ called to the attention of counsel for respondent the probable conclusion of this court in the absence of affirmative testimony contradicting the showing made by petitioner, no such testimony was forthcoming and no request was made for an opportunity to produce any such testimony. To the suggestion that under the Ohio indictment the proof of the crime charged might show the murder to have been committed at a time when petitioner was in the state of Ohio and not in California, but nevertheless on or about the 31st of December, 1920, counsel for respondent stated that no such contention would be made.

The petitioner is entitled to have tried by this court in this proceeding the question of whether he is a fugitive within the meaning of the United States Constitution and statutes providing for extradition from one state to another. Ex parte Shoemaker, 25 Cal. App. 551, 144 P. 985; Hyatt v. Corkran, 188 U. S. 691, 23 S. Ct. 456, 47 L. Ed. 657; see, also, cases collected at 51 A. L. R. 801.

Under this record the plain duty of the court is to discharge the petitioner, and it is so ordered.

I concur: STURTEVANT, J.

95 Cal. App. 307

SUNSET LUMBER CO. v. SMITH et al.

(Civ. 6386.)

District Court of Appeal, First District, Division 1, California. Dec. 6, 1928.

1. Schools and school districts 🔑81(2)—Joinder of contractor and sureties on contractor's bond held authorized in materialman's action on contractor's bond (Code Civ. Proc. § 383).

In action by materialman on contractor's bond to recover for materials furnished in constructing school, joinder of contractor as principal on bond and sureties was authorized, under Code Civ. Proc. § 383.

2. Schools and school districts 🔑81(2)—Joinder of school district and trustees, though not necessary in action on contractor's bond for materials used in constructing school, held not prejudicial to surety on bond.

In action by materialman on contractor's bond to recover for materials furnished in construction of school, joinder of school district and trustees thereof, though not necessary, was not prejudicial to surety on contractor's bond.

3. Appeal and error 🔑1170(1)—Error in overruling demurrer for misjoinder of parties defendant is no ground for reversal, unless prejudicial to party demurring (Const. art. 6, § 4½).

Error in overruling demurrer for misjoinder of parties defendant after trial on merits is not ground for reversal of judgment, unless party demurring has been misled to his prejudice or error otherwise appears to have been injurious, under Const. art. 6, § 4½.

4. Election of remedies 🔑5—Remedy provided materialman under Public Works Act held cumulative with remedy under Code of Civil Procedure, and does not require election by materialman (Code Civ. Proc. § 1184; Public Works Act 1919).

Public Works Act 1919 (St. 1919, p. 487), providing that, unless contractor's bond is filed, no claim shall be allowed in favor of contractor as penalty against contractor, but further providing that materialman shall be entitled to payment in accordance with Code Civ. Proc. § 1184, *held* additional and cumulative remedy with remedy given by Code of Civil Procedure, and does not require election by materialman.

5. Schools and school districts 🔑86(2)—That materialman's verified statement was denominated "Notice to Withhold" and complied with Code did not make it insufficient under Public Works Act (Public Works Act 1919; Code Civ. Proc. § 1184).

Under Public Works Act 1919 (St. 1919, p. 487), requiring materialman to file with body by whom contract was awarded verified statement of claim and that claim has not been paid, fact that materialman's statement was denominated "A Notice to Withhold," or that it was also sufficient to comply with Code Civ. Proc. § 1184, did not make it any less sufficient as compliance with Public Works Act.

6. Schools and school districts 🔑81(2)—Materialman suing on contractor's bond under Public Works Act held not required to first proceed under Code or wait for pro rata payment (Public Works Act 1919; Code Civ. Proc. §§ 1184, 1184a).

Under Public Works Act 1919 (St. 1919, p. 487), requiring that action by materialman on contractor's bond be commenced within 90 days after period within which claims of lien must be filed for record, materialman is not required to first bring action under Code Civ. Proc. § 1184a, or wait for pro rata payment under section 1184.

7. Schools and school districts 🔑81(2)—Contractor's bondsmen are relieved to extent that materialman has succeeded in reducing claim against bondsmen by complying with Code (Code Civ. Proc. § 1184 et seq.).

If materialman has succeeded in reducing his claim against contractor's bondsmen by complying with provisions of Code Civ. Proc. § 1184 et seq., bondsmen are relieved to that extent.

8. Schools and school districts 🔑81(2)—Action by materialman on contractor's bond, commenced May 18, 1923, held timely, where contractor abandoned work November 22, 1922, and only notice of completion was filed January, 1923 (Public Works Act 1919; Code Civ. Proc. §§ 1187, 1190).

Under Public Works Act 1919 (St. 1919, p. 487), providing that statement of materialman's claim shall be filed with body by whom contract was awarded prior to expiration of period within which claims of lien must be recorded, as prescribed by Code Civ. Proc. § 1187, and that suit by materialman must be commenced against contractor's bondsmen within 90 days after expiration of that period, action by materialman on contractor's bond, commenced May 18, 1923, after contractor had abandoned work on November 22, 1922, and notice of completion was filed January, 1923, was commenced within time, whether abandonment by contractor should be deemed to constitute cessation of labor under section 1187, or whether date of notice of completion is to be deemed date of completion; section 1190 having no application.

9. Evidence 🔑83(2)—School trustees are presumed to perform duties and to have exacted contractor's bond as required in construction of school.

Board of trustees of school district is presumed to have performed every duty imposed on it, and hence to have exacted bond from contractor in construction of school as required.

10. Schools and school districts 🔑81(2)—Complaint by materialman, alleging contract between contractor and school district setting out bond referring to contract, authorized conclusion that contract alleged was referred to in bond and did not relieve bondsmen by reason of variance.

Where complaint by materialman on contractor's bond to recover for materials furnished in constructing school alleged contract between contractor and school district, and bond set out as exhibit in complaint referred to contract as contract between same parties for same amount, made on same day, for same character of work and improvements, and there was no evidence or claim that any other contract was entered into between such contractor and school trustees, court was entitled to conclude that contract alleged was referred to in bond, and hence surety on bond was not relieved of liability by reason of variance from provisions of bond.

11. Schools and school districts 🔑81(2)—Surety on contractor's bond held not relieved of liability by school district's consent to judgment for materialman for part of claim (Civ. Code, § 2819).

Where school board for whom school was constructed admitted having certain amount on hand to pay claim of materialman, and consented to judgment against it for such amount in materialman's action on contractor's bond, there was no such settlement or compromise by materialman with school board, under Civ. Code, § 2819, as would release surety on contractor's bond; there being no alteration of obligation of principal nor of rights or remedies of materialman against principal to injury of surety.

12. Corporations 🔑517—Verification of materialman's claim by manager of materialman's corporation held sufficient (Public Works Act 1919; Code Civ. Proc. § 1187).

Under Public Works Act 1919 (St. 1919, p. 487), requiring statement by materialman to be verified without designating who shall make verification similar to Code Civ. Proc. § 1187, authorizing verification by any person who knows facts, verification of materialman's claim by manager of materialman's corporation made on behalf of corporation *held* sufficient.

13. Schools and school districts 🔑81(2)—Materialman held not required to exhaust remedy against school board before proceeding against contractor's bondsmen or prove amount in hands of school board remaining unpaid to contractor (Public Works Act 1919).

In action under Public Works Act 1919 (St. 1919, p. 487), by materialman on contractor's bond for materials furnished in constructing school, materialman was not required to exhaust his remedy against school district before proceeding against bondsmen, and materialman was not required to prove exact amount in hands of school board remaining unpaid to contractor, especially where surety on contractor's bond had ample opportunity to show that school board had funds to apply on materialman's claim in excess of amount for which school board confessed judgment.

14. Schools and school districts 🔑81(2)—Materialman's complaint for materials furnished in constructing school containing verified notice to withhold, specifying materials used, stated case against surety on contractor's bond.

Complaint by materialman on contractor's bond for materials furnished in construction of school, alleging agreement between contractor and materialman for furnishing of materials described in notice to withhold, duly verified and annexed to complaint, and that all materials were used in constructing building, stated cause of action against surety on contractor's bond.

15. Pleading 🔑310—Essential elements of case must be distinctly averred, and cannot be left to inference from documents attached to complaint.

Whatever is essential element of cause of action must be presented by distinct averment, and cannot be left to inference to be drawn from construction of document attached to complaint.

16. Pleading 🔑205(1)—General demurrer does not lie if plaintiff is entitled to any relief under complaint.

A general demurrer does not lie if plaintiff is entitled to any relief under allegations of complaint.

17. Schools and school districts 🔑85—Materials furnished in constructing school are to be paid for when delivered, in absence of express allegation of time of payment (Civ. Code, § 1657).

Under complaint by materialman on contractor's bond for materials furnished in constructing school, in absence of express allegation as to when contractor should pay for materials furnished, such time is fixed by law as being time of delivery of materials, under Civ. Code, § 1657.

18. Schools and school districts 🔑21—School district is necessary political subdivision of county under direction of local authorities to promote general educational purposes of state.

School district is necessary political subdivision of county under direction and supervision of local authorities for promotion of general educational purposes of state; system being matter of general concern and not municipal affair.

19. Schools and school districts 🔑81(2)—Admission in answer to materialman's suit for materials in constructing school, that school district was duly organized district and public corporation, held admission that it was state agency, without further proof.

In action by materialman on contractor's bond for materials furnished in constructing school, admission in answer of surety on bond that school district was duly organized and existing school district and a public corporation constituted admission that district was state agency and political subdivision, and no further proof thereof was required.

20. Stipulations 🔑14(4)—Refusal to permit defense of estoppel in answer held proper, where stipulation on which case was tried raised no such defense (Public Works Act; Code Civ. Proc. §§ 1184–1184c).

Where surety on contractor's bond sued by materialman answered by general denial, and stipulated that defenses urged were insufficiency of statement filed by materialman to meet requirements of Public Works Act 1919 (St. 1919, p. 487), that claim was barred by Code Civ. Proc. §§ 1184–1184c, and provisions of Public Works Act, but did not mention special defense of equitable estoppel, and case proceeded to trial pursuant to stipulation, court properly refused to permit counsel for surety to file in answer issue of estoppel.

21. **Schools and school districts ⚷81(2)—Attorney fees in action by materialman on bond of contractor may be included in judgment without filing of cost bill (Public Works Act 1919; Code Civ. Proc. § 1033).**

Under Public Works Act 1919 (St. 1919, p. 487) providing for attorney fees to be taxed as costs and to be included in judgment, attorney fees in action by materialman on bond of contractor may be included in judgment without filing of cost bill, under Code Civ. Proc. § 1033.

Appeal from Superior Court, Santa Cruz County; H. L. Lucas, Judge.

Action by the Sunset Lumber Company against E. Potter Smith and others. Judgment for plaintiff, and defendant James K. Nelson alone appeals. Affirmed.

Cooley & Gallagher, of San Francisco, for appellant.

Louis Oneal and Maurice J. Rankin, both of San José, for respondent.

CAMPBELL, Justice pro tem. This is an action to recover for materials furnished in the erection and construction of the Soquel union grammar school in the town of Soquel, Santa Cruz county. The action is brought against E. Potter Smith, the contractor to whom the board of trustees of the Soquel union school district let the general contract for the construction of the school building, and against James K. Nelson and J. J. Stevenson, the sureties on the contractor's bond, the members of the school board, and the school district itself. The action is primarily one against the contractor to recover for the materials furnished and used in the construction of the school building. The contractor defaulted, and the other defendants answered. Defendant James K. Nelson, one of the sureties on the contractor's bond, is the only defendant who has appealed.

Appellant presents the following points as grounds for a reversal of the judgment: "(1) The demurrer of this defendant should have been sustained because of misjoinder of causes of action and misjoinder of parties defendant; (2) plaintiff's action is barred by the provisions of the various lien law statutes of the state of California; (3) the defendant James K. Nelson is not liable by reason of the variance from the provisions of the bond; (4) the defendant James K. Nelson is not liable by reason of the settlement by the principal without the consent of the surety; (5) plaintiff has failed to comply with the provisions of the Public Works Act (St. 1919, p. 487); (6) the evidence is insufficient to justify the decision of the trial court; (7) the complaint of plaintiff does not state a cause of action against this defendant; (8) the court erred in striking out the equitable defense of estoppel; (9) the court erred in including in its findings an award of $750.00 counsel fees."

[1-3] As to appellant's first contention it may be said that this action was primarily against the contractor and his bondsmen. The contractor and bondsmen were all parties to the bond in question. The contractor, Smith, signed it as principal, and appellant, Nelson, and defendant Stevenson signed as sureties. Such joinder of principal and sureties in an action is authorized. Code Civ. Proc. § 383; Rice Sureties Co. v. Daggs, 63 Cal. App. 273, 277, 218 P. 484; Rodabaugh v. Kauffman, 53 Cal. App. 676, 682, 200 P. 747. In regard to the joinder of the school district and trustees, it may be said that, while it was not necessary to join them, we fail to see how appellant has been prejudiced or injured thereby. Plaintiff's cause of action arose out of his contract with the contractor, Smith, appellant's principal, and, while the liability of the trustees or the school district, if any, might differ, nevertheless it is based upon plaintiff's contract with Smith, the contractor, and, in order to prevail against any of these defendants, plaintiff would be compelled to prove the performance of his contract with Smith to furnish materials for the construction of this school building. It is well settled that an error overruling a demurrer for misjoinder of parties defendant after a trial on the merits is not ground for the reversal of the judgment unless the party demurring has been misled to his prejudice or the error otherwise appears to have been injurious. 2 Cal. Jur. 1012; Asevado v. Orr, 100 Cal. 300, 34 P. 777; Hirshfeld v. Weill, 121 Cal. 14, 53 P. 402. Were we to concede "that the special demurrer for misjoinder might have been properly sustained by the trial court, the concession is of no avail here. This for the reason that under section 4½ of article VI of the Constitution it could not be said that the overruling of the demurrer was such an error as had produced a miscarriage of justice." Trask v. Garza, 51 Cal. App. 743, 197 P. 807.

[4-6] Appellant contends that, because plaintiff's procedure is a compliance with section 1184 of the Code of Civil Procedure, he cannot enforce the liability of bondsmen given pursuant to the Public Works Act of 1919. A reading of the Public Works Act demonstrates that such act is a remedy in addition to and cumulative with the remedy given by section 1184 of the Code of Civil Procedure, and that the two remedies are intended to be co-operative in effect. There is nothing in the Public Works Act which expressly or impliedly says that a materialman must elect between these two remedies, or that, if he seeks one, he waives the other. On the contrary, the act of 1919 expressly makes the right to recover on the bond an additional and cumulative remedy, for, in section

1 thereof, it is provided that, unless the bond is filed, no claim shall be allowed in favor of the contractor. This obviously is a penalty placed on the contractor for failure to file the bond, but the act provides that nevertheless materialmen shall be entitled to be paid in accordance with section 1184 of the Code of Civil Procedure. Hence it is apparent that the act of 1919 is not an exclusive remedy, but is a cumulative one, and one created in view of the rights given under section 1184. The only condition which must be performed by the materialman to establish his right against the surety under the act of 1919 is that "he shall file with the body by whom the contract was awarded a verified statement of his claim, together with a statement that the same has not been paid." Here plaintiff has filed such verified statement, as shown by the pleadings and the claim admitted in evidence. The fact that this statement is denominated "A Notice to Withhold," or that it is also sufficient to comply with section 1184 of the Code of Civil Procedure, does not make it any the less sufficient as a compliance with the Public Works Act. It is a verified statement containing an itemized list of the materials furnished, together with a statement that the same has not been paid. Appellant apparently urges that, until there is a pro rata payment under section 1184 of the Code of Civil Procedure, no cause of action exists against the bondsmen. The act of 1919 does not require that plaintiff first proceed under section 1184 et seq. The period within which suit may be commenced on the bond as provided in the act of 1919 shows that there need be no steps taken under section 1184 or any waiting for a pro rata payment. The act of 1919 requiring that action on the bond be commenced within 90 days following the period within which claims of lien must be filed for record, it is obvious that, if a materialman was first required to bring an action under section 1184a, a period of time would not only possibly, but probably, expire in excess of 90 days from the time when claims of lien must be filed for record, and hence the bondsmen would, by insisting upon the plaintiff first exhausting his rights pursuant to section 1184 et seq., avoid liability for any portion of a materialman's claim. Such construction would defeat the purpose of the act.

[7] If plaintiff has succeeded in reducing his claim against the bondsmen by complying with the provisions of section 1184 et seq., the bondsmen are relieved to that extent, and cannot consistently complain.

[8] As to appellant's contention that the action is barred, it may be said the Public Works Act provides that the statement of the materialman's claim shall be filed with the body by whom the contract was awarded prior to the expiration of the period within which claims of lien must be recorded, as prescribed by section 1187 of the Code of Civil Procedure, and that suit must be commenced against the contractor's bondsmen within 90 days after the expiration of that period. In this case the contractor abandoned the work on November 22, 1922, and the building was not completed until January, 1923, when notice of completion was filed. If the abandonment by the contractor should be deemed to constitute a cessation of labor under section 1187, such cessation did not constitute completion until it had continued for 30 days, making the time of completion December 22, 1922; there being no notice of completion filed within 10 days thereafter, the time within which to file claims of lien did not expire until March 22, 1923, 90 days after December 22, 1922. If, however, January 24, 1923, when the notice of completion was filed, be deemed the date of completion, the period within which claims of lien must be filed would be 30 days thereafter or to and including February 22, 1923, and plaintiff would have 90 days thereafter or until May 23, 1923, within which to commence its action. In either event the action was commenced within the required time, as the complaint was filed on May 18, 1923. This being an action against appellant on his bond given pursuant to the Public Works Act, and not for foreclosure of a lien, appellant's argument, invoking the period prescribed by section 1190 of the Code of Civil Procedure, and the authorities he cites, have no application.

[9] Appellant's statement in his brief that the bond was executed and filed after the date of the commencement of the work is not borne out by the record. Aside from the fact that the presumption is that the board of trustees performed every duty imposed on it, and that therefore it exacted a bond from the contractor (Stone v. Shackelford, 64 Cal. App. 750, 222 P. 846), the witness J. J. Young, clerk of the board of trustees, testified that, before the work was started, this bond was filed with the trustees.

[10] It is claimed that the bond was given for the construction of a building, while the complaint refers to the improvements as buildings. The complaint alleges the contract to be one between E. Porter Smith and Soquel Union School district, entered into on May 17, 1922, for the sum of $44,735. The bond refers to the contract as the contract between the same parties for the same amount made on the same date, and for the same character of work and improvements. The bond is set out as an exhibit in the complaint and made a part thereof. There is no evidence or claim that any other contract was entered into between this contractor and the board of trustees. The court was entitled to and reasonably should have concluded that it was the contract alleged that was referred to in the bond and the contract to secure which the bond was given.

[11] Appellant contends that he is not liable by reason of a settlement by the principal

without his consent as surety; that section 2819 of the Civil Code alone is sufficient authority. This section provides: "A guarantor is exonerated, except so far as he may be indemnified by the principal, if by any act of the creditor, without the consent of the guarantor, the original obligation of the principal is altered in any respect, or the remedies or rights of the creditor against the principal, in respect thereto, in any way impaired or suspended." The situation here presented is not a settlement or compromise by plaintiff with the school board. The full amount of plaintiff's claim being $10,213.39, and the school board having $5,017 on hand to pay towards plaintiff's claim, it consented that judgment be entered against it for this amount. If plaintiff was satisfied to take judgment against the defendant bondsmen for $5,193.39, allowing the bondsmen credit for the amount for which the school board confessed judgment, appellant has not been injured. Plaintiff was under no obligation to prove that there was a larger amount in the hands of the trustees than they admitted, and appellant was at liberty to make such proof by examination of the trustees or such other persons as were informed upon the subject. The authorities cited by appellant that a creditor cannot, without the consent of the guarantor, alter the original obligation with the principal have no application to the present case. The school board was not a principal on appellant's bond nor a party thereto other than a creditor. Smith was the principal on appellant's bond, and plaintiff did not alter the obligation of Smith, nor have the rights or remedies of the plaintiff against the principal been suspended nor the sureties' rights injured or impaired.

[12] There is no merit in appellant's contention that plaintiff's claim was not properly verified. The verification shows that E. H. Galpin, who verified the claim, is the manager of the plaintiff corporation, and that he verified the claim on behalf of the corporation. The act of 1919 merely requires that the statement be verified, without designating who shall make the verification. It is similar to the verification to claims of lien required by section 1187 of the Code of Civil Procedure, under which it is held the verification may be made by any person who knows the facts. Parke & Lacey Co. v. Inter Nos Oil Co., 147 Cal. 494, 82 P. 51.

[13] It is appellant's claim that there is no proof as to the exact amount in the hands of the school board remaining unpaid to the contractor, and therefore there may be sufficient funds to meet plaintiff's demand. The act does not require that plaintiff exhaust his remedy before proceeding against the bondsmen. And, as has been said, appellant had ample opportunity to show that the board had funds to apply on this claim in excess of the amount for which it confessed judgment.

[14] There is no merit in appellant's contention that the complaint does not state a cause of action against him. The complaint alleges in legal effect the agreement entered into between the contractor and plaintiff under which plaintiff agreed to furnish certain building materials set forth and described in the "Notice to Withhold" annexed to the complaint and made a part thereof, "said building materials to be used in the construction of said buildings and improvements. * * * That all of said materials were furnished to be used and were actually used in the erection and construction of said buildings and improvements," while the bond recites that the agreement was entered into for the "erection of a Union Grammar School Building." The "Notice to Withhold" attached to the complaint, which is duly verified, contains an itemized statement of the materials supplied, together with a statement that the "materials were to be and were actually used in the construction and erection of that certain structure, now being erected on the land and premises occupied by the Soquel Union Grammar School situate at Soquel, Santa Cruz County, California."

[15, 16] It is true, as urged by appellant, that "whatever is an essential element of a cause of action must be presented by a distinct averment and cannot be left to an inference to be drawn from the construction of a document attached to the complaint" (Panter v. National Surety Co., 36 Cal. App. 46, 171 P. 803, 804), and that "recitals in a contract incorporated in a complaint will not supply the want of essential averments in the pleading" (Hayt v. Bentel, 164 Cal. 686, 130 P. 434). While a demurrer for uncertainty here might have been sustained, no such ground appears in the demurrer filed by defendant. A general demurrer does not lie, if the plaintiff is entitled to any relief under the allegations of the complaint. Knowles v. Baldwin, 125 Cal. 224, 57 P. 988; San Francisco Paving Co. v. Fairfield, 134 Cal. 220, 66 P. 255.

[17] As to the contention that there is no allegation as to when the contractor should pay for the materials furnished, it may be said that, in the absence of an express allegation, such time is fixed by law as being the time of delivery of the materials. Civ. Code, § 1657; Clairmonte v. Napier Motor Co., 11 Cal. App. 265, 104 P. 712.

[18, 19] As to appellant's objection that "there is no allegation that the Soquel School District was or is a political subdivision or agency of the State of California," it may be said "the school district is a necessary political division of the county under the direction and supervision of the local authorities for the promotion of the general educational purposes of the state, the system being a matter of general concern and 'not a municipal affair.'" People v. Rinner, 52 Cal. App. 752, 199 P. 1069. It is evident that the act of 1919, pursuant to which this bond was given, was

intended to apply to all those agencies or divisions of government, the buildings or structures of which were not subject to lien, and that, when defendant admits in his answer that the Soquel union school district is a duly organized and existing school district and a public corporation, he admits it is a state agency and political subdivision, and no further proof of such fact is required.

[20] We are not in accord with appellant's contention that the court erred in striking out his equitable defense of estoppel. The most that can be said of this defense is that appellant in his answer alleges that, prior to the execution of this bond, which it is not claimed was expressly authorized or executed with the knowledge of plaintiff or its officers or directors, appellant, who was in the employ of plaintiff, had executed other similar bonds that the plaintiff might secure certain business, and that, on other previous occasions, some of the officers of the plaintiff company had requested appellant to sign similar bonds. It is not alleged or claimed that plaintiff or its officers or directors authorized or directed appellant to sign this particular bond, nor is it alleged or claimed that they had any knowledge that appellant proposed to execute this bond or had done so. When the case came on for trial, an answer had been filed on behalf of appellant containing merely a general denial. The present counsel appeared for the first time on the morning of the trial and announced that he was ready to proceed to trial with the stipulation that the defendant Nelson be privileged to file his answer after the trial was concluded. It was then stipulated that defendant Nelson's answer would admit and deny certain allegations of the complaint, but no suggestion of any special defense of equitable estoppel was made in the stipulation; the defenses urged being that the statement filed by plaintiff was not sufficient to meet the requirements of the Public Works Act and that plaintiff's claim was barred by the provisions of the Public Works Act or sections 1184 to 1184c of the Code of Civil Procedure. "Mr. Gallagher: Yes, I am going to deny that the withhold notice was filed with the board, and I am going to deny that the document purporting to be a withhold notice is a withhold notice, and I am also going to allege by way of special defense that the plaintiff's claim is barred by the particular statute they predicate their action on." Pursuant to this stipulation, the case proceeded to trial, and the evidence was adduced. The court had a full and complete understanding of the entire case, and, when appellant's counsel sought to urge in his answer, when filed, an issue other than that contained in the stipulation and in addition to that upon which the case was tried, the court properly refused to permit him to do so.

[21] Appellant finally complains of the fact that attorney's fees are included in the judgment: First, for the reason that plaintiff proceeded under section 1184 of the Code of Civil Procedure; and, second, the Public Works Act provides that attorney's fees must be taxed as costs. The first objection we have already considered. With respect to the second, it is true that the act provides for attorney's fees to be taxed as costs and to be included in the judgment, but the fixing of attorney's fees must be by the court, and, if included in the judgment, must naturally be fixed at the time of the rendition of the decision, so that the amount so allowed may be so included in the judgment. The act does not expressly or impliedly require that a cost bill be filed under section 1033 of the Code of Civil Procedure. Furthermore, we fail to see how appellant has been in any way prejudiced.

This disposes of the objections urged, and from what has been said it follows that we find no error calling for a reversal of the judgment.

Judgment is affirmed.

We concur: TYLER, P. J.; KNIGHT, J.

95 Cal. App. 384

GRASSIE et al. v. AMERICAN LA FRANCE FIRE ENGINE CO. et al. (Civ. 3566.)

District Court of Appeal, Third District, California. Dec. 10, 1928.

1. Automobiles ⚷224(1)—One voluntarily assuming dangerous position of passenger on fire engine during test run assumed risk ordinarily incident to that dangerous position.

One voluntarily assuming dangerous position of passenger on fire engine during test run assumed risk ordinarily incident to such dangerous position, and fire engine company was not liable for injury arising from such risks.

2. Automobiles ⚷224(1)—One voluntarily becoming passenger on fire engine during test run must take greater precautions for his own safety than passenger in ordinary automobile.

One voluntarily assuming dangerous position of passenger on fire engine during test run was required, in exercise of due care which law always exacts, to take greater precautions for his own safety than if he were passenger in ordinary automobile.

3. Automobiles ⚷175(1, 4)—Fire engine company carrying passenger on test run had same duty as to speed and care as in ordinary run to fire.

Where person voluntarily assumed dangerous position of passenger on fire engine during test run, fire engine company was only under obligation to run at same speed and use same care and caution as is usual when fire apparatuses travel to fire.

⚷For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

Appeal from Superior Court, Los Angeles County; Charles Monroe, Judge.

Action by Katherine F. Grassie and others against the American La France Fire Engine Company and others. Judgment for defendants, and plaintiffs appeal. Affirmed.

Morin, Newell & Brown, of Pasadena, and Duke Stone, of Los Angeles, for appellants.

Lucius K. Chase, of Los Angeles (Lucius F. Chase, of Los Angeles, of counsel), for respondents.

PRESTON, Justice pro tem. The plaintiffs brought this action to recover damages for the death of William S. Grassie, which they allege was caused by the negligence of defendants.

The case was tried before the court sitting with a jury, and the jury returned a verdict in favor of the defendant and judgment was thereupon entered. From this judgment the plaintiffs prosecute this appeal.

Mr. Grassie was killed when a fire engine, upon which he was riding, owned and operated by the defendant American La France Fire Engine Company, collided with a telegraph pole, during the time said fire engine was making a test run. The specific negligence alleged in plaintiffs' complaint is as follows: "The said defendant (American La France Fire Engine Company) by its agents and servants * * * did procure said W. S. Grassie to mount said apparatus, occupy a seat, and they did then drive said apparatus rapidly in a westerly direction along Mariposa Street at a high rate of speed and in the vicinity of Marengo Avenue, approached a double curve at a high, unlawful and reckless rate of speed. They did fail to operate said machine on the right hand side of the highway, but did operate and drive said machine upon the center and also upon the left hand side of a highly crowned highway, and by reason of said high speed, and by reason of the operation of said vehicle in the wrong portion of the highway, and a portion not designed to accommodate vehicles traveling at a high speed in a westerly direction, did fail to properly control said vehicle and did recklessly and negligently drive and propel said vehicle in a tangent from said curve, which was a double curve, across certain parallel railway tracks, and over and against a certain telephone pole, against which said apparatus came in contact. That by reason of the collision with said pole, said W. S. Grassie was crushed, suffering grievous bodily injuries, solely from the effect of which he died. * * *"

The answer of the defendants raised several defenses, among them being: (a) That there was no negligence on the part of either of the defendants; (b) that the accident occurred solely as a result of the negligence of the deceased, in that his elbow interfered with the arm of the driver, causing the driver momentarily to lose control of his machine, resulting in the accident; (c) that even assuming that defendant was traveling in excess of the legal speed, deceased was contributorily negligent, in that, having knowingly placed himself in a dangerous position in riding on the fire engine as an observer on a test run made at the same speed as would generally be made in going to a fire, he assumed the risk ordinarily incident to such a run; (d) that even assuming defendants' negligence, and assuming also that no risk was assumed by deceased, or by assuming that defendants were negligent beyond the risk assumed by deceased, nevertheless recovery was barred by reason of the contributory negligence of deceased, in that he held the arm of the driver with his elbow and thus caused the accident.

The facts are these: Altadena is an unincorporated residential town in Los Angeles county. The board of supervisors of Los Angeles county had, prior to the death of William S. Grassie, which occurred on March 17, 1924, organized what is known as the "Altadena County Fire Protection District," which included the town of Altadena. On or about the 25th of February, 1924, said board of supervisors had made arrangements to purchase from the defendant American La France Fire Engine Company one fire engine for the Altadena district. Some of the citizens of Altadena had suggested to the officers of the Altadena county fire protection district that two fire engines would be required for the protection of the district. The county fire department was opposed to the purchase of two engines, claiming that one engine placed as nearly in the center of the district as possible would afford ample fire protection. To determine the question, Mr. Johnson, deputy chief of the county fire department, arranged with the defendant American La France Fire Engine Company to take a fire engine, such as the district intended to purchase, to Altadena and to make test runs with it from the central portion of the district to the outlying territory. The fire engine was to be run on these tests at the same rate of speed that fire engines ordinarily travel in going to a fire. Pursuant to this arrangement, the defendant American La France Fire Engine Company sent a fire engine from Los Angeles to Altadena in charge of defendant George Kenley, who was the delivery engineer of the defendant company. Mr. Kenley drove this engine to a point near the center of the district and was there met by a committee of citizens of Altadena, among whom was the deceased, William S. Grassie. The defendant George H. Herold, the sales manager of the defendant company, and a Mr. Barker, the battalion chief of the county fire department, were also present. Several test runs were made with the engine, running from a garage located about in the center of the district to the outlying portions of the district in several directions. On these runs, Mr. Herold, Mr. Barker, and a Mr. Graham were passengers. Mr. Graham was president of the citizens' committee. After several runs had been made, Mr. Graham had to leave and requested the deceased, Mr. Grassie, to take his place on the engine and ride with the driver and observe the time that the engine made in making the test runs. Up to this time all the tests had been made to the east boundary of the district. The engine was now to make a test run from the same starting point to the west boundary of the district. Mr. Barker, the battalion chief and an employé of the county of Los Angeles, seeing the deceased start to get on the rear of the engine, requested him to take the front seat by the side of the driver, which was done. Mr. Kenley was the driver of the engine; Herold and Barker were also on the engine. The streets were cleared of traffic for the run. The engine traveled up Lake street and turned onto Mariposa street and proceeded down that street at a speed of between 30 and 35 miles an hour. There were several curves in the street. The first curve was a curve to the left and a second curve was a curve to the right. The engine approached the curves from the east and negotiated the first curve to the left without difficulty at a speed of about 30 miles an hour, and reached the second curve at a speed of 20 to 24 miles an hour, but instead of fully making the right curve the engine left the road, went through a fence for a distance of about 75 feet, and struck a telephone pole on the right of way of the Pacific Electric Railroad, throwing the deceased from his seat on the fire engine and instantly killing him.

While the evidence is somewhat conflicting on the point, there was substantial testimony to the effect that before the second or right-hand curve was reached, and while on that curve, the driver of a vehicle approaching from the east could see ahead a distance of 350 to 500 feet, and that the curve could be made with the engine at a speed of 30 miles an hour with safety. The engine was a right-hand drive. Mr. Kenley, the driver of the truck, testified that as he started to turn it to the right, Mr. Grassie's body swayed toward him and Mr. Grassie's elbow came over his left arm, applying a pressure and preventing him from turning the steering wheel to the right to take the curve.

Appellants make this contention: "A reversal of this case is sought on the ground that the court misdirected the jury as a matter of law, principally on the ground that the court directed the jury as a matter of law that deceased was at the time in a joint undertaking or enterprise with the defendants and that any negligence of the defendants was, therefore, chargeable to the deceased. * * * There is no question of assumption of risk involved in this case. It was a clear case of the deceased being an invited guest and, therefore, neither the assumption of risk or joint adventure had anything whatever to do with the case."

The court did not instruct the jury that, as a matter of law, the deceased was engaged in a joint enterprise, but did instruct the jury in effect that if it found that Mr. Grassie participated in a test run of a fire engine, made at the same rate of speed at which a fire engine ordinarily travels to a fire, and that he made no objection to the speed, that he assumed the risk of the dangers resulting from traveling at a speed faster than the limit allowed by law, provided the speed was such as was used in going to a fire.

These instructions are based entirely upon the familiar principle of law stated in 19 California Jurisprudence, p. 589, as follows: "One who, for the purposes of his own, voluntarily places himself in a position of danger, assumes the risks ordinarily incident to such a position, and must exercise a quantum of care commensurate with the additional danger." See, also, Graff v. United Railroads, 178 Cal. 171, 172 P. 603; Morgan v. Los Angeles Pacific Co., 13 Cal. App. 12, 108 P. 735; Roberts v. Sierra R. R. Co., 14 Cal. App. 180, 111 P. 519, 527; Trousclair v. Pacific Coast Steam-Ship Co., 80 Cal. 521–524, 22 P. 258; Fisher v. Southern Pacific Co., 89 Cal. 399, 26 P. 894; Clark v. Atchison, Topeka & Santa Fé R. R. Co., 164 Cal. 363, 128 P. 1032.

[1-3] Appellants contend that deceased was an invited guest of the defendants. We are unable to find in the record any evidence that any of the agents or employés of the fire engine company invited deceased to become a passenger on this fatal run. Mr. Graham, the president of the citizens' committee, requested deceased to make the trip, and Mr. Barker, an employé of the county, told him what position to take on the engine. However, it seems to us to be entirely immaterial whether Mr. Grassie was an invited guest or not. Mr. Grassie knew that the engine was going to make a run just the same as if it was going to a fire; he also knew that fire engines going to a fire traveled at a high rate of speed, and he knew the condition of the streets over which the run was to be made. Notwithstanding all these facts, Mr. Grassie voluntarily assumed the dangerous position of a passenger on this fire engine on this test run.

Under these circumstances, we hold that Mr. Grassie assumed the risk ordinarily incident to that dangerous position, irrespective of his status, and the defendant fire engine company was not liable for any injury sustained by him arising from the risks ordinarily incident to the dangerous position which he had voluntarily assumed. Manifestly, a passenger upon a fire engine going to a fire is not in a safe place. It was therefore incumbent upon Mr. Grassie, in the exercise of the due care which the law always exacts, to take greater precautions for his own safety than if he were a passenger in an ordinary automobile. Upon the other hand, the fire engine company was only under obligation to run at the same rate of speed and use the same degree of care and caution that fire apparatuses usually run and operate in traveling to a fire. Kelly v. Santa Barbara Railroad Co., 171 Cal. 415, 153 P. 903, Ann. Cas. 1917C, 67; Clark v. Atchison, Topeka & Santa Fé R. R. Co., supra.

Appellants rely upon the case of Curran v. Earle C. Anthony, Inc., 77 Cal. App. 462, 247 P. 236. The facts of that case are entirely different from those in the case at bar. In that case the plaintiff merely went riding in a touring car with the salesman to demonstrate the automobile to a prospective purchaser and was killed through the negligence of the salesman. The widow of the deceased brought an action for damages against the salesman and Earle C. Anthony, Inc., the owner of the car, and recovered a judgment against both. On appeal it was contended that deceased was engaged in a joint enterprise with the salesman. The court held, under the facts, that deceased and the salesman were not engaged in a joint enterprise within the meaning of the law of negligence. The question of deceased assuming a dangerous position was not there involved.

Appellants further contend that the court erred in giving certain other instructions. We have examined all the instructions given, and, taken as a whole, they fully and fairly state the law upon all the issues involved.

We think the judgment was correct under the facts and the law, and should be affirmed, and it is so ordered.

We concur: FINCH, P. J.; PLUMMER, J.

PEOPLE v. HAWLEY et al.★

LOS ANGELES ROCK & GRAVEL CO. v. CITY OF LOS ANGELES et al. (two cases).

(Civ. 6331–6333.)

District Court of Appeal, First District, Division 2, California. Dec. 10, 1928.

Rehearing Denied Jan. 9, 1929. Hearing Granted by Supreme Court Feb. 7, 1929.

1. Nuisance 🔑84—In suit against persons excavating rock, sand, and gravel, evidence supported finding that certain lands could not be excavated and adjacent lands protected by wall (Code Civ. Proc. § 731).

In suit under Code Civ. Proc. § 731, to enjoin nuisance, brought against defendants who were excavating rock, sand, and gravel in residential district, evidence *held* sufficient to support finding that leased lands of defendant could not be excavated and adjacent lands protected by wall, where leased land was table land rising above level of creek, notwithstanding that banks of creek consisted of loose sand, rock, and gravel.

2. Eminent domain 🔑2(1)—Injunction restraining excavation in residential neighborhood held not confiscation of property for public use without compensation (Code Civ. Proc. § 731).

In suit under Code Civ. Proc. § 731, brought by people against persons excavating rock, sand, and gravel in residential district to enjoin such action as nuisance, decree for plaintiffs *held* not erroneous as confiscation of defendants' property for public use without compensation.

3. Constitutional law 🔑48—Reasonableness of legislative act under police power is presumed, when it appears reasonable on face from common knowledge of subject-matter.

Reasonableness of any legislative act under police power is presumed, when it appears upon its face from common knowledge of its subject-matter to be reasonable.

4. Constitutional law 🔑48—One attacking validity of legislative act under police power must plead and prove facts showing unreasonableness.

Where legislative act under police power does not appear reasonable on its face from common knowledge of its subject-matter, any one attacking its validity must plead and prove facts showing that it is unreasonable.

5. Municipal corporations 🔑625, 626—Ordinance forbidding excavating operations in residence districts established by zoning ordinance held not arbitrary or unreasonable.

Ordinance forbidding carrying on of excavating operations in residence districts established by zoning ordinance *held* not arbitrary and unreasonable, where court found against contention that district in which excavation was being conducted was not residence district in fact.

6. Municipal corporations 🔑122(1)—One attacking ordinance forbidding excavating operations in residence districts established by zoning ordinance must plead and prove facts showing ordinance arbitrary and unreasonable.

One attacking ordinance forbidding excavating operations in residence districts established by zoning ordinance must allege and prove facts and circumstances showing ordinance arbitrary and unreasonable under existing conditions.

7. Constitutional law 🔑81—Right to beneficial use of private property is subject to lawful limitation imposed by state exercising police power.

Right to beneficial use of private property is subject to such limitation as state in exercise of its police power may lawfully impose.

Appeals from Superior Court, Los Angeles County; Victor R. McLucas, Judge.

Suit by the People against H. W. Hawley, the Los Angeles Excavating Company, and others, and two suits by the Los Angeles Rock & Gravel Company, against the City of Los Angeles and others, were tried on the same evidence. Judgment for plaintiff was entered

---

★Rehearing denied. Hearing granted. 279 P. 136.

in each case, and defendants appeal separately on one transcript. Affirmed as to first case; reversed, with directions as to second and third cases.

Charles H. Mattingly, of Los Angeles, for appellants Hawley and others.

Jess E. Stephens, City Atty., and Jerrell Babb, Deputy City Atty., both of Los Angeles, for the People and appellants City of Los Angeles, and others.

Charles H. Mattingly, of Los Angeles, for respondent Los Angeles Rock & Gravel Co.

STROTHER, Justice pro tem. The first named of the above actions was instituted by the city attorney of the city of Los Angeles, under the authority of section 731 of the Code of Civil Procedure, in the name of the people of the state of California, to abate and enjoin a nuisance which the defendants Los Angeles Rock & Gravel Company, a corporation, and Hawley and others, directors of the company, were alleged to be committing and maintaining. The facts of the alleged nuisance, as set out in the complaint, were that the defendants were excavating rock, sand, and gravel in the residential district of Los Angeles by means of steam shovels and that the smoke, dust, and noise resulting from its operation were a menace to the health and comfort of its inhabitants; that they were excavating sand and gravel from the company's holdings along Arroyo Seco, or dry creek, in that neighborhood, in a manner to create pools of stagnant water detrimental to the public health, and removing the natural banks of the creek, thereby subjecting the streets of the city and residence lots in the district to the danger of damage and destruction by flood waters and depriving them of lateral support.

The defendants answered, denying the material allegations of the complaint specifically, and setting up that certain other actions were pending between the city of Los Angeles and defendant Rock & Gravel Company, involving the right of the defendant to continue its operation; that retaining walls had been built by the defendant and others were to be built to restrain any flood waters that might come down the creek; that no such waters could come down, as the Los Angeles flood control district had constructed a dam in the hills which would impound all flood water; that the purpose and object of the city in instigating the suit was to confiscate the property of defendant without compensation; that besides lands owned by it along the creek, defendant held a short-time lease on 15 acres having deposits of sand and gravel of the net value of $675,000.

The trial court found that the defendant could continue its operations on its own land with certain restrictions upon the extent and manner of its excavation and by building walls to control the flood waters and give lateral support to adjoining lands; that the leased land might be excavated along the creek channel, but that the excavation of the remainder of it would endanger streets and property adjacent which could not be protected by the building of a wall; that the net value of the deposits on the leased land was $675,000. Decree was entered accordingly, providing for excavation of defendants' land under regulations laid down, and enjoining the excavation of the leased land. The first part of the decree was accepted by the parties, and it is from the latter part that defendants prosecute their appeal.

The only points seriously urged by appellants are: (1) That the finding that the leased lands could not be excavated, and adjacent lands protected by a wall, is not supported by the evidence; (2) that the judgment is erroneous because, in effect, a confiscation of defendants' property for public use without compensation; (3) that the judgment, if permitted to stand, should be so amended by the court as to give judgment in favor of defendant Los Angeles Rock & Gravel Company and against the city of Los Angeles, in the sum of $675,000, the net value of the deposits in the leased land as found by the court.

[1] As to the first point, it is conceded by appellants that the evidence was conflicting; but it is claimed that the physical facts disclosed are so inconsistent with the conclusion of the court as to make the evidence upon which it was based not worthy of credence. The physical facts adverted to are that the banks of the creek consist of loose sand, rock, and gravel, subject to erosion by the flood waters. But it further appeared that the leased land was a table-land rising some distance above the level of the creek, and it cannot be said, as a matter of fact, that the resistant power of the weight and extent of the deposit could be supplied by an artificial wall. The finding of the court being based upon substantial evidence cannot therefore be disturbed.

[2] As to the second point, appellants' position seems to be, though it is not precisely defined, that, their interest in the land being only to do the things which the court held to be a menace to the public welfare, they were in a different situation from the owner of the whole estate, because the result of the judgment was to destroy the whole value of their interest. If their contention were correct, the most obnoxious nuisance might by a very simple device be placed on an impregnable position. The land remains to its owner to be used for whatever lawful purpose he may see fit to use it.

The authorities to the effect that the use of property in a manner detrimental to the public health or safety may be abated, however valuable the use be to the owner, are too numerous and too uniform to require specific citation. What has just been said disposes also of the third contention of appellants; but it may be observed that they have not pointed out how this court could, in any event, render a judgment against the city of Los Angeles, which is not a party to the action.

The two other actions were brought by Los Angeles Rock & Gravel Company against the city of Los Angeles and the mayor and other officials of the city to enjoin the enforcement of two several penal ordinances of the city forbidding such operations as those of plaintiff in certain sections of the city which by ordinance had been set apart as a strictly residence district. The three actions were tried upon the same evidence and separately appealed upon one transcript, and stipulated to be and ordered heard together on appeal. In the two latter cases judgments were given in favor of the plaintiff, from which the respective defendants appeal.

The facts alleged by plaintiff pertinent to the question are that it is the owner in fee and holder under lease of lands which are chiefly valuable for their deposits of rock, sand, and gravel which can be excavated and removed for sale; that it has a very large investment in its business, many contracts for its material unfulfilled, and a great prospective profit from the operation of its business which will be destroyed if defendant is permitted to enforce its ordinances; that while the lands which plaintiff was excavating are within a residence district as defined by the city's ordinance, the district is so thinly populated that its operations will not be detrimental to the public welfare. The tract of land involved in these two actions and upon which plaintiff was operating is the same tract as that which the court enjoined the plaintiff from excavating in the case of People v. Hawley et al., hereinbefore considered.

There are many averments in the pleadings on the part of both parties to these actions which are entirely irrelevant to the single issue which should have been presented; i. e., whether or not the ordinances complained of were void as being an arbitrary and unreasonable, and therefore unconstitutional interference with the right of plaintiff to the enjoyment of its property. The complaint sets out that under an act of the Legislature a flood control district was organized which constructed a dam in the mountains, which, it alleges, controls all but exceptional floods coming down a creek abutting upon plaintiff's property, and that the district is authorized by law to make further provision for the control of flood waters. It also alleges that the city of Los Angeles was by law authorized to lease, operate, and own gravel beds and that it was engaged in a nefarious scheme to drive out all competition and acquire all of plaintiff's properties and acquire a monopoly of the kind of business conducted by plaintiff.

The defendant pleaded a contract alleged to have been entered into between plaintiff and defendant by which the former agreed to build walls along the creek and around certain excavations made by it in its operations, and the defendant, in consideration of plaintiff's agreements, agreed not to interfere with excavations which were the subject of an injunction suit between the parties—the particulars of which suit do not appear—and to permit plaintiff to do certain other things evidently relating to matters involved in that suit. Plaintiff filed an amended and supmental complaint alleging that the contract mentioned was never executed and that, if it had been, it was void as in restraint of trade.

What these various matters had to do with the issue to be tried by the court is not apparent to us, yet the bulk of the voluminous pleadings and findings of the court are devoted to them except that the court made no findings whether or not the city had the evil intent attributed to it. The pleading of such matters, with the consequent burden upon the trial court of hearing evidence and making findings, serves merely to befog the real issue and makes the task of a reviewing court almost as onerous as that of the proverbial searcher for the "needle in a haystack."

Pleading is the final test of a lawyer's knowledge of the facts of his case and the law applicable to the facts. The injection of a great mass of irrelevant and redundant matter into a pleading is evidence that the pleader is either too ignorant to know what it is all about or too indolent to find out. Counsel state that the taking of the joint evidence in the three cases consumed seven weeks, and the size of the reporter's transcript confirms the statement. Only an infinitesimal amount of that evidence is set forth in counsels' briefs, but the judgment rolls in the two latter cases make a large printed volume, and in the former, a considerable part of another.

[3-7] The reasonableness of any legislative act under the police power is presumed when it appears upon its face from common knowledge of its subject-matter to be reasonable. If it does not so appear, any one attacking its validity must plead and prove facts showing that it is unreasonable.

It is contended by respondent that each of the ordinances is arbitrary and unreasonable upon its face. The ordinances forbid the carrying on of operations such as plaintiff's in residence districts established by a zoning ordinance of the city. The power of municipalities to adopt zoning ordinances has been upheld. Miller v. Board of Public Works, 195 Cal. 477, 234 P. 381, 38 A. L. R. 1479. It is not apparent that forbidding the operation of steam shovels or the excavating of deep holes in a residence district is an arbitrary or unreasonable regulation; on the contrary, it would appear that such operations might easily depreciate or destroy the value of such a district for residence purposes and render ineffective the zoning ordinance.

It was, therefore, incumbent upon the

plaintiff to allege and prove such facts and circumstances as would show the arbitrary and unreasonable application of the ordinances under existing conditions. The plaintiff claims that the enforcement of the ordinance will result in the taking of its property without due process of law by prohibiting its most valuable use. The right to a beneficial use of private property, however, has always been held subject to such limitation as the state, in the exercise of its police power, may lawfully impose.

The only allegations in the complaints from which it might be inferred that the application of the ordinances to plaintiff's business was arbitrary and unreasonable is that the district in which it was being conducted was not in fact a residence district, but that all of its land "is an uninhabited district, and the territory around it is thinly inhabited," as expressed in one complaint and by similar allegations in the other complaint. The court, however, found to the contrary of the statements in these allegations. The judgment of the court is not supported by the findings.

The judgment in the case of People v. Hawley et al. is affirmed. The judgments in the cases of Los Angeles Rock & Gravel Co. v. City of Los Angeles and the Same Plaintiff v. City of Los Angeles, Cryer et al., are reversed, with directions to the trial court to enter judgments in favor of the defendants.

I concur: NOURSE, J.

---

95 Cal. App. 487

HENDRICKSON v. HENDRICKSON.

(Civ. 6527.)

District Court of Appeal, First District, Division 1, California. Dec. 14, 1928.

1. Husband and wife ⚿49½(6)—Husband held not entitled to restoration of property given his wife, though she attended dances without his knowledge, and afterwards lost her affection for and left him.

Husband is not entitled to restoration of property which by way of gift he unconditionally conveyed to her, without being induced by fraud to do so, though she attended dances without his knowledge, and afterwards because of his conduct lost her affection for and left him; she never having been guilty of meretricious relations.

2. Deeds ⚿19—Nonpayment of recited consideration in deed of gift is not ground for cancellation.

Conveyance being intended and made and received and accepted as a gift, donor is not entitled to cancellation because the recited nominal consideration was not paid.

Appeal from Superior Court, City and County of San Francisco; James M. Troutt, Judge.

Action by James Hendrickson against Maude Hendrickson. Judgment for defendant, and plaintiff appeals. Affirmed.

R. A. Rogers, of San Francisco, for appellant.

Fred A. Watkins, of Long Beach, for respondent.

TYLER, P. J. Plaintiff by this action seeks the cancellation of a deed to certain real property. The complaint alleges, in substance, that at the time the conveyance was made the parties were husband and wife, and plaintiff, believing that defendant entertained love and affection for him, made the transfer to his wife, upon her request, for their sole use and benefit and upon the promise that she would reconvey the property to him at any time he desired. It is then charged that defendant, when she made the promise, intended to retain the same for her sole use and benefit, and that after receiving the conveyance her attitude immediately changed and she became unbearable, and subsequently deserted plaintiff and their children. Defendant denied these allegations. The trial court found in substance that defendant did not make any false or fraudulent representations to plaintiff in order to procure the conveyance, or that she ever agreed to reconvey the property to him upon his request, but that, on the contrary, such conveyance was a voluntary act on plaintiff's part and was intended as a gift, and was accepted by defendant as such. Judgment in favor of defendant followed.

[1] It is here claimed that the evidence shows conclusively that the execution and delivery of the deed were obtained by means of fraud and deception, and also that title never passed for the reason that defendant failed to pay the consideration of $10 named in the deed. There is no merit in these contentions. There was evidence to show that at the time the conveyance was made the parties had been married for a period of over seven years, and that defendant during that time entertained love and affection for her husband and had borne him three children and was pregnant when the deed passed with twins, as their birth about three months later developed. Defendant admitted that her affections had undergone a change due to the fact that plaintiff insisted upon her submitting herself to a physician for the purpose of having an operation performed at a time when she was pregnant. It also appeared in evidence that defendant was fond of and attended dances without the knowledge of her husband, and it is claimed that by reason of this fact and the change in her affections, together with the additional fact that she sub-

sequently left her husband, entitled him to a restoration of the property. We do not think so. It may be that in a case where a wife has prevailed upon her husband to make a gift to her of property under the false pretense that she was fond of him, when in fact she had determined to desert or abandon him upon securing the conveyance, or where at such time she was carrying on adulterous relations with another, such acts would constitute actual fraud entitling the donor to a restoration of his property, and especially so where it appeared that the conveyance would not have been made but for the deception. Murdock v. Murdock, 49 Cal. App. 775, 194 P. 762. But this is not such a case. There is no evidence to show that defendant was ever guilty of meretricious relations. The record contains ample evidence to show that defendant was fond of her husband at the time of the conveyance, and whatever change may have taken place in her affections subsequently was caused by the act of the defendant in demanding that she undergo an illegal operation and other acts of cruelty practiced by him upon her. There is abundant evidence in the record to show that the conveyance was freely and voluntarily made, and without any promise on the part of defendant to reconvey to the husband upon his request.

[2] Equally without merit is the claim that cancellation should be decreed because the consideration of $10 expressed in the deed was not paid. Upon this question the trial court found that the conveyance was intended and made as a gift and was received and accepted as such. The evidence supports the finding.

The judgment is affirmed.

We concur: KNIGHT, J.; CASHIN, J.

---

95 Cal. App. 390

ANGLO CALIFORNIA TRUST CO. v. KELLY et al. (Civ. 6249.)★

District Court of Appeal, First District, Division 1. California. Dec. 11, 1928.

Rehearing Denied Jan. 9, 1929. Hearing Denied by Supreme Court Feb. 7, 1929.

1. Appeal and error 🔑957(1)—Judgment 🔑139—Trial court's disposition of application to set aside default is largely discretionary, and will not be set aside unless abuse clearly appears (Code Civ. Proc. § 473).

Action of court upon application to set aside default under Code Civ. Proc. § 473, rests very largely in discretion of trial court, and will not be disturbed on appeal unless abuse of discretion clearly appears.

2. Appeal and error 🔑957(1)—Order on application to set aside default will stand, unless unsupported by any evidence (Code Civ. Proc. § 473).

Order of trial court on application to set aside default, under Code Civ. Proc. § 473, will not be disturbed on appeal, unless order is without any evidence whatever to sustain it.

3. Judgment 🔑143(11)—Refusal to set aside default occasioned by failure of defendant's attorney to appear at trial held not abuse of discretion, though defendant himself procured illegal transfer of case to another department.

Trial court's refusal of application to set aside default *held* not abuse of discretion, where failure of defendant's attorney to appear at date set for trial was explained as due to information which he received concerning his client's activities in having the case removed to another department for jury trial, since facts did not show excusable neglect, and attorney should have known that transfer by client was illegal.

4. Attorney and client 🔑88—Attorney has exclusive management of case, and client prior to changing attorneys cannot assume control.

Party to action must appear either in person or by attorney, and party appearing through attorney, though permitted to change attorneys, may not prior to that time assume control of the case, since attorney has exclusive management and control.

Appeal from Superior Court, City and County of San Francisco; Louis H. Ward, Judge.

Action by the Anglo California Trust Company against John Kelly and wife and Lillian Kelly and others. Judgment was entered for plaintiff by default, and, from an order overruling a motion to set aside default, defendants named appeal. Affirmed.

J. C. Flannery, of San Francisco, for appellants.

Grover O'Connor, of San Francisco, for respondent administrator.

Hadsell, Sweet & Ingalls and Lee M. Olds, all of San Francisco, for defendant Commerce Oil & Leasing Co.

TYLER, P. J. [1, 2] Appeal from a default judgment. The action was one brought for the foreclosure of two mortgages. The case was regularly set for trial, and, defendants failing to appear, the court took evidence and entered its decree of foreclosure. This decree was recorded on March 27, 1926, and notice thereof was duly given to defendants. Thereafter a notice of motion to set aside the default was made under the provisions of section 473 of the Code of Civil Procedure. The motion came on regularly for hearing, and was denied, and the sole question here presented is whether or not the trial court abused its discretion in refusing to vacate the decree. It is, of course, elementary, that the action of a court upon an application to set

---

★Rehearing denied. Hearing denied by Supreme Court.

aside a default, or grant relief therefrom, rests so largely in its discretion that it will not be disturbed on appeal unless it shall be made clearly to appear that there was an abuse of this discretion. Pickerill v. Strain, 196 Cal. 683, 239 P. 323. While it has been said in some cases that this discretion is better exercised when it tends to bring about a decision of the cause upon its merits, the rule itself has never been relaxed. Ingrim v. Epperson, 137 Cal. 372, 70 P. 165. The matter being discretionary and reviewable only for abuse, it may well be that this court would sustain an order denying such relief in one case and deny it in another, where the facts presented to the lower court were practically the same in both, because this court would not say that there was an abuse of discretion in either event. Lynn v. Knobb, etc., Co., 177 Cal. 56, 169 P. 1009. In other words, it must be shown that the order is without any evidence whatsoever to sustain it.

[3] Considering all the facts and circumstances as disclosed by the record, we are of the opinion that the court below did not abuse its discretion in refusing to vacate and set aside the decree. It appears from the affidavits presented on the motion that the case was twice regularly noticed for trial. At the time of the first setting of the cause defendants' attorney requested that the matter be allowed to stand over for three weeks upon the understanding that no further continuance would be asked for. Upon this agreement being made, the attorneys for both parties called upon the clerk of department 16 of the court, where the cause was pending, and arranged for a day of trial. The matter was set for March 25, 1926, and plaintiff's attorney served notice of the new date of trial. The matter thereafter continuously appeared on the calendar of department 16 up to the time the default was entered. Prior to the date when the case was thus set for trial, defendants' attorney, who resided in Visalia, sent a written communication to plaintiff's attorney informing him that he had received notice of the setting of the cause. This communication contained a proposed amended answer, which was subsequently filed. Defendants' attorney asked for the exact amount claimed to be due, but, before a reply was given, defendant John J. Kelly, called personally upon plaintiff's attorney and made a similar request. The exact amount due was stated to him, whereupon he attempted to enter into a discussion concerning the matter. Plaintiff's attorney refused to talk about the case except upon the question of immediate payment of the amount due, giving as a reason for such refusal that defendant was represented by an attorney and should act through him. Kelly then made the statement that he would demand a jury. He was informed that, the suit being one in equity, defendants were not entitled to a jury trial. Thereafter Kelly personally consulted with certain officers of the court and filed a demand in person for a jury trial. After the filing of this demand, Kelly delivered to plaintiff's attorney a notice of motion to set the cause for trial. This notice was signed by Kelly alone, his attorney's name nowhere appearing thereon. It contained the recital that the motion would be heard in department 8 of said court on Friday, the 19th day of March, 1926. Plaintiff's attorney ignored the notice, as it was not made by the attorney of record. No notice of the motion appeared upon the calendar of department 8 or in the minutes of the court of said department on that day, but the same did appear on the calendar of department 16. Notwithstanding this fact, Kelly appeared personally in department 8 on the day noticed in support of the motion to set and succeeded in having the cause placed at the foot of the jury calendar in department 8. The judge of department 16 had no knowledge of the proceedings had in department 8, and the matter was ordered dropped from the calendar, but the original order setting the cause for trial on March 25, 1926, remained in full force. Upon procuring the consent of transfer in the manner indicated, Kelly procured a deputy court commissioner to draw up and present to the court a written order of transfer of the cause from department 16 to department 8, a jury department. This order recited that the case was a "jury case" and also that *plaintiff* had demanded a jury; both recitals being untrue. A copy of this order was mailed to plaintiff's attorney. As above stated, notwithstanding the irregular transfer, the case continued on the calendar of department 16 for trial on March 25, 1926. On this day plaintiff appeared with his witnesses for trial, evidence was taken, and the decree here sought to be set aside was entered.

[4] The affidavit of Kelly's attorney states that the sole reason why he did not appear at the trial was because of the information he had received from his client concerning his activities. Such facts do not, in our opinion, show excusable neglect for his failure to appear at the trial. He knew or should have known that the transfer was irregular and had no effect upon the regularly noticed date of trial. Tubby v. Tubby (Cal. Sup.) 260 P. 294. While a party to an action may appear in his own proper person or by attorney, he cannot do both. If he appears through an attorney, such attorney has the management and control of the action. If a party becomes dissatisfied with his attorney he may make a change. Until this has been done, the client cannot assume control of the case. Boca, etc., Co. v. Superior Court, 150 Cal. 153, 88 P. 718. This rule is indispensable to the orderly conduct of a cause. The facts indicate that the activities

of Kelly were for the sole purpose of obtaining delay, and offer no excuse for defendants' attorney failing to be present at the time the case was regularly set for trial and of which he had legal notice. Under all the facts and circumstances, the court below was justified in refusing to vacate the decree.

The order is affirmed.

We concur: KNIGHT, J.; CASHIN, J.

KAUFMAN v. TOMICH et al. (Civ. 6336.)★

District Court of Appeal, First District, Division 2, California. Dec. 10, 1928.

Rehearing Denied Jan. 9, 1929. Hearing Granted by Supreme Court Feb. 7, 1929.

1. Municipal corporations ⚷395(1)—Court was justified in determining damages for subsidence from cost of concrete garage which restored property, where expense was less than that of excavating for retaining wall.

Court's finding as to amount of property owner's damages, due to removal of lateral support by sewer construction, was proper, though based on cost of construction of concrete garage for restoring retaining wall, where evidence showed cost of garage was less than cost of excavating for retaining wall and served same purpose.

2. Appeal and error ⚷221—Defendants could not complain for first time on appeal that incorrect measure of damages was adopted.

Defendants, who tried case below on theory that measure of damages adopted by court in its finding was correct, could not complain for first time on appeal that measure of damages so adopted was improper.

3. Municipal corporations ⚷400—Contractor, sued with city for damages from subsidence due to sewer construction, held solely liable, where plaintiff's retaining wall was not braced as required by specifications.

Where specifications for laying of sewer on street abutting plaintiff's property called for bracing retaining wall, and sewer could have been laid without harming plaintiff's property by contractor's use of proper care, contractor alone was liable for damages caused by removal of lateral support, in suit against contractor and city, where no steps were taken to brace or protect defendant's retaining wall until after damages occurred.

4. Municipal corporations ⚷400—That work planned by city is inherently dangerous does not render city liable for damages caused by contractor.

Municipality is not necessarily liable for damages caused by contractor by reason of fact that the work planned is inherently dangerous, since the amount of danger merely determines the amount of care required of contractor in executing the work.

Strother, Justice pro tem., dissenting in part.

Appeal from Superior Court, Los Angeles County; Walter Guerin, Judge.

Action by Ethel Clayton Kaufman against Peter Tomich and the city of Los Angeles. Judgment for plaintiff, and defendants appeal. Judgment against defendant Tomich affirmed, and that against defendant City reversed.

Jess E. Stephens, City Atty., and Lucius P. Green, Deputy City Atty., both of Los Angeles, for appellant city of Los Angeles.

Hewitt, Ford, McCormick & Crump, of Los Angeles (J. F. Moroney and Pierce Works, both of Los Angeles, of counsel), for appellant Tomich.

Miller & Ellis, of Los Angeles, for respondent.

STROTHER, Justice pro tem. This is an appeal from a judgment in favor of plaintiff for damages to real property. The city council of the city of Los Angeles adopted a resolution of intention to lay a sewer on Fairfield avenue, a street upon which plaintiff's property abuts, to be constructed in accordance with specifications adopted by the council and plans and profiles on file in the office of the city engineer. A contract for the construction was let to the defendant Tomich.

Plaintiff's property was situated on the south side of Fairfield avenue, and sloped at a considerable angle toward the street, and at the line was about 7 feet above the street. A concrete retaining wall formed the property line. The defendant Tomich, in performance of his contract, dug a ditch in the street 7 or 8 feet from plaintiff's line and about 7½ feet deep in which to lay the sewer. The ditch was dug in sections 6 or 7 feet long, about 6 feet apart, with tunnels at the bottom between the sections. Directly after the excavation of the ditch, the westerly part of plaintiff's lot and part of a vacant lot west of hers began to slip diagonally toward the street, breaking the retaining wall and taking out part of the foundation of plaintiff's house, which was set about 15 feet back of the street line. It was the contention of plaintiff that the damage to her resulted from the conjoint negligence of the city in improperly planning and locating the sewer line and of the contractor in negligently performing the work. There was testimony on her behalf that the side of the ditch nearest her property cracked and bulged in, and that the contractor did not properly brace the sides of the ditch, so as to prevent movement of the earth. Judgment went for the plaintiff, and the defendants appeal separately upon a joint bill of exceptions.

It is argued on behalf of the appellant city of Los Angeles that the only act of the city was a governmental one, in declaring the necessity for the construction of the sewer; that the plans and specifications for its construc-

---

★Rehearing denied. Hearing granted. 280 P. 130.

tion were the work of an independent agent, the city engineer, and the carrying out of the plans and specifications solely the responsibility of the contractor. The case of Haughawout v. Hubbard, 131 Cal. 675, 63 P. 1078, and other cases, are cited in support of the proposition that the city is not liable for the acts of its officers in preparing specifications and doing other engineering work. But in all of these cases the court was considering, not the liability of the municipality, but the sufficiency and regularity of the proceedings as authority for proceeding with the proposed work, or the enforcement of the lien of assessments against the property liable for its cost. The cases which hold that a municipality is not liable for the acts of its administrative officers are those where the officer had omitted the performance of his legal duty, or done some act in violation, or in excess, of his legal duty, as in the case of Sievers v. San Francisco, 115 Cal. 648, 47 P. 687, 56 Am. St. Rep. 153.

Section 34 of the "Vrooman Act" (St. 1885, p. 147, as amended by St. 1891, p. 206) does not, as argued by the appellants, give complete power and discretion to the city engineer in the preparation of plans and specifications and other engineering work necessary in carrying out public improvements, and, if it did, it would be merely substituting him as another agency of the municipality for the city council or the board of public works, and would not change its liability, if any, for the results. The city council in its resolution of intention expressly designated the specifications for the work—which specifications it had theretofore adopted by ordinance—and defined the location of the sewer. In determining the necessity of the sewer, the city, by its council, was acting in its governmental capacity; in planning the location and construction of the sewer, in its corporate or ministerial capacity, in the construction of a public work of the municipality. If, by reason of its construction in the particular location, the plaintiff's property was damaged, no "compensation having first been made," as required by article 1, § 14, of the Constitution, the city committed a legal wrong for which it is liable.

The question whether the liability existed at common law or was created by the constitutional provision is immaterial, as the nature of the liability is the same in either case. In Perkins v. Blauth, 163 Cal. at page 789, 127 P. 53, it is said: "Upon the other hand, if the act is one commanded by the municipality itself, *if inherently wrong*, the municipality and the agent who performed will both be liable." Again: "Wherever the injury complained of is the taking or damaging of private property for public use without compensation then under the guarantee of the federal constitution against such invasion of the private rights of property, neither the state itself nor any of its agencies or mandatories may claim exemption from liability." Id. The decisions in this state are uniform to the same effect. In this case, the court having found from competent evidence that the plan and location of the sewer was inherently dangerous, it comes within the rule.

It is urged by appellant city of Los Angeles that the evidence was insufficient to support the finding that the "location and alignment of said sewer was intrinsically dangerous and inherently wrong." Over the objection of defendants, witnesses, who were shown to be experienced in excavation similar in kind and location to that in this case, were permitted to testify that the location and manner of construction of the ditch were likely to endanger plaintiff's property. It is argued that this was not a matter upon which expert testimony was admissible, and appellant Tomich contends that, if the finding was true, he was not liable, and both appellants contend that no joint liability was shown. But it does not seem to us that the effect of the removal of lateral support from soil, on a hillside, composed of an overburden of black adobe on a thick layer of mixed shale and clay, with a subbase of clay, is of such common knowledge that the judgment of those experienced in working under such conditions would not be enlightening, or that the amount of care necessary to prevent soil of that character and in that position from caving, is matter of common knowledge. If they were matters of common knowledge it would seem hardly necessary to have the aid of an engineer, skilled in the planning and supervision of such work, in preparing its plans and specifications and locating its line. This evidence, with the evidence of the physical facts and of what happened, was sufficient to support the finding of the court.

The contractor having undertaken to carry out a work which the court found was inherently dangerous to plaintiff, and having been found by the court not to have taken the precautions which might have averted injury to plaintiff, was also liable.

Certain other findings of the court are objected to by appellants as not supported by the evidence. The finding that the city did not, by its specifications, require that the sides of the ditch should be braced, was contrary to the evidence. There was testimony, however, to the effect that they were not braced, and the court so found. The court having found that the location of the ditch endangered plaintiff's property, it was the duty of the city at all events to prevent the injury and the finding was immaterial.

The complaint alleged, and the court found, that the notice mentioned in section 832 of the Civil Code, defining the rights of coterminous owners to lateral support, and providing that each shall have the right to make proper and usual excavations on his own land, on "giving * * * reasonable notice to the other of his intention to make such excavations," was not given. There was, in the answer, no denial of the allegation, but merely a denial of the further allegation that "no notice was given."

[1] It is claimed by appellants that the amount of damages found by the court was excessive. Plaintiff restored the retaining wall by the construction of a concrete garage. Witnesses on her behalf testified that the cost of this structure was less than would have been the cost of excavating for a solid foundation for an ordinary retaining wall and replacing the earth behind it, and served the same purpose of restoring and maintaining the stability of plaintiff's property. This was sufficient justification for the court's finding.

[2] Appellants contend that the measure of damages adopted by the court in its finding was not correct, and that the finding should have been as to the difference in the value of the property before and after the injury, not the cost of restoring it to its original condition. The question is raised for the first time on this appeal, and the case was tried by both parties on the theory that the latter was the proper measure of damages. Appellants should not now be heard for the first time on appeal to complain that the case was tried on an erroneous theory. Kincaid v. Dunn, 26 Cal. App. 686, 148 P. 235.

The judgment should be affirmed.

KOFORD, P. J. [3] I concur in that part of the opinion which affirms the judgment against defendant Tomich, but do not agree with that part of the opinion which affirms the judgment against the defendant city of Los Angeles. I think the damage to plaintiff's property was caused by the negligence of the contractor in failing to carry out faithfully the specifications and not by the public work as planned, specified, and contemplated. It could have been executed without harm to plaintiff, if proper care was used by the contractor; and so it was not the public work, but the manner of executing that public work by the contractor, which damaged the plaintiff. Although the specifications called for bracing, yet, quoting from respondent's brief, "it clearly appears that no bracing or protection of plaintiff's wall was taken until after the damage had occurred." In the authorities relied upon by respondent for upholding the liability of the municipality, the damage resulted from the very nature of the improvement as planned. This distinction is pointed out by Justice Sloss in Gay v. Engebretsen, 158 Cal. 21, 24, 109 P. 876, 139 Am. St. Rep. 67, and in the case of Perkins v. Blauth, 163 Cal. 782, at page 789, 127 P. 50, and in Sievers v. San Francisco, 115 Cal. 648, 652, 653, 47 P. 687, 56 Am. St. Rep. 153.

[4] The public work planned and ordered was to open and close the street, again restoring it to its former state in good order. The work as planned, then, would do no harm to plaintiff; but the city is held liable by the judgment, because the work as located and aligned was inherently dangerous—inherently wrong and of such a nature as was likely to damage and injure plaintiff's property. If the judgment is correct, then the municipality is responsible at all events for damages caused by the contractor if the work planned is dangerous, but not if the work is not dangerous inherently. No such distinction has been drawn in the authorities between dangerous work and safe work. The amount of danger only determines the amount of care required in executing the work.

The judgment against the defendant Tomich is affirmed. The judgment against the city of Los Angeles is reversed.

I concur: NOURSE, J.

95 Cal. App. 305

PACIFIC ACCEPTANCE CORPORATION v. JONES. (Civ. 3494.)★

District Court of Appeal, Third District, California. Dec. 7, 1928.

Rehearing Denied Jan. 5, 1929. Hearing Denied by Supreme Court Feb. 4, 1929.

1. Principal and agent ⟹23(4), 137(1)—Evidence showed ostensible agency by original seller to collect purchase price for assignee of conditional sales contract, and estopped assignee from denying such agent's authority (Civ. Code, §§ 2305, 2317).

In action to recover possession of automobile sold to defendant's assignor by plaintiff's assignor under conditional sales contract, evidence that plaintiff's authorized agent, empowered to collect balance of purchase price or repossess automobile, agreed to meet purchaser at original seller's office and directed purchaser to pay original seller, that contract directed payment at office of original seller, that plaintiff, after assignment, had made no objections to purchaser paying original seller, though it had knowledge thereof, and that purchaser paid original seller, showed existence of ostensible agency in seller to collect balance, under Civ. Code, § 2305, and estopped plaintiff from denying authority of its agent, under section 2317.

2. Principal and agent ⟹92(1)—Agent's authority is determined by relation of parties and conduct and declarations of principal.

Authority of agent is to be determined by relation of parties, together with conduct and declarations of principal.

★Rehearing denied. Hearing denied by Supreme Court.

3. Principal and agent 🔑105(9)—Acceptance of check by agent limited to collect cash held payment to principal, though agent absconds.

Where agent is authorized to collect money, without specifically limiting him to collection of cash, and valid check is accepted in lieu of cash, it is equivalent to payment to principal, although agent absconds with proceeds.

4. Sales 🔑480(1)—Assignor of conditional sales contract for automobile could not replevin automobile, where possessed by purchaser's assignee when action was commenced and plaintiff's agent was paid.

In action to recover possession of automobile sold by plaintiff's assignor to defendant's assignor under conditional sales contract, plaintiff was not entitled to recover judgment, where defendant was in actual possession of automobile when action was commenced, and final payment had been made to plaintiff's agent.

5. Sales 🔑480(1)—Replevin by assignee of conditional sales contract required immediate and exclusive right of possession when action was commenced.

In action to replevin automobile by assignee of conditional sales contract, brought against assignee of original purchaser, plaintiff, to recover, was required to establish claim to immediate and exclusive right of possession of automobile at time of commencement of action.

6. Sales 🔑480(4)—Assignee of original purchaser, receiving automobile, sought to be replevied, in good faith trade, and in possession as owner at commencement of action, held, under evidence, entitled to judgment.

In replevin for automobile by assignee of conditional sales contract against assignee of original purchaser, evidence that defendant had in good faith received automobile in trade with original purchaser, and was owner thereof and in actual possession at time of commencement of action, showed defendant was entitled to recover judgment.

7. Estoppel 🔑92(2)—Assignee of conditional sales contract held estopped to deny defendant's title to automobile, because certificate of ownership was not transferred, where purchase price was paid to agent (Motor Vehicle Act, § 45).

In replevin for automobile by assignee of conditional sales contract against assignee of original purchaser, plaintiff was estopped to deny defendant's title or right of possession on ground that certificate of ownership had not been transferred, as required by Motor Vehicle Act (St. 1923, p. 517) § 45, where entire balance of purchase price of automobile was paid to agent of plaintiff.

Appeal from Superior Court, Yolo County; W. A. Anderson, Judge.

Action by the Pacific Acceptance Corporation against T. S. Jones. Judgment for defendant, and plaintiff appeals. Affirmed.

Brownstone & Goodman, of San Francisco, and Huston, Huston & Huston, of Sacramento, for appellant.

Gaddis & McDonald, of Woodland, for respondent.

THOMPSON, Justice pro tem. This is an appeal from a judgment in favor of the defendant in an action to replevin an automobile. The answer asserts that the right of possession and title to the car were in the respondent. It also alleges that the car was worth $403.11, and prays for the return of the machine or the payment of its value.

May 23, 1925, Harmon & Graves Motor Company, of Eureka, Cal., sold and delivered to C. A. Bland a Nash touring car upon an executory contract, by the terms of which the title remained in the vendor until the purchase price was fully paid. C. A. Bland was a minor, and the contract was therefore executed by his father, C. M. Bland, although the car was registered in the name of the son. Three days after the contract was executed it was assigned to the Pacific Acceptance Corporation of San Francisco, California. Harmon & Graves maintained an office at Redding, in the vicinity of which the Blands resided. After the assignment of the contract, several payments thereon were made to Harmon & Graves, which were accepted and credited without criticism on the part of the appellant. In February, 1926, Bland was having trouble with his machine and drove it into respondent's garage at Woodland for repairs. An agreement was then made with respondent to exchange this machine for another automobile, upon the purchase price of which Bland was credited the sum of $700 as the value of his Nash car. Bland then drove the new machine away, promising respondent to immediately pay the balance due upon the old machine. In February, 1926, the appellant wrote to C. A. Bland a letter, acknowledging receipt of two installments which were paid upon the Nash car. The appellant said: "You have requested information as to whether it will be satisfactory for you to make two payments at a time. But we understand from our representative, who is at present in and around Redding helping Mr. Graves with some of his collections, that you have already traded your car off. * * * If this rumor is true, * * * we must ask you to send us the entire balance of $403.11." This letter was signed "Collection Manager," beneath which appeared the firm name of Harmon & Graves.

February 24, 1926, Mr. Brown, the agent of appellant, called at the home of Bland, and demanded payment of the balance of the purchase price of the Nash machine. Bland told the agent that he would meet him the following day in Redding and pay the balance. Brown agreed to meet him at the office of Harmon & Graves, but said he had other business in that vicinity, and added: "If I am not there, Graves will attend to it for me."

In this regard, Bland testified on cross-examination: "Q. As I understand it, Brown told your father, if he wasn't at Harmon & Graves the next morning, to pay the balance due on this account to Graves, at Harmon & Graves? A. [Yes; he said to] pay it to Graves." At 9 o'clock the next morning Bland appeared at the designated office in Redding pursuant to agreement and found Brown absent. After considerable delay and effort to obtain Brown's presence, Bland executed and delivered his check to Graves for the entire balance of the purchase price of the Nash car. It appears that Graves failed to account to appellant for this payment. The trial court found that appellant was neither the owner nor entitled to the possession of the automobile, and decreed that it take nothing by this action. Upon the contrary, the court found that respondent was the owner and entitled to the possession of the Nash car, that it was worth $403.11, and that subsequent to the commencement of the action appellant had sold the machine and was unable to restore it to the owner, and thereupon rendered judgment in favor of the respondent for the sum of $403.11.

The appellant asserts that (1) the findings and judgment are not supported by the evidence; that (2) Graves was not authorized as its agent to collect the money in question; that (3) since the balance of the purchase price of the machine had not been paid to appellant, Bland had no title to convey to the respondent; and that (4) the respondent held no valid title to the automobile since the certificate of ownership had not been transferred to him as provided by section 45 of the Motor Vehicle Act (St. 1923, p. 517).

[1, 2] The vital question involved in this appeal is whether Bland was justified in assuming that Graves was authorized by the appellant to collect the balance of the purchase price of the automobile. While there is a conflict of testimony, we are of the opinion that the record discloses substantial evidence of the existence of an ostensible agency in Graves. Brown was the authorized agent of appellant, empowered to collect the balance of the purchase price of the machine or repossess it. He demanded payment from Bland, and agreed to meet him at the office of Harmon & Graves in Redding for that purpose, saying: "If I am not there, Graves will attend to it for me." Harmon & Graves were the original owners of the machine and executed the contract of sale to Bland. The contract itself directed that the payments be made "*at the office of the seller*, or his assigns." After the assignment of the contract several installments were paid by Bland to Harmon & Graves and credited to his account without objection on the part of appellant. The appellant knew that payments were made in this manner. Bland testified that he wrote the appellant July 17, 1925, saying: "* * * Now I paid two payments on my car June 23. I paid the payments that were due and also the July payment, and I have receipts to show it. I paid it to John Witherow, one of Harmon & Graves head salesmen. So, please look up the mistake at once, as I do not intend to make payments twice." In spite of the fact that appellant knew these payments were being made to Harmon & Graves, it failed to direct Bland to discontinue this practice. In this regard, Mr. Bland testified: "Q. Did you ever receive any notice from the Pacific Acceptance Corporation asking you not to make any payments to Graves * * *? A. No sir, I did not."

[3] The authority of an agent is to be determined by the relation of the parties together with the conduct and declarations of the principal. 1 Cal. Jur. 695, § 5; 21 R. C. L. 819, § 5; Rezos v. Zahm & Nagle Co., 78 Cal. App. 728, 246 P. 564. In the case of Schnier v. Percival (Cal. App.) 256 P. 1109, where the principle of ostensible agency was involved, the court said: "It appears from the evidence in the case that defendants knew the general custom of Eshleman to collect payments and issue receipts in his own name, and, by failure to object, acquiesced in this conduct. Where the acts are of such a nature and so continuous as to justify a reasonable inference that the principal knew of them and would not have permitted them if unauthorized, the acts are competent evidence of agency." An agent is authorized to perform any act which the principal may transact, except when it clearly appears that his authority is otherwise limited. Section 2305, Civ. Code. Since the acts, conduct and omission of appellant to notify Bland not to pay installments to Harmon & Graves may reasonably be said to have justified him in believing that Graves was authorized to collect the balance of the purchase price of the automobile the appellant is estopped from denying the authority of its agent in this respect. Section 2317, Civ. Code; Henry Cowell Lime & Cement Co. v. Santa Cruz County National Bank, 82 Cal. App. 519, 523, 255 P. 881; Robinson v. Am. Fish & Oyster Co., 17 Cal. App. 212, 119 P. 388. Where an agent is authorized to collect money, without specifically limiting him to the collection of cash, and a valid check is accepted in lieu of cash, it is equivalent to a payment to the principal, although the agent absconds with the proceeds. California Stearns Co. v. Treadwell, 82 Cal. App. 553, 563, 256 P. 242.

[4-6] Since the respondent was in actual possession of the Nash car on July 13, 1926, when this action in replevin was commenced, and the final payment was made to the agent of appellant February 26, 1926, the appellant was not entitled to recover judgment. In order for appellant to prevail in the present action, it was necessary for it to establish its claim to immediate and exclusive right of pos-

session of the automobile at the time of the commencement of the action. 5 Cal. Jur. 160, § 4; 23 R. C. L. 866, § 15; Boles v. Stiles, 188 Cal. 304, 204 P. 848; Kenny v. Christianson, 200 Cal. 419, 424, 253 P. 715, 50 A. L. R. 1297. Upon the contrary, the evidence indicating that the respondent had in good faith traded with Bland for the Nash machine, and was not only the owner thereof, but in the actual possession of it at the time of the commencement of this action, he was entitled to recover judgment in his favor. In the case of Parke v. Franciscus, 194 Cal. 284, at page 295, 228 P. 435, 440, relied upon by the appellant, it is said: "In an action of claim and delivery the claimant is not called upon to establish ownership, merely a right to the possession of the thing, and since the transfer to appellants was not void ab initio, in an action of claim and delivery, they might be entitled to recover."

[7] The entire balance of the purchase price of the automobile having been paid to the agent of appellant, it was estopped from denying the vendee's title or right of possession upon the ground that the certificate of ownership had not been transferred as required by section 45 of the Motor Vehicle Act, or otherwise. Dowd v. Russell, 78 Cal. App. 262, 248 P. 293; Davies-Overland Co. v. Blenkiron, 71 Cal. App. 690, 236 P. 179; Boles v. Stiles, 188 Cal. 304, 204 P. 848; Kenny v. Christianson, supra.

The judgment is affirmed.

We concur: HART, Acting P. J.; PLUMMER, J.

---

95 Cal. App. 532

BOUCHER v. PEASLEY.

PEASLEY v. CONSOLIDATED INV. CORPORATION et al.

(Civ. 5872.)

District Court of Appeal, First District, Division 2, California. Dec. 17, 1928.

1. Master and servant ⟹80(10)—Evidence held to support finding that employment contract called for fixed salary in addition to commissions.

Finding that contract of employment called for fixed salary payable semi-monthly, in addition to commissions, and not for mere advancements, subject to periodical adjustment of account according to commissions earned, *held* supported by the evidence.

2. Appeal and error ⟹1002—Verdict on sufficient evidence cannot be disturbed on appeal because of conflicting evidence.

Verdict being supported by sufficient evidence cannot be disturbed on appeal because of evidence conflicting therewith.

3. Master and servant ⟹68—Salary is not recoverable for time after parties agreed employee should have commission only.

Where, while one was working on a salary and commission basis, his employer told him that the business would not warrant his further employment, but that he might remain on a commission basis, and he agreed to this and continued with the employer, there is no basis for his recovery of compensation, other than commissions, for the time subsequent.

Appeal from Superior Court, Fresno County; K. Van Zante, Judge.

Action by B. A. Boucher against W. S. Peasley, with cross-action by defendant, joining the Consolidated Investment Corporation as cross-defendant. From a judgment for defendant, plaintiff and the Corporation appeal. Modified and affirmed.

Carl E. Lindsay and Lindsay & Gearhart, all of Fresno, for appellants.

William A. White, of Fresno, for respondent.

NOURSE, J. Plaintiff, Boucher, sued the defendant, Peasley, on an assigned claim for $1,562, alleged to have been paid Peasley by the Consolidated Investment Corporation in excess of money due him. Peasley filed a cross-complaint, bringing in the Consolidated Investment Corporation as a defendant on a claim for $396, alleged to be due for services rendered the corporation. The cause was tried before a jury, and resulted in a verdict for Peasley on the original complaint and in a verdict for him against the corporation on his cross-complaint in the sum of $396. The original plaintiff and the corporation both appeal from the judgment on the same record.

Two points are raised—that the evidence does not support the verdict on the cross-complaint, and that it does not support the verdict on the main issue. For the purpose of clarity, we will reverse the order of the points raised.

On the main issue the evidence is that Peasley was employed by the corporation as a listing and real estate salesman; that his contract called for payments to him as commissions upon sales, and that in addition to this arrangement he was paid $82.50 semi-monthly, which he claimed to be an agreed salary over his commissions, and which the appellants claimed was merely a drawing account, subject to adjustment according to the amount of commission earned. He commenced work with the company on June 17, 1924, and continued until September 15, 1925, when, by mutual consent, the semi-monthly payments ceased, but he continued in the employ of the company on the commission basis until November 30, 1925. The original complaint alleged that the company advanced him during this period the sum of $2,586.40, that the total amount of commissions earned was $1,024.32, and that there was due the company the excess of these advances amounting to $1,562.02. Peasley, however, contended that these payments were by way of salary as the result of an express contract and that they should have continued until November 30, 1925, when he left the employ of the company. This latter claim is the basis of his cross-complaint in the sum of $396.

[1, 2] The evidence on the main issue is sharply conflicting, Peasley testifying that an express contract was made on June 1, 1924, calling for a fixed salary over commissions earned payable semi-monthly. Witnesses on behalf of the company were just as positive that the agreement was that Peasley should be permitted to draw $82.50 semi-monthly, subject to a periodical adjustment of his account according to the commissions earned by him. The books of the company received in evidence supported the testimony of its witnesses. Many of the checks received by Peasley, specifying that they were for advancements, also tended to support this testimony, though it was shown that some three or four of these checks were drawn on account of salary. The jury believed the evidence offered in support of Peasley, and this evidence is sufficient to support the verdict. Such being the case, the verdict cannot be disturbed on that issue.

[3] The second point presents a different situation. Peasley alleged in his cross-complaint that the semi-monthly payments were not made after October 1, 1925, and that the amount claimed to be due was for unpaid salary until he left the employ of the company. The jury gave its verdict for the full sum claimed, but the evidence wholly fails to sustain this part of the verdict. This evidence is that, some time in the month of September, 1925, a representative of the company informed Peasley that the business of the company would not warrant his further employment, but that he might remain with the company on a commission basis only if he so desired. Peasley agreed to this arrangement and testified that he continued with the company merely in a sense of loyalty, without expectation of compensation, that whatever service he gave at that time was "gratis." There is no basis for a claim for compensation either upon an express contract or by way of quantum meruit. The theory of a cause of action for compensation for services rendered rests on a contract, express or implied, to pay for the services. But when the services have been voluntary with the understanding between the employer and the employee that they shall be without compensation, there is no basis for an action for compensation, either upon an express contract or in quantum meruit. We have not overlooked the rule that where an employment under an express contract has continued over the term by mutual consent it will be presumed to have been under the same conditions as the express contract for the term. But such is not the case here.

The judgment is modified by striking therefrom the item of $396, and as so modified it is affirmed, appellants to recover their costs on this appeal.

We concur: KOFORD, P. J.; STURTEVANT, J.

CITY OF LONG BEACH v. STEN et al.★
(Civ. 4991.)

District Court of Appeal, Second District, Division 2, California. Dec. 12, 1928.

Hearing Granted by Supreme Court Feb. 7, 1929.

1. Eminent domain ⟹265(3)—Reasonable attorney's fees should be awarded defendant on dismissal of condemnation proceeding, though he is attorney and defends for himself (Code Civ. Proc. § 1255a).

The reasonable attorney's fees, which Code Civ. Proc. § 1255a, provides shall be awarded to defendant in condemnation proceeding on the proceeding being dismissed, should be awarded him, though he is an attorney and as such defends for himself.

2. Eminent domain ⟹265(3)—On dismissal of condemnation proceeding, each defendant should be awarded reasonable attorney's fee, though one is attorney and defends for both (Code Civ. Proc. § 1255a).

Where one of the co-owners and defendants in condemnation proceeding is an attorney, and as such defends for both, he as defendant is entitled to allowance of a reasonable attorney's fee independent of that allowed his codefendant, under Code Civ. Proc. § 1255a, providing for awarding defendant reasonable attorney's fees on dismissal of the proceeding.

Appeal from Superior Court, Los Angeles County; J. C. Needham, Judge.

Condemnation proceeding by the City of Long Beach against Theodore J. Sten and another. From a judgment granting the motion to retax costs on dismissal of the proceeding, defendant William Ellis Lady appeals. Reversed, with directions.

William Ellis Lady, of Los Angeles, pro se.

Bruce Mason, Geo. W. Trammel, Jr., Fred F. White, and John K. Hull, all of Long Beach, for respondent.

KEETCH, Justice pro tem. The plaintiff filed an action in 1923 in the superior court of Los Angeles county to condemn certain property in the city of Long Beach jointly owned by the defendants Sten and Lady. The latter is an attorney at law and appeared and defended on behalf of his coowner and for himself personally. An interlocutory judgment in the sum of $19,620 was obtained in their favor, and, subsequent

---

★Hearing granted. 274 P. 968.

to the entry of judgment, the plaintiff city passed an ordinance abandoning the condemnation proceedings and duly obtained a judgment and order dismissing the action against defendants. The appellant Lady, on behalf of himself and Sten, filed separate cost bills, claiming, among other items, $1,500 as attorney's fees under section 1255a of the Code of Civil Procedure. Plaintiff moved to retax the costs claimed by defendant Sten, particularly the amount claimed as attorney's fees, and also moved to retax and disallow the costs claimed by Lady as attorney's fees, on the ground of the latter being an attorney at law and having appeared and defended in his own behalf. Evidence was received by the court as to the value of the services rendered; the defendant Lady testifying that he had spent three or four days in preparing for trial and the greater portion of one day in actual trial. An expert witness testified that, on the basis of the amount of the judgment rendered in the case, the reasonable value of the services of an attorney representing the land of defendants Sten and Lady was $750, and that the value of the services of an attorney representing Sten would be $375. The court granted the motion to retax, fixing the amount of the attorney's fees for Sten at $375 and disallowing the attorney's fees as claimed by the defendant Lady. It is from this order that the latter appeals.

[1] Section 1255a of the Code of Civil Procedure, relating to the abandonment of condemnation proceedings, provides in part as follows: "Upon such abandonment, express or implied, on motion of defendant, a judgment shall be entered dismissing the proceeding and awarding the defendant his costs and disbursements, which shall include all necessary expenses incurred in preparing for trial and reasonable attorney's fees." It is contended by appellant that the section above referred to having specifically and specially provided for the allowance of costs and reasonable attorney's fees in connection with the abandonment and dismissal of a cause of action by the party initiating it, the mere fact that an attorney happens to be the owner of the property sought to be taken, and defends for himself in his professional capacity, should not deprive him of just compensation for the time and legal services rendered. He argues: "The statute authorizes it, and common sense and fairness justify it, just as much as if instead of appearing in propria persona he had gone out and obtained another lawyer to represent him, and the defendant himself devoted his own time to other litigation or legal work."

Appellant suggests that there is no authority in this state which applies directly to the situation presented, and we have failed to discover any. It is true that, in support of its contention that appellant, as the attorney in the case, is not entitled to attorney's fees because he appeared in propria persona, the respondent cites the case of Patterson v. Donner, 48 Cal. 369, where the plaintiff, an attorney, appeared personally in the action. As quoted by respondent, the court there said: "The judgment of the court below should be reduced, however, by the sum of five hundred dollars, fee of counsel for foreclosure. The action was brought and prosecuted by the plaintiff personally. We do not think that the stipulation in the mortgage sued on, for counsel fee, can apply where no counsel fee was paid by the plaintiff." As indicated, however, the case cited involved the matter of foreclosure of what was declared to be a mortgage by the court, wherein it provided for the allowance of counsel fees for such foreclosure. Patterson held the note and appeared both as plaintiff and as attorney in person. It is obvious that this presents an entirely different situation from the instant case, where the defendant and appellant has been forced under the right of eminent domain exercised by the plaintiff, the city of Long Beach, to defend, either in person or by some other attorney, his rights as the owner of property sought to be condemned. Section 1255 of the Code of Civil Procedure provides as follows: "Costs may be allowed or not, and if allowed, may be apportioned between the parties on the same or adverse sides, in the discretion of the court." This discretionary power is limited by section 14 of article 1 of the Constitution, which provides that "private property shall not be taken or damaged for public use without just compensation having first been made." It was held that the costs referred to in this section were the ordinary and usual costs attending trials and hearings under statutory provisions, and that counsel fees were not allowable to a defendant in a general judgment in his favor in condemnation proceedings. In 10 California Jurisprudence, at page 432, it is said in this connection: "To require the defendants to pay any portion of their own costs necessarily incidental to the trial of the issues on their part, or any of the costs of the plaintiff, would reduce the just compensation awarded by the jury by a sum equal to that paid for costs." These costs, however, did not include attorney's fees, and in 1911 the Legislature enacted and added to the Code of Civil Procedure section 1255a, covering abandonment proceedings, and has, as we have seen, specifically provided for costs *and reasonable attorney's fees.*

The question of the constitutionality of section 1255a as to attorney's fees was raised in the case of City of Sacramento v. Swanston, 29 Cal. App. 212, 155 P. 101, and its constitutionality upheld in an exhaustive opinion by Mr. Justice Hart. Referring to the specific character of this statute, the court said: "Thus it must at once become obvious that a proceeding for the condemnation of private property for a public use, under the power of which we have been speaking is, in its origin, its purpose and its characteristics, essentially different from any other action or proceeding established by our law as an instrumentality for the enforcement of a private right or the redress or prevention of a private wrong. It is, indeed, not included by the code within the category of ordinary actions at law or suits in equity, but is denominated, with others, as a 'special proceeding,' and even as to other proceedings so denominated in the code, it is, by reason of the characteristics peculiar to it, strictly sui generis. It, therefore, cannot be doubted that the proceeding to condemn property under the right of eminent domain is so differentiated from the ordinary actions or proceedings in a court of justice 'by which one party prosecutes another for the enforcement or protection of a right, or the redress of a private wrong,' as to bring it within the settled test justifying the assignment of the proceeding to a particular class for the purposes of reasonable provisions not applicable to other classes of actions. * * * In the case at hand there exists no basis for the reasoning which led to the conclusion arrived at in Builders' Supply Depot v. O'Connor, 150 Cal. 265 [88 P. 982, 17 L. R. A. (N. S.) 909, 119 Am. St. Rep. 193, 11 Ann. Cas. 712] and in Gulf etc. Ry. Co. v. Ellis, 165 U. S. 150 [17 S. Ct. 255, 41 L. Ed. 666]. In those cases it was held, as we have seen, that an allowance to the plaintiff of an attorney's fee if he was victorious in the trial was distinctly discriminatory, because no such allowance was provided for the defendant in case he prevailed at the trial. In this case, however, as in no other case of which we can presently think, the statute gives to the plaintiff the right to abandon the proceeding, even after a trial thereof and a verdict and judgment of condemnation rendered and entered, and, as a penalty for such abandonment, accords to the defendant the right to be reimbursed by the plaintiff for not only the ordinary costs but an attorney's fee. No right of abandonment is awarded by the statute to the defendant, and, in the very nature of the case, there could not be so that it would affect or impair the right of the plaintiff to condemn and take his property. The conditions as to the two parties in the proceeding are essentially and radically different." This language is applicable as distinguishing from the case at bar the cases of Patterson v. Donner, supra, Bank of Woodland v. Treadwell, 55 Cal. 379, and City Investment Co. v. Pringle, 49 Cal. App. 353, 193 P. 504, also cited by respondent. The same questions were raised in the case of Silver Lake Power & Irrigation Co. v. City of Los Angeles, 32 Cal. App. 123, 162 P. 432, and the case of City of Sacramento v. Swanston was quoted and approved.

In consonance with the language of these decisions with respect to the interpretation and purposes of section 1255a, it is fair to assume that the intention of the Legislature in the enactment of that statute was to indemnify and make whole a defendant in an abandoned condemnation proceeding for the time, trouble, and expense, including attorney's fees, to which he has been put by the plaintiff. That the law under such circumstances allows attorney's fees is now beyond controversy, and the only question presented is whether or not an attorney appearing for himself as a defendant in such an action is entitled to his fees in his professional capacity. It would seem from a review of the authorities, English and American, that the weight of opinion is decidedly in the affirmative. Thornton, in his work on Attorneys at Law (volume 2, p. 861), says: "An attorney who conducts his own litigation is entitled to his statutory fees. The reason for making this distinction between parties who are attorneys and those who are not is that when the party is an attorney he gives his professional time, knowledge and experience in the conduct of the defense of his suit which he would otherwise have to pay another attorney for rendering. It can make no difference to the defeated party, who is by law bound to pay the costs of the attorney of the prevailing party, whether that attorney is a party himself or another attorney employed by him. He, like any other attorney, is paid for his time and services; for if he renders them in the management and trial of his own case they may amount to as much pecuniary loss or damage to him as if he had paid another attorney for doing it"—citing Kopper v. Willis, 9 Daly (N. Y.) 460. See, also, Flaacke v. Jersey City, 33 N. J. Eq. 57; Drake v. Berry, 42 N. J. Law, 60; Crommelin v. Dinsmore, 1 City Ct. R. (N. Y.) 69, and Willard v. Harbeck, 3 Denio (N. Y.) 260.

Among the English cases, the leading authority appears to be London Scottish Benefit Society v. Chorley, Crawford, and Chester, 12 Q. B. Div. 452. Denman, J., reviewing that case, said: "In this action the defendants were solicitors. They employed no agents, but conducted the whole business as defendants in person. They succeeded in their defense, and obtained judgment: and the question has arisen, upon taxation of costs, whether, where a solicitor sues or defends in person, he is entitled only to such costs as any other defendant in person would be entitled to, viz., the costs out of pocket, or whether he is entitled to such costs as a successful defendant would be entitled to who does employ a solicitor, saving only such costs as are in the nature of things not chargeable by reason of their being instructions to himself, or matters of a like nature. The master has allowed the costs in dispute, and, upon a summons at chambers, my Brother Mathew, without expressing any opinion, referred the matter to the Court; and therefore the case comes before us as an original application to review the decision of the master. We took time to consider, owing to our having ascertained that there has been some difference of opinion amongst the taxing officers upon the subject. For the plaintiffs it was contended that these costs ought not to be allowed, and we were referred to the statute 23 Henry 8, c. 15. I do not think any question can be raised here founded upon the distinction between plaintiff and defendant. The origin of costs is to be traced to some early statutes: but none of the rules have at all, I think, affected the question whether, in taxing costs on behalf of a successful defendant who is a solicitor, the master ought or ought not to include such costs as those which have been allowed here. That is now to be decided for the first time and by the same practice, I think, by which it was always to be decided: and we have to look at what is the proper view of the matter, just as much with reference to the present state of things as we should have had to do before the passing of the Judicature Acts, or before the more recent Acts relating to costs. In Harold v. Smith, [5 Hurl. & N. 381] (1) Bramwell, B., laid it down as a general principle that costs are allowed by way of indemnity; and it was argued that these costs cannot fall within that principle, because they are not costs which the defendants have incurred or for which they have become liable. This is, no doubt, a very plausible argument, but I do not think it is by any means conclusive, because, treating the costs as being in a reasonable sense of the word equivalent to an indemnity, I am not aware of any principle which ought to prevent a successful party who is a solicitor, and who does solicitor's work, from being indemnified not merely for the time he must necessarily expend as a witness in his own case, but also for the pains, trouble, and skill which he has to incur and to exercise in order to bring it to a successful conclusion. There is nothing to prevent 'costs' thus incurred from falling within the fair meaning of an 'indemnity,' though not actually money out of pocket such as he would have had to pay if his action or his defense had been intrusted by him to another solicitor. The solicitor's time is valuable: he applies his skill to a suit or action in which he is obliged to spend his time and exercise his skill in consequence of the wrongful act of his opponent; and therefore it is not an unreasonable view that the word 'costs', in the sense of an 'indemnity,' should be held fairly to include a reasonable professional remuneration for that work which, if he did not do it himself, would have had to be done by another solicitor and paid for by his unsuccessful opponent. If that be so, and the word 'indemnity' is reasonably capable of being used in that sense, it becomes a mere question of practice whether the costs here claimed by the defendant ought, as a rule, for it is not necessary to consider exceptional cases, to be allowed to a successful litigant, being a solicitor and conducting his own case." Manisty, J., sitting in the same case, in approving the words of Justice Denman, added: "When a party to an action, be he plaintiff or be he defendant, conducts it himself, and is a solicitor, if he is entitled to his costs he is entitled to them as solicitor's costs: and why should he not be? I think my Brother Denman has answered that also conclusively. Justice seems to require it. Time is money to a solicitor; and why should he not be as much entitled to his proper costs, if he affords the time and skill which he brings to bear upon the business where he is a party to the action as he is where he is not a party? Again, I agree with my Brother Denman that it is for the advantage of the party against whom the judgment is given that his opponent is a solicitor, because there are many charges which the latter cannot make and which would be allowed if the claim or defense were conducted by another solicitor. Justice and reason, therefore, seem to me to favor the conclusion to which we have come."

Another English case is that of In re Donaldson, 27 Chan. Div. 545. We cite this case for the reason that it was there held that the solicitor mortgagee in a foreclosure action was entitled to his fees in his professional capacity, contrary to the holding in the case of Patterson v. Donner, cited by respondent. Lord Bacon, as Vice Chancellor, delivering his opinion, said: "There is no rule more true, more well-established, or more familiar than that a trustee is not entitled to make a profit out of his trust, though he is entitled to the costs incurred by him in the exercise of his trust; but it appears to me that this rule has no application to the present case, because the respondent Mr. Donaldson is not a trustee for the Applicant. Trustees are obliged to protect their trust property and must of necessity frequently employ a solicitor for that purpose, and they are entitled to the costs they have so incurred. If I accede to Mr. Hemming's argument, I shall be obliged to decide that in a case where a separate solicitor is not employed, and a solicitor is both trustee and mortgagee, he cannot, under any circumstances, be entitled to his costs of acting as solicitor for himself and his cotrustees. For that proposition no authority has been cited; but there is authority for the proposition that a solicitor acting for himself has a right to charge for his costs. Now here are trustees acting in their trust, and having advanced money on mortgage in pursuance of their trust proceed to realize their security. One of these trustees is a solicitor. Being trustees they are entitled to employ a solicitor, and they employ one of themselves as such. Because that one trustee happens to be a solicitor I am asked to direct the Taxing Master to disallow the costs which have been incurred through his having been employed as solicitor. That I cannot assent to. I cannot allow that when a solicitor happens to be a trustee he is to be treated as for the time being suspended from practice or struck off the rolls so far as regards the matter in which he is a trustee. I do not think a solicitor is to be deprived of civil rights because he is a trustee. If he were a sole surviving trustee, and had to file a bill for foreclosure of mortgaged property, it could not be said he was not entitled to the costs of the suit; on the contrary, he would be entitled to all his costs. Now what are the facts here? Certain mortgagees enforce their securities against their mortgagor. One of the mortgagees, Mr. Donaldson, who is a solicitor, does the solicitor's work in the matter and charges the mortgagor with profit costs for the work so done. The matter comes before the Taxing Master, when the mortgagor objects that Mr. Donaldson is not entitled to charge profit costs in respect to the mortgages or any other costs than those out of pocket. The Taxing Master then makes a certificate answering the objections as follows: [His Lordship read the certificate and continued:] I cannot say that that is wrong. I know of no principle requiring me to say that the items in question are wrongly charged. The case of London Scottish Benefit Society v. Chorley (1) shews clearly that a solicitor is entitled to charge as a solicitor for costs in an action to which he is a party. I cannot therefore disaffirm the decision at which the Taxing Master has arrived."

Among the American cases cited by Mr. Thornton, we refer to that of Flaacke v. Jersey City, supra, where it was said: "The complainant objects not only to certain items of the bills of costs as taxed for the defendants Andrew V. Church and S. C. Mount respectively, on the ground that the allowances are greater than the law authorizes, but insists that Mr. Mount, who is a solicitor of this court, and appeared in the cause in his own person, is not entitled to any costs, because he did not appear by solicitor. The objections cannot be sustained. A solicitor who is a party to a suit and appears in his own person, is entitled to the allowances made by the fee bill for his services therein, except, of course, for a retaining fee"—citing Willard v. Harbeck, supra.

In Crommelin v. Dinsmore, supra, which was an action where the attorney was sued on a contract and defended in person, the court said: "The services of the defendant (who is an attorney and counsellor-at-law) in his own defense, are presumably as valuable as the same services would have been in the defense of another; and if the doctrine of indemnification is to prevail, there is no reason why he should not be similarly compensated."

[2] It is argued by respondent that appellant Lady "would have been compelled to expend the same amount of time in the preparation and trial of the cause had his codefendant been the sole owner of said property," and that the fixing of the fee was discretionary with the court. Conceding this, it would appear, however, that, while he did not have to do so, being himself qualified to pass as an expert, the court accepted the valuation of $750 as indicated by the legal expert witness by allowing one-half of that amount to the defendant Sten and disallowing any fee for the defendant Lady. The only theory upon which the amount could have been so reduced is that Lady was not entitled to any fees as an attorney in defending as to the one-half interest in the property owned by him. As we have seen, under section 1255a and the authority of the cases cited, this discrimination is inequitable. He is entitled to a reasonable attorney's fee independent of what may have been allowed his codefendant Sten.

The judgment granting the motion to retax costs is reversed, with directions that the sum of $375 be allowed as attorney's fees for the defendant Sten, and that, in addition, the trial court allow such attorney's fees for defendant Lady as in its discretion it may deem reasonable.

We concur: WORKS, P. J.; CRAIG, J.

---

95 Cal. App. 566

SELVAGE v. FRED J. MAURER & SON.★
(Civ. 6585.)

District Court of Appeal, First District, Division 2, California. Dec. 18, 1928.

Rehearing Denied Jan. 17, 1929. Hearing Denied by Supreme Court Feb. 14, 1929.

1. Pleading ⚷369(2)—Where evidence would have sustained verdict on either count and no election was required, court properly submitted counts based on quantum meruit and express contract to jury.

Where evidence on behalf of plaintiff would have sustained verdict upon either count and no election was required, court properly submitted count based on agreed price for services on an express contract and count based on quantum meruit to jury under proper instructions.

2. Contracts ⚷323(1)—Whether plaintiff seeking compensation for excavation work abandoned contract before completion held for jury.

In action by subcontractor against contractor for compensation for performing excavation work, question, whether plaintiff abandoned his grading contract before completion and thus should not recover at all, or at least not full contract price, *held* for jury under evidence shown.

★Rehearing denied. Hearing denied by Supreme Court.

3. Damages 🔑119—In subcontractor's action against contractor for compensation for excavation work, damage resulting from subcontractor's failure to perform another contract held for jury.

In action by subcontractor against contractor for compensation for performing excavation work for United States Coast Guard station, question of damage contractor sustained by subcontractor's failure to commence performance of another contract to construct substructure and launchways, which contractor was compelled to construct, *held* for jury.

4. Damages 🔑189—In subcontractor's action against contractor for compensation for excavation work, evidence warranted jury's finding defendant sustained no damage from plaintiff's failure to perform another contract.

In action by subcontractor against contractor for compensation for performing excavation work in construction of United States Coast Guard station, jury was justified under evidence in making no award upon defendant's offsets for plaintiff's failure to perform substructure and launchways contract because of defendant's failure to prove damage.

Appeal from Superior Court, Humboldt County; Harry W. Falk, Judge.

Action for labor performed by W. S. Selvage against Fred J. Maurer & Son. From a judgment for plaintiff, defendant appeals. Affirmed.

Henry L. Ford and J. T. Fraser, both of Eureka, for appellant.

W. Ernest Dickson, of Eureka, for respondent.

KOFORD, P. J. Plaintiff recovered a judgment for $2,251.81 for performing certain excavation work. Trial was by jury. Defendant appeals from the judgment, assigning errors which largely involve questions of fact.

Maurer & Son were awarded a contract by the United States government to construct a United States Coast Guard station consisting of a marine ways, a building, and the excavation of a land approach on the ocean shore at Pt. Reyes, Cal. They sublet to Selvage, the plaintiff and respondent herein, the construction of the substructure (pile driving) and launchways for the sum of $3,000. This subcontract was in writing and provided, among other things, for partial payment of 75 per cent. of the work completed on the 1st of each month at the request of Selvage. Selvage came to the scene and commenced to make ready for this work. It appeared that it was necessary for the land excavation to be completed before the pile driving for the substructure should be commenced. A. L. Maurer, the son mentioned in the corporate name of appellant, was acting as general superintendent of the entire work covered by the government contract with Maurer & Son. Appellant asked Selvage to give a bid upon the excavation part of the work, because the person whom appellant had relied upon to do this work had failed to appear. Selvage bid $2,000 for the excavation work. A verbal agreement was made with Maurer & Son, accompanied by a brief written bid, signed by Selvage only, specifying the price and a very general description of the excavation work to be done. At the trial the parties differed materially upon what the verbal understanding was between them regarding progress payments on this work, regarding the furnishing of materials and equipment, and as to whether Selvage had agreed to perform the work to the final satisfaction of the government engineer or only to carry out the orders and directions of A. L. Maurer. This subcontract was the basis of the complaint in the action. There were three counts. One for $2,000, as for the agreed price on an express contract, one for the same $2,000, as for the reasonable value of the same work, and a third for $251.81, consisting of $150 for excavating rock, $66.06 for material paid for by Selvage, which should have been paid for by appellant, and the balance for extra labor and excavation caused by appellant's misdirections for the doing of the excavation.

Selvage's testimony was to the effect that neither by contract nor by actual practice did he have anything to do with the government engineer. That the engineer would not recognize him as subcontractor, but dealt only with Maurer, the general contractor. That the engineer laid out lines and established stakes, indicating to Maurer the extent and nature of the excavation required, and Maurer, in turn, placing his own interpretation on these directions, indicated to Selvage in more detail how the work was to be done. That, owing to mistakes of Maurer, Selvage was required to finish the surface of the cut twice, but that finally he finished the job to the last finishing touch, to the expressed satisfaction of Maurer. Thereupon, being greatly dissatisfied because he had been unable to obtain any progress payments on the work, he demanded his pay. He testified that the verbal contract was that he should have 75 per cent. progress payments monthly, just as provided in his written contract for the substructure. Appellant positively declared that no payments would be made until it had received payment from the government. His pay not being forthcoming upon the $2,000 contract, Selvage declared he would not commence with the performance of his $3,000 contract for the substructure and launchways until paid for his excavation work to date.

It was appellant's claim and testimony that Selvage was required to finish the excavation to the satisfaction of the government engineer and the plans and specifications of the government contract; that Maurer's acceptance of the work was necessarily conditioned upon the final approval of the government engineer; that eventually the government engineer came and decided that the grading was not executed up to the lines designated by him; that Selvage was entitled to no payment until Maurer had received payment from the government; that Selvage therefore failed to complete the excavation according to contract, but that he had abandoned it uncompleted; that he also unjustifiably abandoned the contract for the substructure and launchways. Defendant claimed damages by way of counterclaim and cross-complaint for these alleged breaches by Selvage. The jury found a verdict for the plaintiff for the full amount sued for, and allowed defendant nothing upon the offsets pleaded.

[1] At the conclusion of plaintiff's case in chief, defendant moved for a nonsuit upon the second cause of action, which was for quantum meruit, claiming that plaintiff's case rested upon an express contract. This motion was denied. Defendant then immediately moved for a nonsuit upon the first cause of action, claiming that the court had decided by the last-mentioned ruling that there was no express contract, or that the first cause of action had not been proven. Appellant disclaims any motion to compel an election, but claims that his motions for nonsuit presented a pure question of law for the court. If the law did not require respondent to make an election, it is difficult to see how the court was obliged to do so for him by granting one of defendant's motions for nonsuit. The testimony on behalf of the plaintiff would have sustained a verdict upon either count, the one sustained depending upon what view of the testimony the jury approved. This was a question of fact for the jury, and not for the court to decide. The court did not err in submitting both counts to the jury under proper instructions. Where no election was required, both issues could go to the jury. Bancroft's Code Pleading, vol. 1, §§ 108 and 655; Cowan v. Abbott, 92 Cal. 100, 28 P. 213; Estrella Vineyard Co. v. Butler, 125 Cal. 232, 57 P. 980; Tanforan v. Tanforan, 173 Cal. 270, 159 P. 709.

[2] Appellant next claims that Selvage abandoned his grading contract before completion, and hence should not recover at all, or at least not the full contract price. This is entirely a question of fact well within the jury's province under the testimony. There was ample evidence to support the decision of fact that Selvage had fully completed his contract with appellant, even though the excavation did not fully satisfy the plans and grade lines of the appellant's contract with the government. The evidence does not compel the conclusion that the requirements of the two contracts with respect to excavation or grading were identical.

[3, 4] Appellant's last point is that damages should have been awarded it, because plaintiff failed to commence the performance of the substructure and launchways contract. Appellant testified that the cost of the labor in doing this work himself was $4,652.29. On the other hand, the government construction engineer, who supervised and inspected the work and kept account of the amount of labor, testified, that exclusive of the contractor's time, the total labor spent in driving piles for the substructure and construction of the launchways was approximately $3,000 (the contract price) including the laying of rails (not in the Selvage contract). From this testimony the jury could conclude that appellant was inclined to greatly overestimate the cost of labor and therefore of other claimed damage, and that in fact it was not damaged at all by respondent's failure to perform this contract. Appellant testified to items of cost of performing this work in addition to the item for labor (some of which, like the donkey engine and its transportation, may not have been properly chargeable to this part of the work). These items, so far as the jury may have found them proper, may have been less than the labor of laying the rails. If so, the total cost to plaintiff would be found to be less than the contract price of $3,000. Again, these items may have been held unreasonably large, there being no testimony of their reasonable value. The question of damage was, therefore, a question of fact for the jury. The jury could decide from the testimony that appellant completed the work called for by this contract at a cost equal to or less than the contract price of $3,000, and for that reason allow nothing to defendant as offset.

There was also ample testimony from which the jury could decide that appellant made it impossible for respondent to perform the substructure contract by failing to pay anything upon the excavation contract according to its terms. It was understood by the parties, according to respondent's testimony, that he needed the payments to finance and carry out the work. Appellant's positive declaration that progress payments and final payment would not be made, until it had in turn been paid by the government, would justify respondent in believing that the same attitude would be maintained by appellant during the performance of the substructure contract. Having decided, however, that the jury was justified in making no award upon appellant's offsets because of failure of appellant to prove damage, it is unnecessary for us to decide whether respondent was excused from performing the substructure contract on the theory of anticipatory breach or prevention of performance.

Judgment affirmed.

We concur: STURTEVANT, J.; NOURSE, J.

WATTSON v. ELDRIDGE et al., Members of and Constituting Board of Public Works of City of Los Angeles. (Civ. 5988.)★

District Court of Appeal, Second District, Division 2, California. Dec. 13, 1928.

Hearing Granted by Supreme Court Feb. 11, 1929.

1. Dedication 🔑58—Dedication of artificial canal, laid out and constructed to form complete system of waterways within city, held only for use as canals.

Conveyance to city of certain artificial canals, laid out and constructed so as to form a complete system of waterways, *held* to constitute dedication to the public for use only as canals in accordance with intention of grantor as manifested by deeds of conveyance.

2. Dedication 🔑15—Intent is material factor in determining whether dedication has occurred.

In determining whether or not a dedication has occurred, the intent of grantor is a material factor.

3. Dedication 🔑58—City was without authority to convert canals, dedicated to public use as such, into surface streets.

Where canals laid out within city as complete system of waterways were dedicated to public use as canals or waterways, legislative body of the city was without authority to convert them into surface streets by means of grading and filling, in that such a use would not be consistent with the use to which streets were dedicated.

4. Dedication 🔑58—Property dedicated to particular public use cannot be put to other inconsistent use.

Property dedicated to a particular public use cannot be put to other public use inconsistent with the use of original dedication.

5. Dedication 🔑38—Grantor, after dedicating canals for public use as such only, could not thereafter revoke dedication and dedicate property to different use.

Grantor's attempt by subsequent conveyance to abandon reservation in previous dedication of canals within city that areas were to be used only as such, was without effect, in that grantor, after dedication was complete, could not revoke dedication and dedicate property to other and different purposes.

Original application for writ of mandate by R. A. Wattson against Arthur Eldridge and others, as members of and constituting the Board of Public Works of the City of Los Angeles. Peremptory writ denied.

Arthur M. Ellis, of Los Angeles, for petitioner.

Hewitt, McCormick & Crump, of Los Angeles, for respondents.

THOMPSON, J. This proceeding seeks the writ of mandate directed to the respondents, as the members of the board of public works of the city of Los Angeles, compelling them to execute a certain contract for the improvement of certain alleged streets in Los Angeles city, under the Improvement Act of 1911 (St. 1911, p. 730). The respondents refused to execute the contract, and, among their reasons, assigned the fact that the work called for included the filling and improving of artificial canals in that part of Los Angeles, formerly Venice, and stated that there was serious doubt as to whether these canals constituted public streets.

It has been stipulated by the petitioner and the respondents that, of the areas to be improved with concrete pavement, curb, gutters, and sidewalks, the following "are now and have been occupied by and used as canals or waterways, to wit: San Juan Avenue, Market Street, Windward Avenue, Grand Boulevard, Kinney Plaza, Second Avenue, Andulusia Avenue, Cabrillo Avenue and Altair Place —and that there is an existing grade of the bottoms, sides and walkways along and adjacent to all of said canals and that the same have been constructed and at all times up to the present maintained at and to such grades. That the plans and profiles for said work referred to in said ordinance show that said canals and waterways are to be filled and graded to the new grades or elevations indicated thereon and that said walkways are to be removed and reconstructed with new sidewalks and curbs in the place thereof."

The parties to this proceeding being unable to agree upon the title to or the use of the areas heretofore used as canals, a commissioner was appointed to try that issue, and he has found, in substance, that the respondents are mistaken in their belief that the city has not the right to fill in and improve as public streets the areas heretofore used as canals, "for the reason that said canals have been continuously used by the public as public waterways for all purposes of public ways for more than twenty years prior to the passage of the Ordinance of Intention, * * * namely since about the year 1905, and the same constitute and are public streets in the city of Los Angeles." He has also found, in substance, that the owners of lots in the tract containing the canals have not, nor have the owners of lots abutting upon the canals, a right or easement to have the canals kept and maintained as canals. Specifically he has found that "it is not true that any such right is appurtenant to each or every or any lot in said Venice of America Tract." It is also found, in substance, that it is not true that the lands designated as canals are not now open or dedicated "to public use as streets, avenues, lanes or courts," and that it is untrue that the Abbot Kinney Company, who laid out the Venice of America, "by its acts or conduct or otherwise set said lands apart as canals or waterways for use as such perpetually by the owners of land in said tract or the public generally, or either or any thereof * * * that it is true that areas within

---

★Hearing granted. 278 P. 236.

said lots have at all times herein mentioned been used as public walks and ways, and it is also true that certain areas thereof have been occupied by canals and waterways and have been used for the transportation of persons and things by boat and other water craft, and for recreation and pleasure." Another finding is to the effect that it is not true that certain deeds, which will be later discussed in this opinion, did not convey the fee to the areas now in question to the city of Los Angeles, or to the city of Venice and annexed to the city of Los Angeles since the date of the first deed, subject or subordinate to the right of the owners of lots in the Venice of America tract to have the same kept open and maintained as canals.

Exceptions have been interposed by respondents to these findings, and certain others not necessary now to mention on the ground that the evidence is insufficient to justify them and that they are contrary to the evidence. The transcript of the testimony is before us, together with the exhibits, and there appears little if any dispute in the record. The differences of opinion really arise from the interpretation put upon certain acts and documents. This is made patent by a reading of the commissioner's memorandum of opinion, which accompanies his findings, wherein he calls attention to the fact that the Venice of America tract was laid out in imitation of "Ancient Venice," but with this difference, that, although the situation of the beautiful and romantic city of the old world required streets of water, the watery public ways of California's Venice were artificially provided, "their functions, however, being essentially those of streets," and that, although these waterways were dedicated to the city of Venice in 1912, the grantor providing that they should be used "solely and only for perpetual waterways and canals free to the public forever," the same grantor by a subsequent deed abandoned the reservation made in its favor in the deed of 1912. The commissioner having determined that the functions of these canals are akin to those of streets, his findings are, as he says, "predicated upon the theory that it is competent for the governing body in charge of the use to ordain a change in the character of the public ways involved whenever such governing body shall determine that the public weal requires such a change." We therefore proceed to set down those facts which may fairly be said to appear from the record without dispute, and which compel us to depart from the conclusion of the commissioner.

In January, 1905, the Abbot Kinney Company laid out and subdivided the Venice of America tract, and, on the map approved by the trustees of Ocean Park, within the boundaries of which the tract was situated, and who accepted the dedication of the streets, roads, alleys, and highways on behalf of the public, the areas in question were designated as lots, followed by the name of the particular canal, such for example: "Lot H, Grand Canal," with the words underneath in fine print, "not to be dedicated." Out of twenty-three blocks in the tract, comprising several hundred lots, all of the lots, with the exception of a portion of those in five blocks, were made to front upon canals, and vehicular and pedestrian traffic was provided for by streets and alleys. The Abbot Kinney Company, as is recited in the findings, at about the time of recording the map, excavated and dredged the canals, lined them with cement, improved the banks and marginal strips with walkways, and planted them to grass, trees, and shrubs, and erected ornamental structures, including boat landings and stairways, and bridges over the canals for ordinary traffic. They were all so laid out and constructed as to "form a complete system of waterways in said Venice of America Tract, each such canal or waterway being connected with all others, and works, facilities and appliances were installed by said Abbot Kinney Company for the inflow and outflow of water whereby an adequate circulation of salt water from the Pacific Ocean was provided for such system of canals." Since their construction, the canals have been used continuously by the public generally for pleasure and recreation, inclusive of boating, bathing, swimming, and aquatic sports. The lots in the tract were sold by the company, and at least several of the deeds contained the following language:

> "To have and to hold all and singular the said premises, together with appurtenances unto the parties of the second part and to their heirs and assigns forever; but there is reserved to the first party, its successors and assigns all rights of way and easements designated or indicated on the aforesaid map as to railways, canals, buildings, arcades, streets, highways, alleys, and like matters and things, and also the exclusive right to lay and maintain any and all pipe deemed necessary or convenient on the said granted premises in the said Venice of America, and also the exclusive right to place and maintain telegraph, telephone and other electric light poles and wires over and upon the said granted premises in such places and position as to the said first party may seem reasonable. * * * All of the before mentioned reservations and conditions are for the benefit of the owners of said lots in said Venice of America as well as of said first party, and that said reservations and conditions shall run with the land and be binding upon the heirs, legal representatives and assigns of the said grantee."

In 1909 the Abbot Kinney Company deeded to the city of Venice the marginal strips along each side of the several different canals for street and sidewalk purposes, the deed, however, containing a proviso that the city should not interfere with the trees, plants, shrubs, and other improvements, which, as we have already observed, were placed thereon by the Abbot Kinney Company. In 1912 the entire lots or canals (including the marginal strips) were deeded to the city of Venice, the grant, however, being upon and subject to the following conditions:

"1. Said City of Venice shall not destroy or permit the destruction of the flowers, plants, or trees on any part of the premises herein granted, but shall care for and maintain the same perpetually.

"2. * * *

"3. Also the premises herein conveyed shall be used by said second party and its successors solely and only for permanent waterways, and canals, free to the public forever."

The findings recite that prior to the deed in 1912 the Abbot Kinney Company maintained the canals, and that subsequent thereto the city of Venice, and, since its annexation to Los Angeles, the city of Los Angeles, have exercised dominion and control over them and maintained them at public cost, and that they have been used by the public without interruption or interference for like purposes as before the deed. In 1925 and 1926, two deeds were executed and delivered, the latter being a correction deed and the grantee being the city of Los Angeles, to which Venice had meanwhile been annexed, by which the Abbot Kinney Company purported to convey to the city the canal areas in question "to be used as and for" public streets.

[1, 2] Under these facts we cannot escape the conclusion that there was manifest an intention on the part of the grantor to set aside and dedicate the canal areas to the public for use as canals, improved and beautified on both sides with parkways and walks. It is equally obvious that for more than twenty years the public and the owners of lots in the tract have occupied and used the land for the purposes intended. Under these circumstances it is impossible for us to reach any conclusion other than that there has been a dedication to the public for use as canals. Intent is the material factor in determining whether a dedication has occurred. As is said in People v. County of Marin, 103 Cal. 223, 37 P. 203, 26 L. R. A. 659 in speaking of the difference between express and implied dedication: "The substantial difference between the two consists in the mode of proof. In the former case the intention to appropriate the land to public use is manifested by some outward act of the owner manifesting his purpose, while in the latter it is usually by such acts or conduct not directly manifesting the intention, but from which the law will imply the intent." See, also, Myers v. City of Oceanside, 7 Cal. App. 87, 93 P. 686; City of Los Angeles v. Kysor, 125 Cal. 463, 58 P. 90; Anaheim v. Langenberger, 134 Cal. 608, 66 P. 855. In People v. Myring, 144 Cal. 354, 77 P. 976, where the question referred to dedication of certain highways, the court says: "The dedication of a road as a public highway is the setting it apart by the owner of the land for the use of the public, and the subsequent use thereof by the public operates as an acceptance of the same and makes it a public highway. Such dedication may be express, as by a grant to the public, or it may be implied from the circumstances under which the road is set apart and used. The adverse user of the road by the public with the knowledge of the owner for a period of time corresponding to that fixed for conferring a title by prescription establishes as against the owner a presumption of dedication. 'It affords the conclusive and indisputable presumption of knowledge and acquiescence, while at the same time it negatives the idea of mere license' (Schwerdtle v. County of Placer, 108 Cal. 589 [41 P. 448]; Hartley v. Vermillion, 141 Cal. 340 [74 P. 987]). Under this rule the evidence before the jury, as above shown, was sufficient to justify them in finding that the road had been dedicated by the defendant as a public highway. There was, moreover, evidence of positive acts on his part tending to confirm this presumption. In 1876, prior to the construction of the road, he had signed a petition to the board of supervisors for the laying out of the road in the vicinity of its route, and had also signed the grant of a right of way therefor, and after the road was built he had, at different times, worked upon it for its repair. * * *"

So here, we not only have a user by the public for a period in excess of twenty years, but we have the unambiguous grant of the owner to the city upon condition that the areas be used solely for canal purposes "free to the public forever." And, if there were any doubt concerning the acceptance by user, certainly there can be none concerning the acceptance evidenced by the city when, subsequent and pursuant to the deed, it assumed dominion and control over the canals, and maintained them for more than ten years at public cost. Wolfskill v. County of Los Angeles, 86 Cal. 405, 24 P. 1094. Nor do we find the inconsistency, suggested in the briefs, between the provisions of the several deeds to the effect that the reservation of the canals, etc., shall be "for the benefit of the owners of lots in said Venice of America as well as of" the grantor, and the fact that the map indicated that the canal areas were "not to be dedicated." The rational interpretation to be put upon the words found on the map, and the only one which is reconcilable with all the other acts, is that the words were used in order that the city trustees of Ocean Park should not by their acceptance, on behalf of the public, of streets, alleys, etc., obligate the city for the maintenance of the canals.

[3, 4] Having concluded that the canals were dedicated to public use as canals or waterways, the next question to be considered is whether the legislative body of the

city may convert them into surface streets in the manner followed in this proceeding. We are convinced that it cannot. The books abound with authorities to the effect that property dedicated to a particular public use cannot be put to other public use inconsistent with the use of the original dedication. To illustrate to what extent this rule is carried we refer to the case of Spires v. City of Los Angeles, 150 Cal. 64, 87 P. 1026, 11 Ann. Cas. 465, where the Supreme Court determined that, while a public library might be erected upon property dedicated to use as a public park on the ground that it was conducive to the increased use and enjoyment of the land as a park, nevertheless it was held that space could not be provided therein for the use of the board of education. It is there said: "If any part of such building could be used for one administration purpose, it might gradually be devoted to another. If one municipal board or municipal officer of the city having no direct relation to the library can be located therein, so may another, and so the building which the city has a right to erect as a library building solely in aid of the public enjoyment of the park may be gradually invaded for administration purposes and ultimately devoted to those purposes." In Hall v. Fairchild-Gilmore-Wilton Co., 66 Cal. App. 615, 227 P. 649, it was held that an attempt to devote a portion of a public park to street purposes was void and beyond the authority of the legislative body of the city. Numerous authorities are therein cited to uphold the statement that, where the public accepts property designated for use for certain purposes, its acceptance is burdened with the use thus designated, and the object and purpose of the dedication cannot be destroyed by its use for other purposes. Reference may also be had to Archer v. Salinas City, 93 Cal. 43, 28 P. 839, 16 L. R. A. 145, and Slavich v. Hamilton, 201 Cal. 299, 257 P. 60, the latter of which points out that the rule is more strict and the use more narrowly limited where the dedication is by private individuals than where the land is acquired by public purchase. Carrying the rule one step further, it has been determined in Mulvey v. Wangenheim, 23 Cal. App. 268, 137 P. 1107 (and this applies directly to the right of the owners of lots abutting upon and facing the canals), that the owner of property abutting upon a public park is entitled to enjoin the city officials from extending a public street through it, the court saying: "The plaintiffs purchased said property with respect to its location abutting upon said portion of said park and in reliance upon the uses and trusts upon which the title to said park lands is held. No compensation has been provided to be paid to plaintiffs on account of the damage which they claim that they will suffer by the opening and construction of said street." In accord with this enunciation is that found in Riverside v. MacLain, 210 Ill. 308, 71 N. E. 408, 66 L. R. A. 288, 102 Am. St. Rep. 164, where a similar situation was in question. And so we think are the authorities of Eachus v. Los Angeles Ry. Co., 103 Cal. 614, 37 P. 750, 42 Am. St. Rep. 149, and Bigelow v. Ballerino, ,111 Cal. 559, 44 P. 307, in which it was held that "the right of the owner of a city lot to the use of the street adjacent thereto is property which cannot be taken from him for public use without compensation."

Is the use proposed to be made of these canal areas consistent with the use to which they were dedicated? It is hardly necessary for us to deal with any legal refinements in an effort to distinguish by definition an artificial canal used for boating, swimming, and aquatic sports from a public street filled with automobiles, street cars, and pedestrians. No one would be so hardy as to argue that the use of Broadway in Los Angeles, Market street in San Francisco, Pennsylvania avenue in Washington, or Fifth avenue in New York as canals would be consistent with the use to which they have been set aside and dedicated as public streets. Why is not the converse true? The artificial canals of Venice are as fully a distinguishing characteristic of the latter place as the individual boulevards are of either of the former cities. They are not so much highways as they are in the nature of public parks—true, they may by means of the water itself be used as watery ways of transportation—but they are chiefly used as places of amusement and recreation. As streets, the means of transportation heretofore made use of would be destroyed, and, instead of places of amusement and recreation, they would be filled with a wriggling mass of noisy and offensive smelling vehicles. Desirable as it may be to open additional surface arteries of traffic, it cannot be successfully argued that their use for vehicles, animals, and pedestrians is consistent with their dedicated use for boats and bathers. There is much more reason for arguing that the use of public parks with walkways and driveways could be converted into commercial thoroughfares, and at least the same amount of reason for saying that the lakes of our parks, used as they are for boating, could be transformed into highways. It has been almost useless to search the books for a parallel situation, because common knowledge informs us that there is probably no other city in our country with an artificial canal system. The nearest approach to our problem which we have been able to find appears in the case of Perkins v. Town of Colebrook, 68 Conn. 113, 35 A. 772, in which the court uses this language: "In the case at bar it is apparent that the way prayed for was substantially a way over the waters of a pond—a waterway. Whether a private way over water, like the present one, can be laid out at all * * * may well admit of doubt. The statute, in speaking of public highways and private ways, seems to contemplate solid ways that can be worked and repaired, over which men and animals may pass on foot, and whereon wheeled vehicles may be drawn, and whose limits are defined by permanent solid objects, and not an air-drawn line. It contemplates a road or path as distinguished from a ferry or right of ferriage. In Imlay v. Railroad Co., 26 Conn. 249, 256 [68 Am. Dec. 392] this court said: 'The term "public highway," as employed in such of our statutes as convey the right of eminent domain, has certainly a limited import. Although, as suggested at the bar, a navigable river or canal is, in some sense, a public highway, yet an easement assumed under the name of a highway would not enable the public to convert a street into a canal. The highway, in the true meaning of the word, would be destroyed.'"

[5] We have yet to inquire into the effect, if any, of the deeds of 1925 and 1926. As already noted, the commissioner concluded that the Abbot Kinney Company abandoned the reservation that the areas were to be used only and solely for canals. The language we have quoted from the deed of 1912 does not, however, indicate a reservation, but designates the purposes of the use. It would be strange, indeed, after a dedication were complete, if the grantor could revoke the dedication, and dedicate the property to other and different purposes, or if the right could still reside in the grantor to release the conditions imposed by the original conveyance. As soon as the dedication is complete the right of the public is fixed and the former owner loses all control over the property. Such is the declaration of the Supreme Court in Slavich v. Hamilton, supra, and the cases therein cited, and by the petitioner herein is concluded.

Even if we were to assume, contrary to the fact, that there had been no dedication, there would then be another obstacle to the obliteration of these canals in the manner here attempted. It is conceded that they have been used by the owners of lots in the Venice of America tract, as well as by the public, for more than twenty years before the present proceeding. There is a unanimity in the decisions to the effect that the same rights may be acquired in an artificial water course by user over that period of time as in a natural watercourse, even to the extent of holding where the waters of a natural water course are diverted by a dam from the main to a smaller channel, that one who has used the water thus diverted for power purposes is entitled to have the same maintained. Murchie v. Gates, 78 Me. 300, 4 A. 698. For the authorities generally on this subject, see Cole v. Bradbury, 86 Me. 380, 29 A. 1097; Dority v. Dunning, 78 Me. 381, 6 A. 6; Stimson v. Inhabitants of Brookline, 197 Mass. 568, 83 N. E. 893, 16 L. R. A. (N. S.) 280, 125 Am. St. Rep. 382, 14 Ann. Cas. 907; Watkins v. Peck, 13 N. H. 360, 40 Am. Dec. 156; Shepardson v. Perkins, 58 N. H. 354; Ranney v. St. Louis & S. F. R. Co., 137 Mo. App. 537, 119 S. W. 484.

It has been suggested that the case of Schultz v. City of Venice, 200 Cal. 50, 251 P. 914, has an important bearing upon the proceeding and may be conclusive upon us. As we understand the holding therein, it has no bearing upon the questions before us. All that the Supreme Court determined in that case was that they could not review the testimony to determine its insufficiency to support the findings without specifications of insufficiency in the bill of exceptions, where the pleadings tendered, and it was apparent that the cause was tried upon the theory that the pleadings sufficiently tendered, the issues covered by the findings.

Other objections are argued by the respondents why the writ should not issue; particularly it is said that there is a lack of definiteness in the ordinance of intention, but no useful purpose would be served, nor is it necessary to discuss them further.

Peremptory writ of mandate denied.

We concur: WORKS, P. J.; CRAIG, J.

---

95 Cal. App. 523

O'NEIL v. EDWARDS. (Civ. 6252.)

District Court of Appeal, First District, Division 1, California. Dec. 17, 1928.

Easements ⟹36(3)—Evidence supported finding that defendant's easement in portion of plaintiff's property for driveway was established by grant, estoppel, prescription, and ratification.

Finding that defendant's easement in portion of plaintiff's property used as driveway was fully established by grant, estoppel, prescription, and ratification *held* supported by evidence, where predecessors in interest of parties some 16 years before entered into written agreement to construct mutual driveway upon contiguous portion of their premises, and evidence indicated plaintiff had notice thereof.

Appeal from Superior Court, Alameda County; J. D. Murphey, Judge.

Action by Ria O'Neil against John T. Edwards. Judgment for defendant, and plaintiff appeals. Affirmed.

Snook, Snook & Chase, of Oakland, for appellant.

Markell C. Baer, of Oakland, for respondent.

TYLER, P. J. By this action plaintiff sought to restrain defendant from using a portion of her property as a driveway. Defendant by answer and cross-complaint denied plaintiff's exclusive right to the property, and claimed the right to the use thereof

---

⟹For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

in common with plaintiff, and prayed for damages for the denial of the use. The trial court found in favor of defendant and entered judgment quieting title to a common driveway and restraining plaintiff from interfering therewith and granting defendant $1 damages and costs of suit.

The court made numerous findings, from which it appears that defendant's title to the easement had been fully established by grant, estoppel, prescription, and ratification. Appellant claims that certain of these findings are not supported by the evidence. There is no merit in the contention. It appeared in evidence that the predecessors in interest of the parties had on August 1, 1912, entered into a written agreement to construct a mutual driveway upon contiguous portions of their respective premises. This joint use was for the purpose of enabling the owners to reach the rear of their lots by automobile. This grant of easement was expressly created and designed by them to run with the land as a covenant, the agreement providing that "the common driveway shall be perpetual and shall attach to their heirs and assigns forever." Upon the execution of this agreement, one of the parties thereto immediately constructed a garage upon his premises and made use of the driveway. The agreement was not recorded at the time plaintiff acquired title to one of the parcels of land impressed with the easement, but there is ample evidence to show that at that time the driveway was open, laid out, in visible existence, and was seen by her prior to the taking of her title. The evidence also shows that the driveway was used under a color of right and for many years after plaintiff acquired her property was so used without objection or hindrance, and that plaintiff herself not only acquiesced in its use, but availed herself of its benefits.

A further review of the evidence would answer no useful purpose. It fully supports the findings of the trial court.

The judgment is affirmed.

We concur: KNIGHT, J.; CASHIN, J.

95 Cal. App. 545

COMER v. LOS ANGELES RY. CORPORATION. (Civ. 6294.)

District Court of Appeal, First District, Division 1, California. Dec. 18, 1928.

Rehearing Denied Jan. 17, 1929. Hearing Denied by Supreme Court Feb. 14, 1929.

1. Trial 🔑404(1)—Findings should be read together and liberally construed in support of judgment, reconciling conflict on material points.

All findings of trial court are to be read together and liberally construed in support of the judgment, and if possible should be reconciled so as to prevent any conflict on material points.

2. Trial 🔑398—Ultimate facts found which support judgment are not overcome by inconsistent findings as to certain of probative facts.

In reviewing sufficiency of finding, ultimate facts, which are in themselves sufficient to support judgment, may not be overcome by mere findings of probative facts, which are not the only facts on which the court may have based its ultimate finding.

3. Appeal and error 🔑996—Reviewing court may draw necessary inferences from findings to support judgment.

It is well established that the reviewing court is entitled to draw necessary inferences to support the judgment.

4. Electricity 🔑19(13)—Findings of negligence and lack of contributory negligence, in automobile driver's action for injuries from contact with broken trolley wire, supported judgment for plaintiff, notwithstanding finding that wire became heated and illumined.

In action for injuries, to driver of automobile colliding with broken trolley wire, findings of trial court that injuries were caused proximately by defendant's negligence, and that plaintiff was not guilty of contributory negligence, *held* to sustain judgment in plaintiff's favor, though trial court also found that short circuit caused wire to become heated and illumined, from which it was claimed that plaintiff's failure to see it was negligence.

5. Appeal and error 🔑1071(6)—Failure of trial court to make additional findings is not ground for reversal, where record indicates such findings would have been adverse to appellant.

Where it is evident from the facts found and the judgment, in the light of the entire record, that more complete findings, if made, would have been adverse to appellant, omission to make further findings is not ground for reversal.

6. Electricity 🔑19(5)—Finding of want of contributory negligence, in automobile driver's action for injuries resulting from contact with broken trolley wire, held sustained by evidence.

In action for injuries to driver of automobile, resulting from contact with broken trolley wire which came in contact with rail of car track, causing short circuit, which illumined the wire, evidence *held* sufficient to support trial court's finding that plaintiff was not guilty of contributory negligence.

Appeal from Superior Court, Los Angeles County; Albert Lee Stephens, Judge.

Action by C. E. Comer against the Los Angeles Railway Corporation. Judgment for plaintiff, and defendant appeals. Affirmed.

Gibson, Dunn & Crutcher and Norman S. Sterry, all of Los Angeles, for appellant.

E. B. Drake, of Los Angeles, for respondent.

KNIGHT, J. Respondent, while driving an automobile on one of the streets in Los An-

---

*Rehearing denied. Hearing denied by Supreme Court.

geles, collided with a broken trolley wire of the appellant company, sustaining injuries to himself and damage to his automobile. Thereupon he brought this action for damages, and upon trial before a jury was awarded a verdict, but the judgment entered thereon was reversed on appeal because of erroneous instructions. Comer v. Los Angeles Ry. Corp., 66 Cal. App. 219, 225 P. 869. The action was then tried before the court sitting without a jury, and judgment was again rendered in respondent's favor, and the company again appealed.

The material facts surrounding the accident were as follows: During the early part of the month of January, about 6:35 o'clock in the evening, appellant's trolley wire, suspended above its south-bound track on Vermont avenue, broke at a point some distance south of the intersection of Vermont avenue and Tenth street, just after the car had passed under it, and a considerable portion of it fell between the tracks. It was already dark, the lights were lit, and there was considerable traffic on the street at the time. When the trolley wire broke and fell, the car stopped; and while the motorman was adjusting the trolley pole attached to the top of the car, and trying to sweep the wire free from the rails, the conductor was endeavoring to give warning to drivers of approaching vehicles. The wire sputtered around for a while, and finally became welded to the easterly rail of the south-bound track. Respondent drove along a few minutes after the wire broke, traveling in a southerly direction and in the regular traveled portion of the street. He saw the car, but, there being no crossing where it had stopped, paid little attention to it, intending to pass it on the right-hand side. He testified that he was traveling between 15 and 20 miles an hour, when suddenly he saw a man, who afterwards proved to be the conductor, jump out in the street directly in the pathway of his machine; that he believed the man was hailing him for a ride, but being in a hurry and having some money on his person he concluded not to stop; and that in order to avoid hitting the man he turned suddenly to the left and drove directly into the wire which, he testified, he had not seen at any time before striking it. When the machine came in contact with the wire there was a flash, followed by flames and sparks, and in some manner respondent was thrown or jumped from his automobile to the pavement, and, besides sustaining severe shock, his ankle was broken and his automobile damaged.

No point is made by appellant on this appeal as to its own negligence, it being conceded that the evidence adduced at both trials is substantially the same on all issues, and that therefore, under the law as declared by the decision on the former appeal, the evidence here is unquestionably sufficient to support the trial court's affirmative finding on that issue.

However, appellant assails the form and sufficiency of the trial court's findings herein determining the issue of contributory negligence, and also the sufficiency of the evidence to support those portions of the findings. With respect thereto, the state of the record is as follows: In paragraph IX of the second amended answer appellant pleaded contributory negligence as an affirmative defense, it being alleged therein "that after its said trolley wire broke the same came in contact with the rail of the said car track and caused a short circuit, which in turn caused the said wire to become heated and brightly illumined, and the same could have been seen by the said plaintiff or any other person passing along Vermont avenue who was exercising any care or caution; * * * that the said contact with the said wire was due to the utter failure upon the part of said plaintiff to exercise ordinary, or any, care, for his own safety, and his entire disregard of the warnings of said conductor."

In determining the truth of said allegations, the trial court found, in paragraph 10 of its findings, as follows: "That it is true that the trolley wire broke and came in contact with the rail of the car track and caused a short circuit which in turn caused said wire to become heated and illumined," but that it is not true that the conductor gave warning of the broken wire, "nor is it true that the said contact with the said wire by plaintiff's automobile was due to the utter failure, or any failure, upon the part of said plaintiff to exercise ordinary, or any care, for his own safety, or his entire disregard of the warnings of said conductor; and the court further finds that it is not true that the injuries and damages found herein, and which resulted proximately from said accident, were directly, proximately, and concurrently, or either or at all, contributed to by the fault, carelessness and negligence, or either, of the said plaintiff, but, on the contrary, the court finds that the plaintiff was not guilty of contributory negligence, or any negligence, as alleged in the separate defense in paragraph IX of the second amended answer to the complaint, but, on the contrary, that the negligence of the defendant as found herein in paragraph 9 was and is the sole proximate cause of the injuries and damage to the plaintiff, as found herein."

Appellant interprets the decision on the former appeal as holding that, if the broken wire was lighted sufficiently so that it could have been seen with ordinary care, respondent was guilty of contributory negligence; and that whether it was so lighted was a question of fact for the determination of the trial court or jury; and, basing its argument on the foregoing construction, appellant contends that a fair and reasonable interpretation of the word "illumined" as used in said findings, is that the wire was sufficiently lighted so that it could have been easily seen, and that therefore said finding is in conflict with, and contrary to, the general finding of the trial court that respondent was not guilty of contributory negligence; and it further contends that, if such be not the reasonable interpretation of the word "illumined" as used in said finding, then there was a failure to find upon a material question of fact presented by the plea of contributory negligence, that is, as to whether or not said wire was lighted sufficiently so that it could have been seen with the exercise of ordinary care. We find no merit in either point.

In our opinion, the plain meaning and effect of the trial court's findings as a whole, as set forth in paragraph 10 thereof, a portion of which is hereinabove quoted, is that the wire was not sufficiently illuminated so that it could have been easily seen with ordinary care; and we believe that such meaning is emphasized by the fact that, in addition to having negatived allegations of specific acts of contributory negligence as pleaded by appellant, the trial court made a general and ultimate finding to the effect "that plaintiff was not guilty of contributory negligence or any negligence, as alleged in the separate defense in paragraph IX of the second amended answer to the complaint," which necessarily negatived the specific allegation contained in said paragraph IX to the effect that "said broken wire could have been seen by said plaintiff or any other person passing along Vermont avenue who was exercising any care or caution."

[1-3] The established rule is that all the findings are to be read together, and liberally construed in support of the judgment; and if possible are to be so reconciled as to prevent any conflict on material points (Neher v. Kauffman, 197 Cal. 674, 242 P. 713; Goodwin v. Snyder, 70 Cal. App. 98, 232 P. 763); and the law is also well settled that in reviewing the sufficiency of findings the ultimate facts found, which are in themselves sufficient to support the judgment, will be deemed controlling, and may not be overcome by findings of mere probative facts, which are not shown by the findings to be the only facts proved, and from which alone the court finds the ultimate facts (2 Cal. Jur. p. 872, and cases cited; Enterprise Foundry Co. v. Polly, 73 Cal. App. 225, 238 P. 722; Culver v. Miller, 54 Cal. App. 545, 202 P. 338; Snearly v. Hiestand, 50 Cal. App. 393, 195 P. 272); also that the reviewing court is entitled to draw necessary inferences from the findings to support the judgment (Lomita Land & Water Co. v. Robinson, 154 Cal. 36, 97 P. 10, 18 L. R. A. (N. S.) 1106; Hulen v. Stuart, 191 Cal. 562, 217 P. 750).

[4, 5] Applying the legal rules above set forth to the findings in the present case, it is obvious that they are sufficient to sustain the judgment. Moreover, as said in Hulen v. Stuart, supra: "From the facts found, and from the judgment ordered, it is evident, in the light of the entire record, that if more complete findings had been made they would have been adverse to the contentions of the appellant. If that be so, the failure to find further is not a ground for the reversal of the judgment (Krasky v. Wollpert, 134 Cal. 338, 342 [66 P. 309])."

[6] Further contention is made by appellant that in any event the ultimate finding of the trial court as to the alleged contributory negligence of the respondent is unsupported by the established facts. The evidence relating to this issue was summarized by the decision rendered on the former appeal as follows: "After the wire fell it sputtered and squirmed around, subsequently becoming welded to a rail of the track, and there was testimony that it got very hot, first turning red, then white. The conductor testified that it was five or six minutes from the time his car first went dark and he discovered the broken wire until respondent's accident; that until the accident happened he had not looked up at the wire, but that there was a reflection on the pavement, and he was conscious of a glow; other witnesses testified to having seen light from the wire before the collision, while still others said that it did not extend far along the wire, and that there was not much light given off. Respondent stated positively that it did not give off any light, and that he did not know the wire was down until he struck it with his machine, when 'everything lit up.'" And, in passing upon the sufficiency of such evidence, the court said: "We do not agree with appellant's contention that the court erred in refusing to grant its motion for nonsuit, or to give the peremptory instruction directing a verdict for defendant. * * * In view of the contradictory testimony above outlined, we are not at liberty to say that the evidence of contributory negligence was 'conclusive,' since there was evidence tending to show that the plaintiff was not negligent"—citing authorities.

On the present appeal appellant concedes that "the testimony on all issues is substantially the same as given at the former trials, except that the defendant produced an additional witness who had not been found at the former trial, a Mr. Rogers, but his testimony added nothing so far as the legal questions are concerned, simply tending to corroborate the evidence already commented on, showing that the wire was at a white heat"; and, that being so, we find no reason to disagree with the conclusion reached on the former appeal as to this point.

The judgment is affirmed.

We concur: TYLER, P. J.; CASHIN, J.

95 Cal. App. 563

PEOPLE v. MIHALY. (Cr. 1519.)

District Court of Appeal, First District, Division 2, California. Dec. 18, 1928.

1. Larceny ⚷65—Evidence held to support verdict of guilty of grand theft of automobile.

Evidence *held* sufficient to support verdict finding defendant guilty of grand theft of automobile.

2. Criminal law ⚷369(5)—Evidence of defendant's statements that he could not keep car found in garage with stolen car, because prevented from stealing tire, held admissible.

Where defendant was seen by police officer leaving garage, containing stolen car, stripped of accessories, and another car containing defendant's coat and letters, testimony of witness that defendant said he could not keep such car, because he was interfered with by police while endeavoring to steal a tire, was relevant to connect defendant with the car found in the garage, and show admission that he had been stealing a tire when the police appeared, and not inadmissible as showing similar crimes.

3. Criminal law ⚷956(11)—Verdict cannot be impeached by hearsay affidavit as to occurrences in jury room.

A verdict may not be impeached by hearsay affidavit of defendant's attorney as to what occurred in the jury room.

4. Criminal law ⚷703—Opening statements of counsel do not limit right to introduce evidence.

Opening statements of counsel are not limitation on right of either party to introduce evidence of facts not referred to.

Appeal from Superior Court, Alameda County; Leon E. Gray, Judge.

Eugene Mihaly was convicted of grand theft, and from the judgment, and an order denying motion for a new trial, he appeals. Affirmed.

John Corgiat, Jr., of Oakland, for appellant.

U. S. Webb, Atty. Gen., and Emery F. Mitchell, Deputy Atty. Gen., for the People.

NOURSE, J. The defendant was tried before a jury on an information framed in two counts, the first charging a violation of section 146 of the Motor Vehicle Act (St. 1923, p. 564), the driving of an automobile without the consent of the owner, and the second charging grand theft. The information also charged two prior convictions. The defendant pleaded not guilty to the charges in each count of the information and admitted the two prior convictions. The jury found the defendant not guilty on the first count, and guilty as charged in the second count. The defendant has appealed from the judgment following the verdict, and from the order of the court denying his motion for a new trial.

[1] On May 1, 1928, a man by the name of Brown rented a private garage, No. 7, connected with the Glenwood apartment house in the city of Oakland. On the same day a Hudson automobile was stolen from a place near the Melrose station on Forty-Sixth avenue in Oakland. Theft of this car having been reported to the police department, a police officer, in company with two others, approached the Glenwood Apartments, following the tracks of an automobile which had been stolen a few days previous, and which had been run from this garage without tires and abandoned upon the street. As the three parties approached the garage, the defendant and Brown came out, and, when ordered to stop by the police officer, both ran; defendant being captured some two months later.

An inspection of the garage at the time disclosed the stolen Hudson automobile stripped of its accessories. Near by was found a Jewett car, in which were the defendant's coat and letters addressed to him. The witness Pacetti, who was employed in an automobile repair shop in Oakland, testified that the defendant and Brown had been together at his place of business on numerous occasions; that he had loaned this Jewett car to the defendant, and that immediately following the theft of the Hudson car the defendant informed the witness that he was unable to retain the Jewett, because "we got knocked over making a hoop," which, being interpreted, meant that they were interfered with by the police in endeavoring to steal an automobile tire. The same witness also testified that on a number of occasions the defendant had offered him tires for sale.

On this appeal the appellant states that the evidence is insufficient to support the verdict of guilty, but does not point out wherein any material element of the crime was not proved. The statement of facts which we have heretofore given, which was wholly uncontradicted, is fully sufficient for this purpose.

[2] The argument is made that the trial court erred in refusing to strike all the testimony of the witness Pacetti, just referred to. The argument is that this testimony was introduced solely for the purpose of prejudicing the jury, in that it tended to connect the defendant with the commission of similar crimes. The point is wholly without merit. The testimony was relevant for the purpose of connecting the defendant with the Jewett car, found in front of the garage, as well as for the purpose of bringing before the jury the admission of the defendant that he had been stealing a tire when the police appeared.

[3] An attempt is made to attack the verdict upon the claim of fraud, upon the hearsay affidavit of the attorney for the appellant as to what occurred in the jury room. It needs no citation of authority that a verdict may not be impeached in this manner.

[4] Finally, it is argued that the district attorney failed to state sufficient facts in his opening statement to show the commission of a crime. No authorities are cited by appellant in support of his contention, and it would seem unnecessary to cite authority to the well-known rule that the opening statements of counsel are not a limitation upon the right of either party to introduce evidence of facts not referred to. See 8 Cal. Jur. p. 259, § 322; People v. Stoll, 143 Cal. 689, 693, 77 P. 818.

The judgment and order are affirmed.

We concur: KOFORD, P. J.; STURTEVANT, J.

---

95 Cal. App. 537

CLECAK v. DUNN et al. (Civ. 6569).

District Court of Appeal, First District, Division 2, California. Dec. 17, 1928.

1. Garnishment 🔑42—Commissions earned under agreement with employer to hold commissions as protection on employé's notes guaranteed by employer held not debt due employé until notes were paid, but mere contingent obligation not subject to garnishment.

In action by divorced wife against divorced husband and employers to establish existence of indebtedness due husband and apply same in satisfaction of judgment for alimony, where husband agreed with employers that any commissions earned should be held by employers for their protection as guaranty against loss from liability as accommodation makers on certain notes of husband, commissions earned by husband did not ripen into debt until notes were fully paid, but constituted mere contingent or conditional obligation, which, in absence of fraud, neither husband nor judgment creditor could enforce, and which was not subject to garnishment, regardless whether commissions were earned before or after levy of execution.

2. Garnishment 🔑105—Judgment creditor is in same position as debtor as regards debt due debtor sought to be garnished.

In absence of fraud, judgment creditor seeking to establish indebtedness due defendant subject to garnishment could stand in no better position than defendant, and could not enforce payment if defendant could not do so at any time prior to trial.

3. Garnishment 🔑42—Debt which may never become due is not garnishable.

Debt which is uncertain and contingent, in sense that it may never become due and payable, is not subject to garnishment.

4. Garnishment 🔑42—That commissions were credited on employé's note to employer, instead of being held as guaranty for payment thereof, held immaterial as regards garnishment.

In action to establish indebtedness due divorced husband and sought to be garnished, defended on ground that commissions due husband by employer could be retained by employer for protection on notes guaranteed by employer, fact that commission was credited on payment of note given by husband to employer, instead of being held as guaranty for payment of notes guaranteed by employer, *held* immaterial.

Appeal from Superior Court, City and County of San Francisco; F. M. Jamison, Judge.

Action by Nancy B. Clecak against W. F. Dunn and another, copartners doing business under the name and style of Dunn-Williams Company, and others. Judgment for defendants, and plaintiff appeals. Affirmed.

Leo R. Friedman, of San Francisco, for appellant.

A. Don Duncan and Nat. Schmulowitz, both of San Francisco, and C. M. Booth, of Los Angeles, for respondents.

DOOLING, Justice pro tem. Plaintiff and appellant, who is the divorced wife of respondent John A. Clecak, on June 14, 1926, procured a writ of execution for unpaid alimony in the sum of $2,078 to be levied on the respondents W. F. Dunn and J. A. Williams, copartners doing business as Dunn-Williams Company, to garnish a debt alleged to be owing from said Dunn and Williams to respondent Clecak. Dunn and Williams, by return to the levy, denied any indebtedness to Clecak. Thereafter, on June 26, 1926, appellant commenced this suit in equity seeking a decree establishing the existence of said alleged indebtedness and compelling its application in satisfaction of said judgment for alimony. Respondents answered, admitting that respondent Clecak had earned a certain commission of $1,500 by reason of an exchange of two parcels of real property in the negotiation of which he had acted as one of the brokers, but alleged that nothing was due or owing from respondents Dunn and Williams to respondent Clecak by reason of the following facts: That on January 19, 1926, Dunn and Williams had become the accommodation makers with Clecak of one promissory note for $4,000 and had unconditionally guaranteed the payment of another note executed by Clecak for $6,000; and that coincident therewith, as security against loss by Dunn and Williams in case they should be compelled to pay all or any part of such notes, Clecak had executed and delivered to Dunn and Williams his promissory note for $10,000, and "it was then and there agreed by and between the said W. F. Dunn and J. A. Williams, doing business as the Dunn-Williams Co., and the said John A. Clecak, that any commissions due or owing or belonging to the said John A. Clecak through or from the Dunn-Williams Co. should not be paid to said John A. Clecak, but should be credited on account of said promissory note or on account of the said two obligations for which the said Dunn-Williams Co. were guarantors for the said John A. Clecak, at the option of the said Dunn-Williams Co." And that the $1,500 commission earned by Clecak was accordingly not due or owing to Clecak, but "to pass as a credit on the account of John A. Clecak with W. F. Dunn and J. A. Williams on account of the aforesaid agreements." The evidence showed without conflict that the $1,500 was earned by Clecak as a commission from Dunn and Williams for the exchange of a hotel building in which Dunn and Williams had a one-half interest, that only a small part of the notes for $4,000 and $6,000, respectively, had been paid, and that on June 30, 1926, Dunn and Williams, acting pursuant to their claimed rights under their agreement with Clecak, entered a credit on their books of $1,500 in favor of Clecak on his $10,000 note held by them.

Because we believe it to be the crux of the case, we quote rather fully from the testimony of Dunn and Clecak, who were the only witnesses examined on this subject, concerning Clecak's agreement with Dunn and Williams.

Respondent W. F. Dunn testified as follows:

"It was agreed that he (Clecak) was to leave with our firm the sums that he earned through our office in commissions. * * *

"Q. But you had an understanding with Mr. Clecak whereby Mr. Clecak was to leave with your firm any monies that he received through dealings with your firm? A. Yes.

"Q. * * * What were to become of the commissions? A. They were to be credited on the books of our account and if he did not make his payments upon the Beecher and Ivancovich notes and we should be called upon to make the payments and advance that money for him."

Respondent Clecak testified: "I assigned all the commissions made through their office to Dunn-Williams Co. as a guarantee that I would pay that $10,000 as I was called upon to meet them. I agreed that all the commissions be assigned to the Dunn-Williams Co., and this would stand until the account was weeded out."

Judgment went for the defendants, and this appeal is prosecuted therefrom.

[1-3] Appellant presents her appeal on the theory that there was no assignment, either legal or equitable, of the $1,500 commission to Dunn and Williams prior to the levy of the execution and the commencement of the suit, and hence that by the levy appellant obtained the right to compel the payment of the $1,500 to her which she could not subsequently be deprived of by any act of the parties. This is based on the claim that under the agreement Dunn and Williams had the option to apply this commission either as a credit on Clecak's note for $10,000 which they held, or to pay it on one or the other of the notes upon which they were liable, and that until they had exercised this option in some manner the commission had not been appropriated by them under the agreement and was therefore unqualifiedly due to Clecak at the time of the levy. We do not think that the agreement as testified to justifies this contention. The legal effect of the agreement was that any commissions earned from them by Clecak should be held by Dunn and Williams for their protection as a guaranty against loss from their liability upon the notes of Clecak to others upon which they had made themselves liable. Until the notes were fully paid, any commissions earned by Clecak from Dunn and Williams did not ripen into a debt, but constituted a mere contingent or conditional obligation. It was expressly stipulated by counsel for appellant that there was no element of fraud in this agreement. In the absence of fraud, appellant can stand in no better position than Clecak could. Since Clecak could not have enforced payment at any time prior to the trial of this action, his judgment creditor cannot do so. "A debt which is uncertain and contingent in the sense that it may never become due and payable, is not subject to garnishment." 28 Cor. Jur. 130; 12 R. C. L. p. 794; Early v. Redwood City, 57 Cal. 193; Maier v. Freeman, 112 Cal. 8, 13, 44 P. 357, 53 Am. St. Rep. 151.

In this view of the case it becomes unnecessary to determine whether the commission was earned after the levy as found by the court, or prior thereto as claimed by appellant. In neither event was anything due to Clecak so as to be subject to garnishment.

[4] It is likewise immaterial that the $1,500 was on June 30, 1926, credited on Clecak's note to Dunn and Williams. That was a mere matter of bookkeeping. The material fact is that, in good faith and without fraud, Dunn and Williams were given the right by Clecak to retain this commission for their protection until such time as the notes on which they were liable had been fully paid.

In the absence of fraud, Clecak could perform services for Dunn and Williams on any terms that he saw fit. Having agreed to those terms, neither he nor any one standing in his shoes can now complain of them.

Judgment affirmed.

We concur: KOFORD, P. J.; STURTEVANT, J.

95 Cal. App. 481

BRYAN v. BAYMILLER et al. (Civ. 3661.)

District Court of Appeal, Third District, California. Dec. 13, 1928.

1. Vendor and purchaser 🔑109—Purchaser, whom vendors furnished water for irrigation from land company's well under agreement therewith, held not entitled to rescind contract because water company, which was to furnish water, owned no water system or rights.

Purchaser, whom vendors furnished water for irrigation of land from well of land company under agreement therewith whenever demanded or desired by him, *held* not entitled to rescind contract for failure of consideration in that water company, from which he was to receive water, owned no water system or rights because of conveyance of entire irrigation system to another company by vendors' assignee, even if such agreement gave only a permissive right terminable at any time, as it cannot be said that vendors would be unable to furnish water from other sources.

2. Vendor and purchaser 🔑114—Purchaser paying interest on balance, promising to pay principal, and negotiating for extension of time, after notice of facts authorizing rescission, waived right to rescind for fraud.

Purchaser paying interest on unpaid portion of price, promising to pay principal, and negotiating with vendors for extension of time therefor, after being notified that water system was to be transferred to another company than that which was to deliver water for irrigation of land and that he would receive no more water unless he purchased stock in such company, waived right to rescind contract for fraud.

3. Contracts 🔑262—Right to rescind contract may be waived.

The right to rescind a contract may be waived.

4. Vendor and purchaser 🔑119—Purchaser, not rescinding or offering to rescind for about ten months after learning of such right, was guilty of laches precluding rescission (Civ. Code, § 1691, subd. 1).

Purchaser, not rescinding or offering to rescind contract until about ten months after obtaining full knowledge of any and all rights to rescind, *held* guilty of laches precluding rescission, under Civ. Code, § 1691, subd. 1.

5. Contracts 🔑270(3)—Whether defrauded party rescinded contract promptly depends on particular circumstances, and is primarily for court (Civ. Code, § 1691, subd. 1).

Whether or not defrauded party has rescinded contract promptly, as required by Civ. Code, § 1691, subd. 1, depends on circumstances of particular case and is primarily for court, to whom large discretion is confided.

6. Appeal and error 🔑1008(1)—Appellate court will not disturb trial court's conclusion as to whether defrauded party rescinded contract promptly, unless manifestly unjust (Civ. Code, § 1691, subd. 1).

Disposition of appellate court is to respect trial court's discretion in determining question whether defrauded party rescinded contract promptly, as required by Civ. Code, § 1691, subd. 1, and not to interfere with his conclusions unless injustice was manifestly done.

7. Vendor and purchaser 🔑170—Vendors were justified in refusing purchasers' conditional tender of balance due (Civ. Code, § 1494).

Under Civ. Code, § 1494, vendors were justified in refusing purchasers' tender of balance of purchase price subject to conditions foreign to contract for purchase of land.

8. Contracts 🔑267—Party in default cannot rescind contract.

Rescission of a contract cannot be made by a party who is in default.

Appeal from Superior Court, Tehama County; H. D. Gregory, Judge.

Action by Charles Tyson Bryan against W. H. Baymiller and another, copartners doing business as the Baymiller Post Company, the Pacific Land Corporation, and another, in which defendants filed a cross-complaint. From a judgment for defendants and for defendant land company on the cross-complaint, plaintiff appeals. Affirmed.

Fred C. Pugh, of Red Bluff, and Ernest L. English, of Santa Monica, for appellant.

Huston, Huston & Huston, of Woodland, and McCoy & Gans, of Red Bluff, for respondents.

JAMISON, Justice pro tem. Plaintiff brought this action to rescind a contract for the purchase of real estate entered into between him and defendant Baymiller Post Company and to recover the sum of $4,250 paid by him on the purchase price of said land under said contract and for damages in case rescission cannot be had.

Defendants answered, denying the material allegations of the complaint and setting up that plaintiff was guilty of laches in attempting to rescind the contract and that he had waived the alleged fraud of defendants, and also filed a cross-complaint demanding judgment in favor of defendant Pacific Land Company, to whom said contract had been assigned, for the remainder of the purchase price called for by said contract, to wit, $4,500.

Judgment went for defendants and in favor of the Pacific Land Company on the cross-complaint for the said sum of $4,500.

As ground for rescinding the said contract, plaintiff alleges in his complaint:

That the consideration passing to him under the contract has wholly failed, in this, that by said contract Baymiller Post Company agreed that they would bore wells and install pumps and construct a water system necessary to irrigate the lands described in the contract, and, when so constructed, said system would be conveyed to the El Camino Water Company, which last-named company

Baymiller and Post had caused to be incorporated as a subsidiary company to hold title for them to said water system, and that the said water company after such construction and transfer would deliver water for the irrigation of plaintiff's said lands in accordance with a contract entered into by plaintiff with said water company of the same date as that of the contract between Baymiller Post Company and plaintiff, namely, June 3, 1921.

That thereafter Baymiller and Post caused the Pacific Land Corporation to be incorporated and in June, 1922, the said land contract was duly assigned by Baymiller Post Company to said last-named corporation; it assuming all obligation of the Baymiller Post Company contained in said contract.

That after its incorporation said Pacific Land Corporation continued the development of said irrigation system and completed the same in October, 1923. That in February, 1923, Baymiller and Post and Pacific Land Corporation proceeded to incorporate a second water company, known as the El Camino Canal Company. It was organized as a mutual water company empowered to furnish water to the stockholders only, and that on or about September 8, 1923, the Pacific Land Corporation conveyed to said canal company the entire irrigation system aforesaid.

That thereby the El Camino Water Company, with whom plaintiff had contracted for water for the irrigation of his lands, was left without any water system whatever and without means of supplying plaintiff with any part of the water it had contracted to supply him.

That plaintiff purchased the land, agreeing to pay $250 an acre for the same upon the representations of Baymiller and Post that the same would be irrigated under the contract he entered into with the El Camino Water Company, and that without the necessary water to irrigate said land it would not be worth to exceed $25 per acre.

On the 28th of March, 1924, plaintiff served upon defendants a notice of his rescission of said contract, in which he stated that the consideration for his contract for the purchase of said land had failed by reason of the failure and refusal of the El Camino Water Company to develop water for the irrigation of said land and by reason of the transfer of the water system to the El Camino Canal Company, thereby making it impossible for either the Pacific Land Corporation or the El Camino Water Company to deliver water to said land.

The court found defendants had not committed fraud and that the El Camino Water Company was ready, able, and willing to supply to plaintiff the water called for by the said water contract, and that it is not true that since the execution of said water right the lands of plaintiff have been without a water right or right to irrigating water.

Half of plaintiff's land lies north of a public road and the other half south of said road. For the irrigation of the north half a pipe line leads to it from what is known as well No. 6 and for the south half a ditch leads to the same from said well.

The only period during which any of said land was irrigated was during the year 1922, when a tenant of plaintiff raised a crop on a part of the south half of said land. During that period water was conveyed to said south half of said land through a ditch from said well No. 6. Other than this period, neither the plaintiff nor any tenant or agent of his has ever demanded water from defendants for the irrigation of said lands. This well was not owned by any of the defendants. It was the property of the Finnel Land Company, but the right to use water from this well for the irrigation of plaintiff's land was claimed by defendants under an agreement to that effect entered into by the Finnel Land Company with the Pacific Land Corporation.

Although defendants did not own this well, they claimed the right to furnish water for plaintiff's lands from it under the terms of said water contract which provides that the El Camino Water Company might supply the said water from any source whatsoever.

Shortly prior to July 1, 1923, the defendants, other than the El Camino Water Company, co-operating with the landowners who owned land irrigated by said water system, organized a mutual water company, known as the El Camino Canal Company, and about that time plaintiff was informed of the organization of the company and that the defendants, other than the El Camino Water Company, would transfer the said water system to said El Camino Canal Company, and thereupon he was requested to surrender his water contract and purchase water stock of the said canal company in the proportion of one share of water stock for each acre of land owned by him; that is to say, that plaintiff should purchase 35 shares of said stock at $60 per share. This request plaintiff refused.

Plaintiff testified that, at the time defendants made the request or demand that he surrender his water contract and in lieu thereof purchase said stock, they informed him that, unless he did this, he would receive no water for the irrigation of his land. Defendants denied this, and the court found against plaintiff upon this proposition.

[1] In his opening brief, plaintiff appears to rely, as ground for rescinding the land contract, upon the total failure of consideration, and, in support of this contention, says that this failure was due to the fact that the El Camino Water Company owned no water system or water rights or property of any kind.

It appears, however, that the Pacific Land Company to whom the said land contract was assigned, and who, plaintiff alleges in his complaint, assumed all the obligations of Baymiller Post Company called for by said land contract, has a right to irrigate the lands of plaintiff from the said well No. 6, under the agreement with the Finnel Land Company.

Plaintiff argues upon the theory that this agreement does not guarantee a permanent right to the use of the water of said well, but is only a permissive right which may be terminated at any time. Admitting that this contention is true, yet up to the present plaintiff at all times has been furnished with water for the irrigation of his land whenever demanded or desired by him. Even in case defendants lost the right to use water from well No. 6 to irrigate plaintiff's land, it cannot be said that they would not be able to furnish it from other sources. Speaking of impossible considerations, Elliott, in his work on Contracts, vol. 1, § 225, says: "To bring the case within the rule of dispensation, it must appear that the thing to be done cannot by any means be accomplished." And, in the case of Berry v. Wells, 43 Okl. page 70, 141 P. 444, the court used this language: "The contract, as a matter of law, not being impossible of performance, defendants had no right to assume that plaintiff in no way could comply with the conditions which he undertook to perform."

[2] The trial court found that plaintiff had waived any fraud of which defendants might have been guilty by his recognition of the contract, after the time, according to plaintiff's contention, his right to rescind was created, and that is equally true of his right to rescind the contract.

It appears from the evidence that, after plaintiff had notice of the proposed transfer of the water system to the El Camino Canal Company, and after, as he claims, he had been notified by defendants that, unless he purchased stock from said company, he would receive no more water for the irrigation of his said land, he paid interest on the unpaid portion of the purchase price of said land, promised to pay the principal sum and entered into negotiations with defendants for an extension of time for the payment of said principal sum.

[3] That the right to rescind a contract may be waived is well settled. Harrington v. Paterson, 124 Cal. 542, 57 P. 476; Black, Rescission, vol. 2, §§ 590, 594; Elliott, Contracts, vol. 3, § 2430; Bernard v. Sloan, 2 Cal. App. 744, 84 P. 232.

[4-6] The trial court also found that plaintiff was guilty of laches, in that he did not use diligence in rescinding or offering to rescind; that continuously from June, 1923, until the date of the notice to rescind was given, namely, March 28, 1924, plaintiff had full knowledge of any and all rights he may have had to rescind said contract, and that his delay in attempting to rescind was inexcusable. Subdivision 1 of section 1691 of the Civil Code provides that the party seeking to rescind must do so promptly upon discovering the facts which entitle him to do so. Whether or not the defrauded party has rescinded promptly depends upon the circumstances of the particular case, and is a question primarily for the court, to whom a large discretion is confided, and the disposition of the appellate court is and should be to respect that discretion and not interfere with his conclusions unless manifestly an injustice has been done. Pratt v. Pratt, 43 Cal. App. 261, 184 P. 956; French v. Freeman, 191 Cal. 579, 217 P. 515. The courts have held that delay in rescinding from one to four months was too late. Schneider v. Henley, 61 Cal. App. 758, 215 P. 1036; Marten v. Paul O. Burns Wine Co., 99 Cal. 355, 33 P. 1107; Bailey v. Fox, 78 Cal. 389, 20 P. 868.

[7] At the time plaintiff served his notice of rescission, he had defaulted in payment of the balance owing on the purchase price of said land. This balance was due on July 1, 1923. In December, 1923, he tendered to defendants the balance of said purchase price, but coupled this tender with conditions. Defendants refused to accept the tender with the said conditions. Defendants were justified in refusing the tender which was made subject to conditions foreign to the contract for the purchase of the land. Section 1494, Civ. Code; Roffinella v. Roffinella, 191 Cal. 753, 218 P. 397.

[8] Rescission of a contract cannot be made by a party who is in default. Russell v. Penniston, 55 Cal. App. 492, 203 P. 813.

We think the judgment should be, and it is, therefore, affirmed.

We concur: HART, Acting P. J.; PLUMMER, J.

---

95 Cal. App. 575

GAUGER v. WESTBERG. (Civ. 3656.)

District Court of Appeal, Third District, California. Dec. 18, 1928.

1. Partnership ⚷64—Firm name, which is combination of partners' true names, is not "fictitious name," within statute as to filing and publishing certificate (Civ. Code, §§ 2466, 2468).

Where partners do business under a firm name which is the combination of their true names, it is not transacting business under a fictitious name, so as to require filing and publishing of certificate, under Civ. Code, §§ 2466, 2468.

[Ed. Note.—For other definitions, see Words and Phrases, First, Second, and Third Series, Fictitious Name.]

2. Evidence ⚷413—Testimony as to manner of addressing bid for doing work held not testimony varying terms of written contract.

Where firm of G. & L. advertised for bids for work, and bid submitted by W. was addressed to Gauger Construction Company, name under which G., before forming the partnership, had done business, testimony that W. had previously done business with the partnership, and sometimes addressed it as G. & L., and sometimes as on the occasion of the bid in question, would not have been testimony varying the terms of a written contract; the address being no part of the bid.

Appeal from Superior Court, Los Angeles County; Carlos S. Hardy, Judge.

Action by Herbert E. Gauger against Ed Westberg. Judgment for defendant, and plaintiff appeals. Reversed.

Page, Nolan, Rohe & Freston and Barstow & King, all of Los Angeles, for appellant.

John F. Poole, Julius V. Patrosso, and Earle M. Daniels, all of Los Angeles, for respondent.

PLUMMER, J. Action by plaintiff to recover damages by reason of failure and refusal of the defendant to enter into a contract for the doing of certain plastering on a certain building being erected by the plaintiff, according to the bid for doing such work presented by the defendant to the plaintiff. The defendant had judgment, and the plaintiff appeals.

The record shows that on or about June 29, 1923, the appellant, Herbert E. Gauger, a building contractor, having requested bids for plastering work on a certain building called the California Christian College dormitory, then being erected by the appellant, received a bid from the defendant for doing such work. The complaint alleges the calling for bids, the receiving of bids, that the defendant's bid was the lowest responsible bid received, was accepted by the plaintiff, and the refusal thereafter of the defendant to enter into the contract. The bid received from the defendant, Ed Westberg, was addressed to the Gauger Construction Company, but was delivered to and received by the plaintiff Herbert E. Gauger. At the time of receiving the bid, the plaintiff, Herbert E. Gauger, and one David S. Lockwood were copartners doing business under the name of Herbert E. Gauger and David S. Lockwood. The record also shows that at one time Herbert E. Gauger transacted business under the name of Gauger Construction Company. The record further shows that the claim upon which the action is based was assigned to the plaintiff by the copartnership.

At the trial of the action the plaintiff proposed to show by testimony that the defendant was familiar with the names and personnel of the partnership—that is, that he was acquainted with and knew both Herbert E. Gauger and David S. Lockwood; that the defendant had done business with the partnership on previous occasions, and sometimes addressed the partnership by the name of Gauger & Lockwood, and sometimes as the Gauger Construction Company. The court refused to admit this testimony, and also held that the partnership must have complied with the law relating to fictitious names before the action could be maintained. The findings are also to the effect that at the time of receiving the bid the plaintiff and David S. Lockwood were operating and doing business under the fictitious name and style of Gauger Construction Company, and that the Gauger Construction Company had never filed a certificate as provided by sections 2466 and 2468 of the Civil Code. The findings to which the appellant takes exceptions are as follows:

"* * * That it is not true that said bid was the lowest responsible bid for said work, and it is not true that plaintiff or the Gauger Construction Company notified the defendant of its acceptance and reliance upon said bid of defendant, and it is not true that plaintiff entered into and signed a contract with said trustees for the erection and completion of said dormitory; that it is not true that said bid thus submitted and accepted was for the amount of $15,900; that plaintiff, at the time of the receiving of said bid from the defendant, was in partnership with one David S. Lockwood, operating and doing business under the fictitious name and style of Gauger Construction Company in the city of Los Angeles, Cal.; that Gauger Construction Company had never filed a certificate of doing business under the fictitious name and style with the county clerk of Los Angeles county, nor caused publication of said certificate as provided in sections 2466 and 2468 of the Civil Code of the state of California; that the said David S. Lockwood assigned all his right, title, and interest in and to said contract and offer of the defendant to the plaintiff herein; that plaintiff herein has no legal capacity to sue or maintain this action, nor has the plaintiff's partner, David S. Lockwood, the assignor to plaintiff, the right to enforce or maintain this action; that said bid of the defendant was made to the Gauger Construction Company, which was a fictitious partnership composed of the plaintiff and David S. Lockwood, operating and doing business in the city and county of Los Angeles, state of California, and that neither said partners nor the said Gauger Construction Company has ever filed the certificate of fictitious name with the county clerk of Los Angeles county, nor caused the publication thereof, pursuant to the provisions as contained in sections 2466 and 2468 of the Civil Code of the state of California."

There is absolutely no testimony in the record that Herbert E. Gauger and David S. Lockwood, at the time of receiving the bid from the defendant, were operating or doing business under the name of the Gauger Construction Company. The only testimony in the record on that subject is that they were not so doing business. The following questions, answers and statements of court and counsel illustrate the error under which the trial court was laboring in this case (question of the plaintiff by Mr. Daniels, counsel for defendant):

"Q. Mr. Gauger, at the time, June 29, 1923, the date of the bid that has just been handed me, you were a copartnership? A. Yes.

"Q. Who was your partner? A. David S. Lockwood.

"Q. Well, at the time when this bid was received, you were doing business as the Gauger Construction Company, you and Lockwood? A. No, sir.

"Q. Who were the members of the company? A. There was no Gauger Construction Company at that time, doing business at all.

"The Court: Do you contend that at this date, June 29, Lockwood and the plaintiff were doing business under any particular name?

"Mr. King (of counsel for the plaintiff): No; I don't think so.

"The Court: They must have been doing business under some name, and that name would have to be registered.

"Mr. King: They were doing business under the name of Herbert E. Gauger and David S. Lockwood at that time, and the defendant knew it.

"Mr. Daniels (counsel for the defendant): That is a fictitious name.

"The Court: The partnership must be a fictitious name.

"Mr. King (counsel for plaintiff): Not if they were under real names. There are two names. There is nothing fictitious about it.

"The Court: It is a fictitious name (pardon me), for this reason, that there is no human being of that name. If your name is Herbert E. Gauger, you can do business under that name; you do not have to comply with the statute, but, if Herbert E. Gauger and Mary Gauger want to do business as Herbert E. Gauger and Mary Gauger, that is the name of no human being; it is a fictitious name for the purpose of their going into business.

"Mr. King (counsel for plaintiff): I do not understand that two people could not do business under their own names together. As I understand the decisions, it must be a name which is different from their true names in order to come within the section.

"The Court: Let's get an understanding between court and counsel. You offer to show, as I understand it, from what you have said previously, that the defendant, Westberg, in presenting this bid to Herbert E. Gauger and David Lockwood, were doing business at that time as Herbert E. Gauger and David Lockwood? A. (by Mr. Barstow, of counsel for plaintiff): Yes, sir.

"The Court: And it is a partnership?

"Mr. Barstow: Yes, sir.

"The Court: That the defendant was and had been dealing with said Herbert E. Gauger and David S. Lockwood, under that name and title, for some time?

"Mr. Barstow: Yes, sir.

"The Court: And that name and title of Herbert E. Gauger and David S. Lockwood had not been filed as a fictitious name?

"Mr. Barstow: Your honor, that is correct.

"The Court: Then, if I let you go ahead and show all that, you will land, in my judgment, just where you are right now, because I would exclude the testimony then. I would hold as I have indicated before, and I will say it again, I will hold that, where two people join themselves together as partners doing business as Herbert E. Gauger and David S. Lockwood, that being the names of the two persons, that they have to comply with the fictitious name law in order to maintain an action in that name."

The testimony relative to the presentation of bids and the manner of addressing the bids by the defendant, Westberg, was excluded, and the court, without any testimony whatever to support the finding, held that the plaintiff and David S. Lockwood were doing business under the title of Gauger Construction Company, although the theory of the court at the time of the trial, as indicated by the foregoing, was that they were doing business as a copartnership under the name of Herbert E. Gauger and David S. Lockwood, and certificate would have to be filed.

[1, 2] There being no testimony to support the finding that business was being done under the name of Gauger Construction Company, by the appellant and his partner, David S. Lockwood, at the time of calling for bids, and at the time of the presentation and acceptance of the defendant's bid, the judgment of the court would have to be reversed for that reason; but, as the cause must go back for retrial, we cite the cases of Pendleton v. Cline, 85 Cal. 142, 24 P. 659, and Lamberson v. Bashore, 167 Cal. 387, 139 P. 817, which established the law in this state that, where partners do business under their true names, certificates do not have to be filed, by anything contained in sections 2466 and 2468 of the Civil Code. In the last case cited the partners were doing business under the name of Lamberson & Lamberson. In the first case cited the partners were doing business under the name of Pendleton & Williams, one partner being C. W. Pendleton and the other W. J. Williams. These cases show clearly that the trial court was in error relative to the filing of a certificate, when the true names of the persons are disclosed, and it is therefore in error in excluding the testimony relative

to the manner in which Westberg addressed his bid. We may further state that the address was no part of the bid, and testimony relative thereto, and the manner in which Westberg had previously addressed his bids, would not have been testimony varying the terms of a written contract.

For the reasons herein stated the judgment is reversed.

We concur: HART, Acting P. J.; SHIELDS, Justice pro tem.

---

95 Cal. App. 500

FIRPO v. SLYTER. (Civ. 6447.)

District Court of Appeal, First District, Division 1, California. Dec. 15, 1928.

1. Insurance 🔑188(2)—Defendant's denial that he applied for insurance, showing that application contained untrue statements, and testimony that premium was prohibitive, held to support finding that he did not sign application.

Insistent denial of defendant, sued for premium on life policy, that he made application for insurance, coupled with showing that application contained statements contrary to truth, concerning defendant and his financial ability and age, and testimony that amount of premium was prohibitive, *held* sufficient to support finding of court that application was never signed by defendant.

2. Insurance 🔑112—Defendant, sued for premium, held not to have ratified agent's act in procuring policy, by keeping policy when insurer returned it to him following defendant's rejection.

Defendant, sued for premium on life policy, *held* not to have ratified agent's act in procuring the policy insuring his life, by keeping policy after insurer returned it to him following defendant's refusal to accept it.

3. Insurance 🔑188(2)—Return of policy to defendant, who rejected it, held to justify conclusion that insurer tried to force policy on defendant.

Where insurer returned life policy to defendant, sued as the insured for premium after defendant's refusal to accept, conclusion was justified that insurer attempted to force on defendant policy against his wish and without his authority, expressed or implied.

4. Insurance 🔑231—Policy need not be physically delivered and surrendered to insurer to cancel it.

It is not necessary to valid cancellation of insurance policy that it be physically delivered and surrendered to the insurer.

Appeal from Superior Court, City and County of San Francisco; E. P. Shortall, Judge.

Action by E. Firpo against Byron Joseph Slyter. Judgment for defendant, and plaintiff appeals. Affirmed.

Raymond Perry, of San Francisco, for appellant.

Russell W. Cantrell, of San Francisco, for respondent.

PARKER, Justice pro tem. The action is upon an assigned claim of one Frank De Patta against defendant Slyter. The complaint is on the common count for money laid out and expended by said De Patta for the use and benefit of defendant. Issue was joined by a specific denial. Judgment went for defendant, and plaintiff appeals.

[1] In determining the questions presented, it becomes necessary to recite in a general way the facts involved in the controversy. De Patta was engaged in the business of soliciting life insurance. In the course of this work he approached the defendant Slyter and interested him to the extent of a consideration of the advisability of making certain changes in his insurance. Discussion was had concerning the policies being carried by Slyter, but apparently the matter went no further. Some time thereafter a physician called at the home of the defendant and stated that he had been sent by De Patta to make a physical examination of defendant. The testimony of the defendant is that he told the doctor that he had ordered no policy, and the doctor then assured him no obligation was being incurred, and that the examination was merely preliminary, so that it might be ascertained what company might accept defendant as a risk before Mr. De Patta would go to the trouble of submitting an application. The examination was had, and the defendant signed a medical report attesting as true the answers given by him in answer to the interrogatories listed in the form. This examination took place on November 20, 1925. There was nothing further done concerning the matter.

[2] Appellant contends that at the time defendant signed the medical report he signed an application for insurance specifying the character of policy applied for and the amount desired, namely $25,000. Evidence was offered by appellant supporting the contention. The evidence consisted of a written application for insurance in the amount named, at the bottom of which was, in writing, the name of defendant. Defendant denied that he had signed any such application and characterized the signature as fake. A handwriting expert was called, who gave his opinion that the signature was genuine. Examples of defendant's genuine signature were received in evidence and compared with the disputed signature. From all of the evidence the finding of the trial court is that no application for such or any insurance was ever

signed by the defendant. Appellant urges this court to make an independent comparison of the exemplars and the disputed signature, and after such comparison make our own determination, regardless of the trial court's finding. This we decline to do. No reason appears to relax the well-established rule which precludes our inquiry into the domain of disputed fact. The insistent denial of the defendant was sufficient to support the finding of the lower court, particularly when coupled with the showing that the application contained statements contrary to the truth concerning defendant and his financial ability and his age. Further, defendant testified that the amount of premium was prohibitive. Without at all discrediting the testimony of experts, handwriting or others, we conclude for the instant case that the testimony of the expert did not conclude the inquiry, or render any finding opposed to such testimony, unsupported.

[3] Continuing the facts, on or about July 31, 1926, the agent De Patta offered to defendant a policy of life insurance covering the latter. This policy was in an amount of $25,000, and showed payment of $994.55 covering premium for one year from the date thereof, which was December 10, 1925. It will be observed that the delivery or offer on the policy was at a time almost eight months after its date. Defendant refused the proffered policy, and De Patta left it on the desk in defendant's place of business, in the absence of defendant. The same day defendant sent the policy to his attorney, and the latter, on August 19th, returned the policy to the issuing company with the statement that Slyter had never applied for any insurance, and refused to accept the policy, and that Slyter denied any liability thereunder. On September, 1926, the insurance company returned the policy to the attorney, advising him that the company would accept De Patta's statement of facts in the matter, and, that as De Patta had paid the full amount of the premium to December 10, 1926, the policy was in full force, and would not be canceled. The attorney for Slyter then retained the policy up to the date of trial, in April, 1927.

Appellant argues that this state of the record shows a ratification by defendant and acceptance of benefits under the policy to an extent which renders of no avail the attempted avoidance of liability for premium paid. He argues that defendant, after notice of policy and payment of premium by De Patta and of the further fact that the policy was continued in force, nevertheless retained the policy, and could have, in the event of death, through his beneficiaries, obtained the full benefit of the insurance. Supporting his contention, appellant cites many authorities, both local and from other jurisdictions. It appears, however, that the authorities cited, without consideration or analysis by us here, do not apply to the facts before us. It is conceded that, if an insurance agent, without the knowledge or consent of his client, obtain a policy of insurance concerning the latter, that alone gives no right to the agent to claim reimbursement for any outlay made. Therefore, the whole question here rests upon the conduct of defendant after issuance of the policy. The fact that the policy was not delivered until some eight months from issuance is a strong circumstance here. When it was finally tendered defendant he refused acceptance. The policy was then left in the office of defendant without his knowledge. He then notified the company of his nonacceptance and returned the policy. To this point he did everything possible to promptly disaffirm the policy and to refuse benefits thereunder. The company, refusing the returned policy, held the insurance to be in full force, and this closed the matter. We do not think that by his failure to act further defendant ratified the act of De Patta in securing the policy. What defendant could have done after the return of the policy is problematical. Possibly he should have returned the policy to the agent De Patta, but, in view of the fact that the premium was alleged to have been paid and the policy in effect, he had the right to conclude this to be a useless act. We decline to concede that, if the same state of facts as appears here was presented in behalf of the insurance company in resisting the claims of beneficiaries under the policy, the amount of the policy could be recovered.

[4] However, this question is not before us. We mention it only by reason of the fact that appellant seems to take for granted the right of the beneficiaries to recover should the insured have died before the end of the first year. From the facts here the trial court was justified in its conclusion that there was an attempt to force upon defendant an insurance policy against his wish and without his authority, express or implied. It is not necessary to a valid cancellation of a policy that it be physically delivered and surrendered to the insurer. Stevenson v. Sun Insurance Office, 17 Cal. App. 288, 119 P. 529. The cited case differs much from the case at bar, but holds that, where there is an actually outstanding enforceable policy, an agreement of cancellation may be effected without delivering up the policy. The effect of this holding obviously supporting the conclusion that, where no authority exists for issuing the policy and the insured upon a forced or fraudulent delivery having promptly expressed his refusal to accept, then his failure to act further upon the return of the policy to him, against his express objection, does not bind him to payment of premium. And this is particularly true here, where the policy is not offered until near the end of the term covered.

Incidentally, it may be noted that, while the record discloses evidence sufficient to sustain a finding that the agent De Patta did actually advance the premium, yet the evidence, while not characterized as inherently improbable, is very weak and unsatisfactory. In La Marche v. N. Y. Life Ins. Co., 126 Cal. 498, 58 P. 1053, plaintiff had received a policy different from the kind he had applied for, and when the company declined to return the premium plaintiff instituted suit therefor. In sustaining plaintiff's demand, the court makes no mention of the fact that the policy was or was not returned, but does say: "Plaintiff never applied for the policy which defendant assumed to issue, and, of course, his" beneficiary "could have no vested or other interest in a policy which he did not accept nor agree to accept." Here the company was not requested by defendant to issue any policy at all. In the case of Amory v. Hamilton, 17 Mass. 103, the court says: "The cases of ratification are, where the agent has gone beyond or beside his authority, for the benefit, as he supposes, of his principal, and gives him immediate notice. In such case, silence is construed acquiescence and ratification. But a delay of intelligence, until an election to approve or disapprove would be attended with no advantage to the principal, defeats the right to construe silence into ratification." This case of ancient origin (1821) is still accepted as excellent law, and cited in Joyce on Insurance (2d Ed.) § 642.

In the instant case, the policy, when delivered, had but a few months to run, and approximately two-thirds of the premium had then been earned, and the advantage to the principal was correspondingly reduced. We think that defendant was charged with no duty further than he performed. The appeal is wholly without merit.

Judgment affirmed.

We concur: TYLER, P. J.; CASHIN, J.

---

95 Cal. App. 594

OLSON v. OLSON. (Civ. 6293.)

District Court of Appeal, First District, Division 1, California. Dec. 20, 1928.

1. Divorce ⚷303(1)—Jurisdiction to award custody of minor children is continuing.

Where jurisdiction to grant a divorce and award custody of minor children of marriage once attaches, that jurisdiction is continuing one, so that power to amend, modify, or annul an order of custody for welfare of children as existing conditions may demand ever after remains.

2. Divorce ⚷303(2)—Change of circumstances arising after original divorce decree is necessary to justify modification thereof with respect to custody of minor children.

In order to justify a modification of divorce decree with respect to custody of minor children, there must be a change of circumstances arising after the original decree is entered, or at least a showing that facts were unknown to party urging them at time of prior order and could not with due diligence been ascertained.

3. Divorce ⚷312—Abuse of discretion is necessary to warrant interference by appellate court with order denying modification of decree with respect to custody of children.

In order to warrant appellate court in disturbing order of trial judge refusing to modify divorce decree with respect to custody of children, an abuse of discretion must be shown, since trial court, having the parties before it and able to act promptly and appropriately under changed conditions, has a very wide latitude of discretion.

4. Divorce ⚷298(1)—Interest of children is paramount consideration in controversy between divorced parents relative to custody.

In determining controversy relative to custody of minor children of divorced parents, the interest of children is the paramount question to be considered.

Appeal from Superior Court, Los Angeles County; K. S. Mahon, Judge.

Action by Amelia Olson against Peter Olson, wherein defendant filed a cross-complaint in divorce. Decree of divorce, and from a subsequent order refusing to modify the decree with reference to the care and custody of minor children, defendant appeals. Affirmed.

John E. Carson and Munson T. Case, both of Los Angeles, for appellant.

Arvin B. Shaw, Jr., of Los Angeles, for respondent.

TYLER, P. J. This is an appeal from an order refusing to modify a divorce decree with reference to the care and custody of minor children. Plaintiff and defendant intermarried in the year 1900, and lived together as husband and wife until May 5, 1922. During that period plaintiff bore defendant seven sons, who at the latter date were of ages ranging from 6 to 20 years. At this time plaintiff filed her complaint for separate maintenance, alleging cruelty on the part of defendant toward herself and the children. On May 9, 1922, in pursuance of an order to show cause, Judge J. W. Summerfield ordered that defendant pay plaintiff alimony pendente lite, and the custody of the minor children were awarded to plaintiff. Defendant subsequently filed a cross-complaint in divorce charging desertion and cruelty. At the trial, with the approval of Judge Walton J. Wood, who presided, the complaint of separate maintenance and the cruelty charges of the cross-complaint were withdrawn by stipulation, and a divorce was granted to defendant upon the ground of desertion. An interlocutory decree was entered in which the custody of the children was awarded to plaintiff.

⚷For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

In August, 1924, defendant instituted proceedings to obtain a modification of this judgment. Hearings were held upon the application by Judge F. M. Jamison. Witnesses were sworn on behalf of each of the parties and evidence taken respecting their fitness to act. Defendant's application was denied. On February 3, 1925, on motion of defendant's attorney, a final decree of divorce was entered in which the provisions of the interlocutory decree, in respect to the custody of the children, were continued in force. In both decrees plaintiff was granted an allowance of $120 per month for their support. About a year after the hearing before Judge Jamison, defendant again applied for a modification of the decree respecting the children. A hearing was held thereon by Judge Hartley Shaw, at which defendant testified, and again his application was denied. Three months thereafter defendant once more obtained an order to show cause why the decree should not be modified in respect to the custody of the four youngest children. This hearing was had before Judge K. S. Mahon. In an affidavit filed by defendant in support of his motion, it was charged that Judge Wood in making his interlocutory decree acted without a careful regard touching the fitness of plaintiff to have the custody of the children, and defendant asked the court to receive evidence relative to her fitness at a time antedating the interlocutory decree. The court refused to hear evidence of facts occurring prior to the former hearings, but heard a number of witnesses produced by defendant in support of his motion. The application was again denied. It will thus be seen that the fitness of plaintiff to have the care and custody of her minor children has been passed upon by five different judges. Appellant appeals from the last order and claims that the court erred in not permitting him to introduce testimony which was or might have been introduced at the prior hearings.

[1, 2] There can be no doubt that where jurisdiction to grant a divorce and award the custody of the minor children of the marriage once attaches, that jurisdiction is, under our statute, a continuing one, so that the power to amend, modify, or annul an order of custody for the welfare of children as existing conditions may demand, ever after remains. But this does not mean the parties to such litigation may, after a court has once heard evidence upon the subject of their fitness to act and ruled upon the question, immediately again invoke the powers of the court to have it inquire into the same or other facts existing at the time of or prior to the former decree. Such holding would lay a foundation for interminable and vexatious litigation. Burns v. Shapley, 16 Ala. App. 297, 77 So. 447. The rule is stated to be that to justify a modification there must be a change of circumstances arising after the original decree is entered, or at least a showing that the facts were unknown to the party urging them at the time of the prior order, and could not with due diligence have been ascertained. 19 Cor. Jur. 350.

[3, 4] Then again, in proceedings of this character appellant must show abuse of discretion. The rule is elementary that in matters affecting custody of children the trial court has a very wide latitude of discretion. It has the parties before it, is able to act promptly and appropriately under changed conditions, and its decision cannot be altered by an appellate court unless it clearly appears that the court not merely erred, but has radically abused its discretion. Bancroft v. Bancroft, 178 Cal. 352, 173 P. 582; Black v. Black, 149 Cal. 224, 86 P. 505. In passing upon contests of this character, the interest of children is the paramount question to be considered, and these numerous and acrimonious applications add nothing to their welfare.

The order is affirmed.

We concur: KNIGHT, J.; CASHIN, J.

---

95 Cal. App. 551

SPARTER et al. v. MISSION MOTOR SERVICE, Inc., et al. (Civ. 6431.)

District Court of Appeal, First District, Division 1, California. Dec. 18, 1928.

1. Appeal and error 🔑1010(1)—Trial court's determination, supported by substantial evidence, is accepted by appellate court.

Determination of trial court, supported by substantial evidence, will be accepted by appellate court.

2. Brokers 🔑86(4)—Evidence held to warrant finding that brokers were procuring cause of sale of gasoline service station and entitled to commission.

In action to recover brokers' commission arising out of sale of gasoline service station and equipment, evidence *held* to warrant finding that plaintiffs were procuring cause of sale, and therefore entitled to commission.

3. Corporations 🔑410—President and general manager of corporation held authorized to bind corporation to sell gasoline service station.

President and general manager of corporation, authorized by resolution of board of directors to bind corporation in matter of sale of gasoline service station belonging to corporation without binding him to make sale to any particular person, *held* authorized to bind corporation to contract of sale.

Appeal from Superior Court, Alameda County; T. W. Harris, Judge.

Action by Louis Sparter, doing business as Sparter & Company, and another, against Mission Motor Service, Incorporated, and another. Judgment for plaintiffs, and defendants appeal. Affirmed.

Young & Hudson, of San Francisco, for appellants.

Skinner & Friedman, Monroe Friedman, and Howard H. Desky, all of Oakland, for respondents.

PARKER, Justice pro tem. This is an action to recover broker's commission arising out of the sale of a gasoline service station and equipment. Judgment was for plaintiff against both defendants, and both defendants appeal. Two points are raised, namely:

(1) Plaintiffs and respondents were not the inducing or procuring cause of the sale so as to entitle them to receive the commission.

(2) No judgment is justified as against defendant and appellant Mission Motor Service, Inc., by reason of the fact that there was no antecedent authority to Waugh from the corporation to enter into the alleged contract.

No questions are raised as to the capacity of plaintiffs to act as brokers or the compliance by them with the laws governing. There is evidence to support the following statement of facts:

Defendant Mission Motor Service, in January, 1927, was the owner of the service station in question, and defendant Waugh was the president of said corporation and its general manager and acting as such in the management and conduct of the station.

As stated, plaintiffs are licensed brokers operating in Alameda county. In January, 1927, Waugh called at the office of plaintiffs and stated that the service station was for sale and asked one of those connected with the office to send Mr. Sheets, one of the plaintiffs, to the station for further discussion. At this first conversation defendant Waugh promised to pay a commission on the sale. Sheets subsequently, a few days later, called upon Waugh at the service station, and the matter of the sale was again taken up. Waugh at this time told Sheets that if he brought somebody out to purchase the station and a sale was made he would pay $1,000 commission irrespective of the price obtained. Some time during February, 1927, Sheets had another conversation with Waugh concerning the service station, during which Waugh confirmed his former offer and told Sheets to get him an offer, saying he would consider $18,000. Subsequent to the conversation in February, Sheets had several conversations with Waugh. All that was required under the offer was to secure a purchaser for the service station.

In April, 1927, Sheets took Stanley and Gallinatti to see the station. The last-named persons were introduced to Waugh by Sheets, and a general discussion was had on the subject of the station, its name, lease, rental, etc. Stanley and Gallinatti told Waugh they would get in touch with him later. The price named at that time by Waugh was $22,000. After then Sheets had several conversations with Stanley and Gallinatti concerning the service station, though not on the premises of the station. Many conversations were had thereafter between Sheets and Waugh, the latter constantly urging diligence on the part of Sheets and assuring him of his commission. In May, 1927, the station was sold to Stanley and Gallinatti for $15,000, and notice of the sale given. While notice was being given and the escrow yet unclosed, plaintiffs called upon defendant Waugh regarding the payment of their claimed commission and asking if they should take it up with the purchasers. Waugh stated to them at that time, and on other occasions pending the closing of the escrow, that he knew they were entitled to the commission and that he would pay it as soon as the deal was closed. However, he refused to pay any commission; hence the action. The trial court found that the services were rendered as alleged and a commission of $1,000 earned under the contract, and awarded plaintiffs judgment accordingly.

[1] It is perhaps needless to add that the evidence offered by defendant contradicted the foregoing statement in many of its essentials. It is more needless to point out the conflict. Bound by the rule which requires no citation, the determination of the trial court, where substantial evidence supports it, is accepted by us.

[2] From these facts we determine that the first ground of the appeal is without merit. Bail v. Glantz, 78 Cal. App. 49, 248 P. 258; Sessions v. Pacific Improvement Co., 57 Cal. App. 1, 206 P. 653; Roth v. Thomson, 40 Cal. App. 208, 180 P. 656; Contant v. Wallace, 62 Cal. App. 768, 217 P. 1081; Hill v. McCoy, 1 Cal. App. 159, 81 P. 1015; 9 Corp. Jur. 613, § 96; Twogood v. Monnette, 191 Cal. 103, 215 P. 542; Boland v. Ashurst Oil Land Co., 145 Cal. 405, 78 P. 871.

[3] This brings us to an inquiry concerning the power of Waugh to bind the corporation. Waugh was the president of the corporation and its general manager and the owner of 25 per cent. of the stock. There was a resolution passed by the board of directors authorizing him to bind the corporation in the matter of the sale of the premises. The resolution did not bind him to a sale to any particular person. Further, there was a resolution authorizing him to proceed with the sale of the station. Waugh talked frequently during the months of January, February, March, April, and May of 1927 with the directors, and they discussed all matters, and he told the others of his plans, and they told him to go ahead. They told him to go ahead and sell the place for any price he liked—any reasonable price. The board of directors passed a resolution authorizing the

sale as made to Stanley and Gallinatti and accepted the offer of the buyers and authorized Waugh to execute the necessary instruments of conveyance.

From these facts the authority of President Waugh is manifest. Cases cited therein: Sessions v. Pacific Imp. Co., 57 Cal. App. 1, 24, 206 P. 653; Burns v. Valley Bank (Cal. App.) 271 P. 107, and cases cited therein; Hoffman v. Guy M. Rush Co., 27 Cal. App. 167, 149 P. 177; Pettibone v. Lake View Co., 134 Cal. 227, 66 P. 218.

Appellant presents no authorities in the place of the appeal.

Judgment affirmed.

We concur: TYLER, P. J.; CASHIN, J.

CALIFORNIA REPORTER

273 PACIFIC REPORTER

206 Cal. 94

CRESCENT BED CO. v. JONAS.

(L. A. 9547.)

Supreme Court of California. Dec. 27, 1928.

1. Bailment 🔑31(3)—Evidence supported finding that bed springs had been damaged by bailee's negligence and carelessness.

Evidence *held* to support finding that bed springs, which were delivered to defendant on consignment, creating relation of bailor and bailee between defendant and plaintiff, had been damaged by reason of defendant's negligence and carelessness.

2. Bailment 🔑14(1)—Bailee, to whom bed springs were delivered on consignment, must exercise reasonable care in protecting springs from damage (Civ. Code, § 3300).

Bailee, to whom bed springs were consigned, was required to use reasonable care in protecting the springs while in his possession or be liable in measure of damages specified in Civ. Code, § 3300.

3. Bailment 🔑32—Damages from bailee's failure to properly care for bed springs would be difference between reasonable value of springs in good condition and condition when they were removed from bailee's premises (Civ. Code, § 3300).

Damages arising from bailee's negligence in failure to use reasonable care to protect bed springs consigned to him would, under Civ. Code, § 3300, be the difference between the reasonable market value of the springs in good condition and that in which they were at the time they were removed from defendant's premises.

Department 1.

Appeal from Superior Court, Los Angeles County; Dana R. Williams, Judge pro tem.

Action by the Crescent Bed Company against J. H. Jonas, doing business under the fictitious firm name and style of J. H. Jonas & Son. Judgment for plaintiff, and defendant appeals. Affirmed.

E. F. Gerecht and I. B. Benjamin, both of Los Angeles, for appellant.

Derthick & Hull, Theodore T. Hull, and William J. Cusack, all of Los Angeles, for respondent.

CURTIS, J. The complaint in this action is in two counts. In the first the plaintiff sought to recover the balance due upon an open book account for goods, wares, and merchandise sold by plaintiff to defendant in an amount of $1,427.78; the second count was for damages sustained by plaintiff by reason of the negligent care given by the defendant to a consignment of wire bed springs, shipped by the plaintiff to defendant, and kept by the latter at his place of business. The amount of damages claimed under the second count was the sum of $2,490.54. The court gave judgment in plaintiff's favor for the sum of $1,373.57 under the first count, and the full amount sued for under the second count. The defendant has appealed.

The objection made by defendant to the judgment under the first count is that the cause of action stated therein is based upon an open book account for goods, wares, and merchandise sold by the plaintiff to the defendant, but that at the trial the plaintiff failed to produce or offer in evidence any books of account showing said indebtedness. There was no dispute at the trial but that the appellant had purchased said goods, wares, and merchandise at the price stated in the complaint. The only controversy between the parties as to the amount claimed to be due respondent under the first cause of action arose over certain offsets, which the appellant claimed he was entitled to, and which he was not credited with in the account. Eight of these items, which appellant claimed as offsets to the respondent's account, amounting to $1,373.57, the court disallowed, and gave judgment for respondent under the first cause of action for said sum of $1,373.57, the precise amount of these eight items claimed by appellant as offsets. No question was raised during the trial that plaintiff had failed to produce its books of account, and there was ample evidence before the trial court to the effect that the account sued on was an open book account. This evidence was received without objection by the defendant, and was sufficient to prove the open book account upon which the cause of action set forth in the first count was based.

[1] As to the judgment rendered upon the second cause of action, defendant claims that there was no evidence to justify the findings upon which the judgment rests. It was claimed by plaintiff that defendant had stored a consignment of wire bed springs on a platform in defendant's yard and allowed them to remain there for a long period of time without any covering or protection against the weather, with the result that the springs became covered with rust, and were accordingly greatly damaged. Defendant admitted that he had stored the springs upon said platform, and that they were left in the open air without any covering against the weather. While there was some evidence that the springs, at the time they were delivered to the defendant, were in a damaged and rusty condition, there was a large amount of evidence contrary thereto. A number of witnesses testified that the springs were in good condition and free from rust at the time they were delivered to defendant. There was no question but that at the time the springs were removed from defendant's place of business they were in a damaged condition by reason of their being covered with rust at that time. This evidence was sufficient to support the finding of the trial court that the bed springs had been damaged by reason of the negligence and carelessness of the defendant.

[2, 3] Defendant also objects to the manner in which the trial court arrived at the amount of damages sustained by the plaintiff by reason of defendant's negligence in caring for said springs. A portion of said springs, after their removal from defendant's place of business, on account of their then damaged condition, was sold at 50 cents on the dollar, and the balance at 44 cents on the dollar. The court found what the reasonable market value of the springs would have been had they not been damaged, and deducted from this amount the amount for which the springs were sold, and gave plaintiff judgment for the difference in these two amounts. It was further found that the amount for which they had been sold was their reasonable market value in their damaged condition at the time the springs were removed from defendant's premises. We find no objection, legal or otherwise, to the computing of plaintiff's damage by this method. The springs were delivered to defendant on consignment, and, as claimed by him, the relation of bailor and bailee existed between him and the plaintiff in reference to them. He was therefore required to use reasonable care in protecting the springs from damage while in his possession. For the breach of this obligation he would be liable in damages in an amount which would compensate the plaintiff for the detriment proximately caused by the defendant's failure to perform this obligation. Civ. Code, § 3300. This amount would be the difference between the reasonable market value of the springs in good condition and that in which they were at the time they were removed from defendant's premises. This method, as we have already noted, was the method adopted by the court in fixing the amount of damages sustained by plaintiff. In this connection the defendant contends

that there was no evidence as to the market value of springs in good condition at the time said springs were removed from defendant's place of business, nor was there any evidence as to the market value of the springs in their damaged condition. There is no merit in either of these suggestions. There was positive evidence of the reasonable market value of the springs in their damaged condition, and there was also evidence, equally satisfactory as to the value of springs, free from rust or other damage, at the time in question.

The judgment is affirmed.

We concur: PRESTON, J.; SEAWELL, J.

206 Cal. 90

GODBER v. CITY OF PASADENA et al. (SWAN, Intervener). (L. A. 9505.) ★

Supreme Court of California. Dec. 27, 1928.

Hearing Denied in Bank Jan. 24, 1929.

1. Municipal corporations 🔑514(3)—Under statutes, city council may set aside assessment and make reassessment (St. 1913, p. 434, § 26a; St. 1903, p. 381, § 19).

St. 1913, p. 434, § 26a, providing that city council may set aside assessment and order new assessment, being in pari materia with St. 1903, p. 381, § 19, providing that action of council upon assessment shall be final and conclusive, city council may reassess property where proper conditions exist.

2. Municipal corporations 🔑63(1)—Every intendment must be indulged in favor of city's action in reassessing property, and all doubts resolved in favor of validity (St. 1913, p. 434, § 26a; St. 1903, p. 381, § 19).

Every intendment must be indulged that can be in favor of action of city directors in reassessing property, and all doubts resolved in favor of validity of action so taken under St. 1913, p. 434, § 26a, and St. 1903, p. 381, § 19.

3. Municipal corporations 🔑63(1)—Court will not declare reassessment void unless face of record or facts judicially known show city's action was incorrect (St. 1913, p. 434, § 26a; St. 1903, p. 381, § 19).

Court will not declare reassessment by city under St. 1913, p. 434, § 26a, and St. 1903, p. 381, § 19, to be void, unless it can plainly see from face of record or from facts of which court may take judicial notice that action taken by municipality was not correct.

4. Municipal corporations 🔑538—Burden was on taxpayer to show invalidity of reassessment by city (St. 1913, p. 434, § 26a; St. 1903, p. 381, § 19).

In action to enjoin enforcement of assessment for street work, burden to show invalidity of city's action in making reassessment under St. 1913, p. 434, and St. 1903, p. 381, § 19, was on taxpayer.

Department 1.

Appeal from Superior Court, Los Angeles County; Walter Guerin, Judge.

Action to enjoin the enforcement of an assessment for street work by Harry H. Godber against the City of Pasadena and another, in which Frances B. Swan intervened. From a judgment for defendants, plaintiff appeals. Affirmed.

Hearing denied in bank: SHENK, J., voting for a hearing.

William J. Carr, of San Francisco, and Roy A. Linn, of Los Angeles, for appellant.

R. C. McAllaster, of Los Angeles, for respondent City of Los Angeles.

Wood, Janeway & Pratt and John Perry Wood, all of Los Angeles, for respondent intervener.

James H. Howard and Roscoe R. Hess, both of Pasadena, for other respondents.

PRESTON, J. This appeal questions the validity of a reassessment made by the city of Pasadena under a street proceeding authorized by the 1903 Street Opening Act (Stats. 1903, p. 376, amended; Stats. 1913, p. 429). The regularity of the proceeding in every respect other than as to the power of the city to order this reassessment is conceded. The facts are undisputed, but the parties draw opposite deductions therefrom. The same principles of law are likewise relied upon by all parties, but they differ as to their applicability or their application.

In 1923 the said city set about to open, extend, and widen Oakland avenue, a territory through a level area in about the center of the business district. After the construction of the new street, boundaries of the area benefited were established and a district organized, and on April 28, 1925, the directors of the city confirmed the assessment upon the property of the district made presumably consonant with the degree of benefit bestowed by the new improvement. Plaintiff owned two parcels of land in this district, known on the assessment roll as lots Nos. 84 and 85. He paid the assessments of $239.72 and $930.49, respectively. Thereafter, and on the 2d day of June, 1925, the city, purporting to act under section 26a of said above-mentioned statute, as amended, passed a resolution declaring the assessment of April 28, 1925, invalid because unreasonable and not levied in proportion to the benefits derived. The assessment was then set aside, and a reassessment was ordered pursuant to said section. Thereafter said reassessment was confirmed by said city and recorded on August 15, 1925. Under it $3,000 was added to said lot No. 84 and $4,000 to lot No. 85, a total increase of $7,000.

Plaintiff thereupon sought by the complaint herein an injunction against the enforcement of said second assessment alleged to be invalid solely by reason of the pre-existing assessment. There was no allegation of an entire lack of benefit, nor was there any allegation that the second assessment was in any

---

★Hearing denied in bank.

way disproportionate, unfair, or arbitrary, nor was there any allegation that said first assessment was itself just and fair. In other words, the complaint rests plaintiff's cause solely upon the existence of said two assessments and the contention that the first assessment alone can be the valid one. The city answered, but did not enlarge the issue, nor did the intervener, a property owner in the district, who was allowed to become a party to the proceeding. The trial was short. The case was submitted on a stipulation of facts which carried the issues no further than as made by the pleadings. No evidence was offered by either side to show that either assessment was or was not disproportionate to the benefits conferred. The evidence, therefore, sheds no additional light upon the subject.

The court made findings to the effect that the first assessment was void because not levied in proportion to the benefits derived and that the new assessment was proper and valid because so levied and gave its judgment for the defendants. Plaintiff has appealed.

The effect of the judgment is that on the record as made the city acted within its powers in declaring the first assessment void and causing to be made the reassessment in question. We can see no escape from the conclusion that the judgment of the court below was proper and correct.

[1] Section 26a (Stats. 1913, p. 434) provides that the city council may "at the request of any interested party, or on its own motion * * * set aside any assessment or assessments * * * and order a new assessment or assessments * * * if in its opinion the assessment be invalid." Appellant's position seems to be that, inasmuch as section 19 (Stats. 1903, p. 381) of said act provides that "* * * the action of the council upon such objections and assessment shall be final and conclusive in the premises, * * *" the first assessment may not be disturbed under any circumstances by the city, but this conclusion entirely ignores said section 26a which was added by way of amendment to the act and is a provision in pari materia, and, as so construed, situations may exist where a reassessment is proper. How are we to say this is not a proper one? Said section 26a also contains language as follows: "[The approval and confirmation of the reassessment by the city council] * * * shall be a final determination of all matters relating to the actual benefits derived or to be derived from the improvement by the respective lots, pieces and parcels of land enumerated in the reassessment. * * *"

[2, 3] Appellant seems to overlook the fact that the court may take only a restricted view of the action of the city directors. We are required to look, therefore, upon the last action of the board with the same complacency that we would have looked upon the first assessment had there been no attempt to rescind it. The rules of law which guide the court in a proceeding of this character are well settled and are relied upon by both parties. The controlling principle, in a word, is that every intendment must be indulged that can be in favor of the final action of the city directors and all doubts resolved in favor of the validity of the action so taken. The court will not hear the opinions of witnesses and other evidence in any subsequent issue involving the assessment in order to determine whether or not it can plainly see that the action taken by the municipality was or was not correct, but the court can only view such facts as appear on the record of the proceedings taken in the light of those further facts of which we may take judicial notice. Duncan v. Ramish, 142 Cal. 686, 692, 76 P. 661; Lent v. Tillson, 72 Cal. 404, 429, 14 P. 71.

This principle has also been stated in Larsen v. San Francisco, 182 Cal. 1, 15, 186 P. 757, 763, as follows: "In such a case the court will not declare the assessment void unless it can plainly see from the face of the record, or from facts judicially known, that the assessment so finally confirmed is not proportional to the benefits, or that no benefits could accrue to the property assessed. (Duncan v. Ramish, 142 Cal. 692, 76 P. 661; Lent v. Tillson, 72 Cal. 429, 14 P. 71.)" See, also, Cutting v. Vaughn, 182 Cal. 151, 156, 187 P. 19, and Rutledge v. Eureka, 195 Cal. 404, 234 P. 82.

[4] If we must look at an assessment in this light, we must also look at a reassessment in the same light. Looking at the record before us, we see nothing to indicate invalidity in the action taken by the city. The burden in this respect rested upon appellant. The only thing that does appear is that it is manifest that either one or the other of the two assessments was invalid, but appellant made no claim that his property was not benefited, nor did he make any claim that the assessments were disproportionate to the benefits received. Consequently, if we make any deduction from the record, it must be in favor of the last action of the legislative body.

We can therefore find no merit in the appeal, and the judgment is affirmed.

We concur: CURTIS, J.; SEAWELL, J.

206 Cal. 112

PEOPLE v. GIBBONS. (Cr. 1637.)

Supreme Court of California. Dec. 28, 1928.

1. Burglary ⚷4—Defendant could not be convicted of burglary where structure from which property was alleged to have been stolen was bin open on one side.

Defendant could not be convicted of crime of burglary where structure from which property was alleged to have been stolen consisted of bin having three sides and a roof, since breaking into some kind of a structure is essential element of burglary.

2. Criminal law ⚷1114(1)—Appellate court must apply law to record before it.

It is duty of appellate court to apply law to record before it.

Shenk, J., dissenting.

In Bank.

Appeal from Superior Court, Los Angeles County; William T. Aggeler, Judge.

Venice Gibbons was convicted of burglary in the second degree, and he appeals. Reversed.

For opinion of District Court of Appeal, see 267 P. 383.

M. H. Broyles, of Los Angeles, for appellant.

U. S. Webb, Atty. Gen., John L. Flynn, Deputy Atty. Gen., and Asa Keyes, Dist. Atty., and Tracy Chatfield Becker, Deputy Dist. Atty., both of Los Angeles, for the People.

PER CURIAM. In this case a hearing was granted after decision by the District Court of Appeal because of the earnest insistence of the Attorney General that the statute defining burglary in this state had been misconstrued. After a careful consideration of the authorities relied upon by petitioner, we are satisfied with the opinion of the District Court of Appeal, Second District, heretofore filed herein and written by the Honorable Justice Craig, and we adopt said opinion as the opinion of this court, as follows:

The appellant, Venice Gibbons, and two codefendants, Tippen and Simpson, were charged jointly by an information filed by the district attorney of Los Angeles county with burglary, with receiving stolen propey, and conspiracy to commit a felony. During the trial counts 2 and 3, charging receiving stolen goods and conspiracy to commit a felony, respectively, were dismissed. Appellant was convicted of burglary in the second degree, and from the judgment pronounced by the court thereon he appeals.

[1, 2] It is first contended that the verdict is contrary to the evidence because, it is said, the structure from which the evidence tended to show the stolen property to have been taken was not of such a nature as to permit of the crime of burglary being committed therein. In this regard the record discloses that certain aluminum was taken from a bin having three sides and a roof. However, the roof consisted of the floor of a building called by the witnesses a "bag house," which it was testified was completely inclosed. The side of the bin which was open faced on a yard which was entirely fenced, but there was no roof over the yard. In response to questions by the trial court, the witness Snyder, an officer of the corporation owning the premises from which the aluminum was taken, stated that the bin is not a cellar or basement; that it is on a level with the lot; that over this bin is "a bag house for the reception of all smokes"; that the floor of the bag house is up from the ground some six or eight feet, and forms the roof of the bin, "and it is walled in except one side."

It is true, as stated in People v. Coffee, 52 Cal. App. 118, 198 P. 213, that in this state the statutory definition of burglary is much more comprehensive than the definition of the same offense at common law. In that case a chicken house was held to be a structure which might be burglarized. The same was the ruling in People v. Stickman, 3 Cal. 242, and in People v. Franco, 79 Cal. App. 682, 250 P. 698, a showcase was broken open. It was held that the taking of shoes therefrom was burglary, because, it was pointed out, the showcase was a part of, and was under the roof of, the store building to which it was attached, and the court concluded that such a showcase was a "house" within the meaning of section 459 of our Penal Code.

However, in each of these cases, and others cited in People v. Franco, supra, the structure had four sides and a roof. The showcase was completely inclosed, and so were the chicken houses. We are cited to no case, and know of none, where the element of the definition of burglary which requires a breaking into some kind of structure has been held to be nonessential. The common law, of course, required that the building be a human habitation. This is not necessary under our statutes, but as said in People v. Coffee, supra, the structure need only be one having four sides and a roof. The bin in question being open on one side does not measure up to that definition. This case may be another example of a guilty man escaping punishment because the prosecuting officer has persisted in pressing a charge which is not justified under the evidence when apparently there was ample evidence to sustain a verdict of guilty of grand theft. It is the duty of this court, of course, to apply the law to the record before us, and since the testimony is uncontradicted in establishing the facts as above related, the defendant's contention is fully sustained.

It is not necessary to pass upon other points presented by the appellant.

The judgment is reversed.

SHENK, J. I dissent. I find myself unable to agree with the conclusions reached by a majority of the court to the effect that the offense proved was not burglary. The information charged the defendant with unlawfully entering "the outhouse and building" with the intent to commit larceny therein. The proof showed conclusively to my mind that the portion of the structure which was entered was an integral part of a building having four sides and a roof and satisfied the definition of numerous structures named in section 459 of the Penal Code. That section provides: "Every person who enters any house, room, apartment, tenement, shop, warehouse, store, mill, barn, stable, outhouse or other building, tent, vessel, railroad car, mine or any underground portion thereof, with intent to commit grand or petit larceny or any felony is guilty of burglary." The fact that the portion of the building entered was for convenience left open on the one side facing the private service yard would not, in my opinion, remove the structure from the definition of a "building" as contemplated by the code section. The structure described in the evidence is no more open than was the stairway leading to the store involved in People v. Franco, 79 Cal. App. 682, 250 P. 698. In that case the roof of the building covered the showcases from which the shoes were taken. Access to the showcases was by means of the open stairway. It was held, not that a showcase was a "house" as stated by the majority opinion, but that the said showcases were, in legal effect, part of the store proper. So, here, the storeroom for the metals beneath the main building was part and parcel of the building itself. Our present statutory crime of burglary is much more comprehensive than the offense of that name at common law. Breaking is not now an essential element of the crime. Entry only is required to be alleged and proved. The main opinion has, I think, placed a too narrow construction on those words as used in the statute, and has unduly limited the effect of the law relating to the crime of burglary.

---

205 Cal. 727

COLLINS v. INDUSTRIAL ACCIDENT COMMISSION et al. (S. F. 13035.)★

Supreme Court of California. Dec. 15, 1928.

Rehearing Denied Jan. 14, 1929.

1. Master and servant 🔑414—Whether hazard of heat stroke, which painter working on roof suffered, was incidental to ordinary outdoor work, held question of fact for Industrial Commission.

Whether hazard to which painter working on roof and suffering heat stroke was that incidental to ordinary outdoor work, or whether it was one which was inseparably connected with and substantially increased by employment, *held* question of fact for Industrial Accident Commission.

2. Master and servant 🔑405(4)—Evidence sustained Industrial Commission's finding that painter suffering heat stroke was not subjected to exposure greater than that experienced by other people; "arise out of employment."

Evidence sustained finding of Industrial Accident Commission that painter working on roof and suffering heat stroke had failed to establish that he had been subjected to exposure greater than that experienced by the commonalty in that vicinity, and hence that danger of heat stroke did not constitute a hazard incident to his particular employment, which injury did not therefore "arise out of employment."

[Ed. Note.—For other definitions, see Words and Phrases, Third Series, Arising Out of Employment.]

In Bank.

Proceedings under the Workmen's Compensation Act by Tom Collins, employé, opposed by Brown & McGrew, employer, and a Federal Mutual Liability Insurance Company, insurer. To review an order of the Industrial Accident Commission denying compensation, employé applies for certiorari. Judgment of Industrial Accident Commission affirmed.

Bronson, Bronson & Slaven, of San Francisco, for petitioner.

G. C. Faulkner and R. P. Wisecarver, both of San Francisco, for respondent.

LANGDON, J. This matter comes before us upon a petition for a writ to review a judgment of the Industrial Accident Commission, denying compensation to the petitioner. The facts of the case appear from the findings of said Commission, as follows:

Tom Collins was employed as a painter on the 2d day of July, 1926, at Sacramento, Cal., by defendants Brown & McGrew. The other defendant is the insurance carrier. Collins, during the course of his employment, suffered a heat stroke or heat exhaustion by reason of exposure to the heat and rays of the sun, resulting in intracranial damage of considerable severity. The Industrial Accident Commission found that the employé had failed to establish that he had been subjected to exposure greater than that experienced by the commonalty in that vicinity, and that therefore the danger of sunstroke, heat prostration, or heat exhaustion did not constitute a hazard incident to that particular employment, and therefore did not arise out of said employment.

The record discloses that the employé, a painter, started to work on a roof in the city of Sacramento, Cal., at about 8 o'clock a. m., using a roofing paint consisting of graphite,

★Rehearing denied.

linseed oil, and some turpentine. Very noticeable symptoms of some disorder began to appear about 10 o'clock when the temperature was only 72 degrees, according to the United States Weather Bureau report introduced in evidence. This report shows temperatures as follows in Sacramento on the day in question: 63 degrees at 8 a. m., 67 degrees at 9 a. m., 72 degrees at 10 a. m., 77 degrees at 11 a. m., and 81 degrees at 12 noon. The humidity at noon was 42, at which time the employé collapsed after descending a ladder to the ground. He was taken to a hospital, where he became violent and irrational and continued so for some time. There is considerable question, from the evidence, as to whether employé's condition was caused from sunstroke or whether it was due to other causes, but the Commission has found this issue in favor of said employé.

The Commission took the position that the burden was upon the employé to establish that the temperature on the roof where employé was working was greater than the temperature on the street, and suggested to the representative of the employé that a test be made and the results submitted. This was not done, however, and there is no evidence appearing in the record from which it could be concluded that there was a higher temperature on the roof than the temperature in the city generally. On the other hand, the Commission takes the position that as the roof was a dark shingle roof, the radiation of heat would be less than from a light colored sidewalk; that employé was at a height where he would get any breeze there was; and that he was in as favorable a position, if not a more favorable one, than persons, generally, in the city.

[1, 2] The record merely presents a question of fact, which the Commission has properly decided against the employé in the absence of evidence, because upon him rested the burden of proof. There is no evidence in the record showing any special hazard of the employment with reference to heat prostration. Under such circumstances, the rule announced in volume 27, Cal. Jur. § 79, is applicable, as follows: "As a general rule injuries suffered from so-called 'acts of God,' such as sunstroke, freezing, lightning, wind, etc., are not compensable inasmuch as the casualties are risks taken by the entire community and ordinarily do not arise out of or happen in the course of the employment. But without doubt there may be conditions under which the employee performs his work which expose him peculiarly to the elements in a manner not common to the community in general. Thus disability by sunstroke is compensable when suffered by a workman employed in a superheated warehouse upon the roof of which the sun beats with great force so that he is, because of his employment, subjected especially to the danger of sunstroke. And when an employee, without acclimatization, is placed at work in a locality in which the heat is intolerable to one not acclimated, the special exposure is in excess of the risk of the commonalty, and death from sunstroke is compensable. Of course, in such cases the evidence should show the special exposure and that the injury and disability were caused thereby."

The rule is also announced in the recent case of London Guarantee & Accident Co. v. Industrial Acc. Com. (Cal. Sup.) 259 P. 1096: "The responsibility of an employer for an injury sustained by his employee resulting from an earthquake or other like peril has frequently been the subject of judicial determination, and the rule applied by the courts almost universally is as follows: 'As a general principle, the employer is not responsible for damages caused to his workmen by lightning, storms, sunstroke, freezing, earthquake, floods, etc. These are considered as "force majeure," which human vigilance and industry can neither foresee nor prevent. The victim must bear alone such burden, inasmuch as human industry has nothing to do with it and inasmuch as the employee is no more subject thereto than any other person. Every human being is liable to suffer from events in which he has no share of responsibility.'"

The question whether the hazard was that incidental to ordinary out of door work, or whether it was one which was inseparably connected with and substantially increased by the employment, was primarily a question of fact to be found by the Commission. The employé in this case has introduced no evidence justifying a finding other than the one made.

The judgment of the Industrial Accident Commission is affirmed.

We concur: WASTE, C. J.; PRESTON, J.; SHENK, J.; SEAWELL, J.; RICHARDS, J.; CURTIS, J.

206 Cal. 10

HAINES et al. v. COMMERCIAL MORTG. CO. et al. (L. A. 9674.)

Supreme Court of California. Dec. 22, 1928.

1. Receivers 🔑58—Ex parte order appointing receiver may be set aside on seasonable application of parties injuriously affected.

An order made ex parte appointing a receiver may be set aside by the court making it, on seasonable application of parties injuriously affected thereby, who were given no opportunity to resist the application for the ex parte order.

2. Receivers 🔑58—Order denying application to set aside order appointing receiver without prejudice was not res judicata on renewal of application.

Where order refusing to aside order appointing a receiver was without prejudice to renewal of such application, and renewal was seasonably made, the order refusing to vacate the prior order was not res judicata on the subsequent application.

3. Courts 🔑481—Order setting aside order of another judge of same court granting receivership was not invalid as exercise of appellate jurisdiction.

Order made by one judge of superior court of Los Angeles county, setting aside order of another judge of the same court granting receivership, was not invalid as an exercise of appellate jurisdiction.

In Bank.

Appeal from Superior Court, Los Angeles County; John L. Fleming and Hartley Shaw, Judges.

Action by Francis S. Haines and others against Commercial Mortgage Company and another. From an order annulling an order granting a receivership, the defendant named appeals. Affirmed.

See, also, 269 P. 921.

Schweitzer & Hutton and H. F. Clary, all of Los Angeles, for appellant.

Geo. L. Sanders, of Los Angeles, for respondents.

PER CURIAM. [1, 2] This appeal is from an order of the superior court in and for the county of Los Angeles, by the terms of which a receivership applied for and granted ex parte to the defendant was set aside and annulled upon the application of the plaintiffs, made promptly upon being advised of the making and entry thereof. The plaintiffs, as appears from the record, made two such applications, the first of which was, apparently for some defect in the form or sufficiency of the moving papers or of the notice given thereof, denied "without prejudice." The plaintiffs promptly renewed their motion, and upon a hearing thereon the trial court granted the same, and in so doing ordered, adjudged, and decreed that its former order for the appointment of a receiver be annulled, revoked, set aside, and canceled, and that the receiver appointed thereby and qualified thereunder surrender and deliver over to the plaintiffs all properties of every kind, nature, and description coming into his possession under and by virtue of said order appointing him such receiver. The appellant appeals from the order thus setting aside such receivership, and makes two points upon this appeal. The first is that the prior orders of the trial court appointing such receiver and thereafter, upon the plaintiffs' first motion, refusing to set aside its ex parte order made in that behalf, rendered the matter of the regularity of the appointment of such receiver res adjudicata. There is no merit in this contention. An order made ex parte appointing a receiver may be set aside by the trial court making the same, upon seasonable application of the parties injuriously affected by said order and who had been given no opportunity to resist the same upon the application for and the granting of such ex parte order. The action of the trial court in the instant case in refusing to set aside such order upon the plaintiffs' first application therefor was "without prejudice" to a renewal of such application, and, such renewal of the application having been seasonably made, neither the original order nor the order refusing to vacate the same without prejudice could be res adjudicata as to the rights of the plaintiffs upon proper application and notice to have vacated a receivership thus obtained. There is no merit, therefore, in appellant's first contention.

[3] Its second contention is also devoid of merit. It appears that the order vacating the receivership, from which this appeal has been taken, was made by a judge of the said superior court other than the judge who originally granted the receivership, and the appellant contends that the order of the judge in setting aside such receivership was invalid, for the reason that in making the same he was exercising appellate jurisdiction over the order of the judge who granted the receivership. This contention is without merit. The superior court in and for the county of Los Angeles is a single court, and the judges of the various departments thereof, in making or in vacating orders therein, are acting in the same capacity as though said court had but one judge, exercising all of its jurisdiction, and in so doing vacating whatever orders he might have theretofore inconsiderately made.

We therefore conclude that, upon the face of the record as presented by the appellant's brief alone, this appeal is without merit, and that the order assailed thereby should be, and the same is hereby, affirmed.

95 Cal. App. 628

MOORE v. NEIGHBOURS et al. (Civ. 5051.)

District Court of Appeal, Second District, Division 2, California. Dec. 20, 1928.

Bankruptcy ⚷143(9) — Community property held not subject to claim of wife's trustee in bankruptcy for accounting and division; wife's interest being mere expectancy (Civ. Code, § 161a, as added by St. 1927, p. 484, and §§ 682, 700, 1401, 1402).

Community property *held* not subject to claim of wife's trustee in bankruptcy for accounting and division thereof on ground bankrupt had no other assets, since interest of wife in community property during marriage is mere expectancy, to be realized only upon her surviving her husband, under Civ. Code, § 161a, as added by St. 1927, p. 484, and sections 682, 700, 1401, 1402.

Appeal from Superior Court, Los Angeles County; Frank C. Collier, Judge.

Action by William H. Moore, as trustee in bankruptcy in the matter of the bankruptcy of Edith F. Neighbours, against Edith F. Neighbours and another. Judgment for defendants, and plaintiff appeals. Affirmed.

Goodspeed & Pendell, of Los Angeles, for appellant.

Burrel D. Neighbours and F. A. Jeffers, both of Los Angeles, for respondents.

CRAIG, J. An order was made and entered on September 14, 1923, in the District Court of the United States for the Southern District of California, Southern Division, adjudging the respondent Edith F. Neighbours a bankrupt. The scheduled liabilities amounted to $2,314.10, though it appears that but one claim, consisting of a judgment amounting to $1,764.10, was filed, approved, and allowed. There being no assets scheduled in said proceeding, appellant as trustee in bankruptcy commenced an action in the superior court of Los Angeles county, alleging that the respondents herein were husband and wife; that they owned community property of a value of about $10,000; that the defendant Edith F. Neighbours' bankruptcy estate had no assets other than her interest in said community property; and that "it is necessary, therefore, to resort to the interest of said Edith F. Neighbours in the community property of said Edith F. Neighbours and her said husband with which to pay said claim." It was further alleged that said community property was in part acquired by the defendants between August 17, 1923, and September 14, 1923; that it is all in the custody and control of Burrel D. Neighbours. Upon information and belief it was alleged, also, that all of the proceedings in bankruptcy were taken and had by and on behalf of Edith F. Neighbours with "full and complete knowledge, consent and approval of her said husband, Burrel D. Neighbours, and with his help and financial assistance, pursuant to a common understanding and agreement between said defendants," and that they are estopped to claim or assert that said Edith F. Neighbours does not have any interest in said community property, and that the same is not subject to administration in the bankruptcy proceeding. The plaintiff prayed that the defendants be required to account as to the community property; that its value be decreed, and that the same be divided and one-half be delivered to the plaintiff up to the amount of the alleged judgment; that it be adjudged that one-half of the community property is owned by Edith F. Neighbours, and that the same is an asset of her bankruptcy estate, and that it be subjected to the payment of said claim. The defendants demurred to the complaint, and to each count thereof, upon the ground that it did not state facts sufficient to constitute a cause of action. The demurrer was sustained, judgment went for the defendants, and the plaintiff appealed.

It was contended below, and is insisted here, that the plaintiff and appellant cannot compel an accounting and division of the community property, for the reason that the husband is invested with the entire title, possession, and control during the life of both spouses, and that the wife has no more than an expectancy. Appellant concedes that prior to 1923 the provisions of the Civil Code were held to vest in the wife a mere expectancy, but contends that, since the amendments of the year last mentioned, the law is otherwise, and that the wife has a present, vested interest. The sections relied upon by appellant are 161a (added by St. 1927, p. 484), 682, 700, 1045, 1401, and 1402, of the Civil Code. It is at once observed, however, that the two latter sections are contained in title 7, div. 2, pt. 4, of the Civil Code, relating to succession, when one of the spouses is presumed to be dead. Section 1045 provides that a mere possibility, not coupled with an interest, cannot be transferred. Section 700 deals with a mere possibility such as the expectancy of an heir apparent, which is not an interest. Section 682 defines ownership by several persons, one of which is the "community interest of husband and wife." Section 161a of the Civil Code was enacted nearly three years after the commencement of this action, and yet, since it became effective, our Supreme Court, in Stewart v. Stewart (Cal. Sup.) 269 P. 439, referring to a previous appeal of the same case, said:

"In that opinion we held that the long-established doctrine of this state was, as reiterated and confirmed by this court in Spreckels v. Spreckels, 172 Cal. 775, 158 P. 537, that the husband was during marriage 'the sole and exclusive owner of all of the community property, and that the wife had no title thereto, nor interest or estate therein, other than a mere expectancy as heir, if she survived him.' We further pointed out, what was declared in more recent decisions of this court, that legislation enacted subsequent to the rendition of said last-mentioned decision had not in any manner changed or modified said doctrine as to the wife's right in community property acquired in, or prior to, the year 1918, the year the parties hereto purchased the real property described in the complaint herein. We saw no escape from that conclusion at the time of the rendition of that opinion, and nothing has since been brought to our attention to cause us to doubt the correctness of our views as thus expressed. The opinion as then rendered must now stand as a correct embodiment of the views of this court upon the questions therein considered and determined."

Hence it was further held that "the interest of the wife during marriage in the community property is a mere expectancy, to be realized only upon her surviving her husband, or upon the earlier dissolution of the marriage by divorce proceedings." Further discussion of this question is therefore not here necessary.

From what has been said upon the principal argument advanced for reversal, other points attempted to be made by appellant at once become untenable.

The judgment is affirmed.

We concur: WORKS, P. J.; THOMPSON, J.

---

95 Cal. App. 476

HEFFNER v. JACKSON. (Civ. 5034.)

District Court of Appeal, Second District, Division 2, California. Dec. 13, 1928.

1. Automobiles 🔑19—Conditional sales contract and stipulation that it had passed to plaintiff by assignment warranted recovery in claim and delivery, notwithstanding noncompliance with vehicle act.

In claim and delivery, conditional sales contract covering automobile, and stipulation that, by assignment by vendor, contract had passed to plaintiff, established a cause of action in plaintiff's favor, even though there had been no assignment or transfer of certificate of registration under California Vehicle Act (St. 1923, p. 517, as amended).

2. Sales 🔑452—Attachment against conditional purchaser could not be levied on property sold conditionally prior to statute (Code Civ. Proc. § 689a).

As Code Civ. Proc. § 689a, enacted in May, 1921, specifically provides that it relates only to contracts subsequently entered into, conditional vendor under contract made prior to enactment of the statute did not have a mere lien, but retained title, and attachment against purchaser could not be levied on the property.

3. Bankruptcy 🔑20(1)—Pendency of bankruptcy proceedings does not affect jurisdiction of state court when it could determine rights of parties without interfering with jurisdiction of federal court.

When state court assumes jurisdiction in a case in which it can completely determine the rights of the parties without interfering with the federal court's jurisdiction, pendency of bankruptcy proceedings does not affect jurisdiction of the state court.

4. Bankruptcy 🔑156—It was duty of trustee to intervene in claim and delivery action if he desired to defend on behalf of estate.

In claim and delivery action by assignor of vendor's interest under conditional sale contract against sheriff taking property under attachment against conditional purchaser, purchaser's trustee in bankruptcy should have intervened if he desired to defend on behalf of the bankrupt estate.

5. Bankruptcy 🔑299—Trustee's presence was not necessary to complete determination of claim and delivery action when no judgment was sought against him.

In claim and delivery action by assignee of conditional sales contract against sheriff taking property under attachment against purchaser, no personal judgment being sought against purchaser's trustee in bankruptcy, his presence was not necessary to complete determination.

6. Appearance 🔑12—Claimant of property appearing only to ask that order to show cause be dismissed as to her held not estopped.

Where assignee of conditional sales contract appeared on bankruptcy court's order to show cause why property should not be decreed to be that of purchaser's bankrupt estate, only to ask that the order be dismissed on ground that she had judgment in claim and delivery for recovery of property or its value, she was not estopped by her appearance, though judgment referred to was subsequently set aside.

Appeal from Superior Court, Orange County; Z. B. West, Judge.

Action by M. C. Heffner against C. E. Jackson in claim and delivery for an automoble. From a judgment for defendant, plaintiff appeals. Reversed.

Phil S. Gibson, of Los Angeles, for appellant.

V. F. Bennett, of San Diego, for respondent.

THOMPSON, J. An action in claim and delivery was commenced by plaintiff against the defendant, as sheriff of Orange county, for the recovery of an automobile. Judgment went for the defendant, and the plaintiff prosecutes this appeal from that judgment.

The following facts were stipulated to at the opening of the trial: L. J. Heffner purchased a Chevrolet automobile from the Taggart Motor Company on January 8, 1921, on a conditional sales contract, the monthly payments of which were $94.81. The contract was assigned to the Merchants' Finance Company by the Taggart Motor Company. On December 6, 1921, the contract was assigned by the Merchants' Finance Company to the plaintiff and appellant, who paid the Finance Company therefor an amount equal to the two payments which were to become due on December 8, 1921, and January 8, 1922, respectively. The plaintiff then offered in evidence the contract, which contained the following clause: "* * * in the event that the party of the second part shall become financially involved, or insolvent, all payments herein provided for shall be due and payable at once, or the party of the first part may immediately take possession of said property whenever and wherever found with or without process of law," etc.—and also containing the usual stipulation in contracts of this character that title shall remain in the seller until all of the payments are made. An objection was interposed by respondent to this contract. On November 30, 1921, an attachment was issued in an action by one F. L. Hinckley, as assignee of the Spreckles "Savage" Tire Company, against L. J. Heffner, by virtue of which writ the respondent attached and took into his possession the automobile in question. On December 9, 1921, the appellant served upon respondent a third party claim. On December 20, 1921, L. J. Heffner filed a voluntary petition in bankruptcy and was shortly thereafter adjudged a bankrupt. On January 27, 1922, the automobile was delivered by the respondent to the trustee in bankruptcy without order therefor. In the meantime and on December 15, 1921, this action was commenced. Judgment on the pleadings in favor of plaintiff was entered on April 24, 1922, for the return of the car or for its value, which judgment was subsequently set aside by the trial court on its own motion.

While this judgment was outstanding and on April 27, 1922, the trustee in bankruptcy secured an order from the referee in bankruptcy directed to the appellant, the respondent, F. L. Hinckley, and the Spreckles "Savage" Tire Company, commanding them to appear and show cause why the automobile should not be decreed to be property of the bankrupt estate. The appellant here made a motion to dismiss the proceedings before the referee as to her, on the ground that her rights had been determined by the judgment of the state court just mentioned. The referee made an order dismissing as to the appellant and adjudging that the respondent, Spreckles "Savage" Tire Company, and F. L. Hinckley, did not have nor did any of them have any right or title to the automobile, but that L. J. Heffner was the owner and entitled to possession. The respondent offered this order in evidence, and an objection was interposed by appellant. The appellant then offered in evidence all of the proceedings before the referee in bankruptcy for the purpose of showing that they were not precluded of their rights and respondent interposed an objection. Evidence was adduced that the Spreckles "Savage" Tire Company tendered to appellant the payment due December 8, 1921, in the sum of $94.81, which tender was refused. We have not said what disposition was made of the three objections interposed for the reason that they were all treated alike and disposed of by one order. When made, the court announced that it would reserve the ruling and on September 18, 1924, and prior to judgment the trial judge made a written ruling sustaining each and every of the objections. The record was then left without evidence of the order of the referee in bankruptcy, or the proceedings before him, or the substance matter of the contract. The only evidence left was the stipulation, the tender and refusal, testimony relative to the condition of the automobile and its value, the fact that an attachment was run, and that L. J. Heffner was adjudged a bankrupt.

[1] It is obvious under this state of the record that much of the argument of both appellant and respondent cannot be considered for the reason that it assumes testimony to be in evidence which is not. It is also apparent that a reversal must result. The foundation of appellant's claim to possession was the contract between the Taggart Motor Company and L. J. Heffner. Even assuming that there had not been an assignment or transfer of the certificate of registration in accordance with the provisions of the California Vehicle Act (St. 1923, p. 517, as amended), yet the contract and the stipulation that by assignment it had passed to appellant would under the authority of Parke v. Franciscus, 194 Cal. 284, 228 P. 435, establish a cause of action in claim and delivery in favor of plaintiff. The case just cited establishes the rule that the seller in a conditional sales contract of this character has such a property right as to entitle him to maintain the action. There is in the instant cause no question of estoppel such as was considered in the Parke Case, nor the rights of an innocent purchaser intervening.

[2] As is pointed out in Bice v. Harold L. Arnold, Inc., 75 Cal. App. 629, 243 P. 468, the right of the conditional vendor is not a mere lien, but he retains title, and, as the law was at the time, this attachment could not be levied. Section 689a of the Code of Civil Procedure, which was enacted in May, 1921, specifically provides that it only relates to the interest of the conditional purchaser under those contracts entered into subsequent to the time of the going into effect of the act. This contract was entered into before the section took effect and is therefore governed by the rule announced in Morris v. Allen, 17 Cal.

App. 684, 121 P. 690, to the effect that a conditional purchaser acquires no attachable interest. Therefore the respondent had no right of possession under the writ.

[3-5] In view of the necessity for a new trial, we must say something concerning the effect of the adjudication of bankruptcy and the order of the referee. In so far as the jurisdiction of the state court is involved we find the general rule stated in 4 Cal. Jur. 69, as follows: "When the state court assumes jurisdiction in a case in which it can completely determine the rights of the parties without interfering with the jurisdiction of the federal court, a plea of the pendency of bankruptcy proceedings is of no avail. Thus the court may settle property rights where it is alleged that the property involved never belonged to the bankrupt or to his estate, and therefore never passed to the trustee." To the same effect is Collier on Bankruptcy (12th Ed.) p. 554. Had the trustee desired to defend on behalf of the bankrupt estate it was his duty to intervene. However, no personal judgment was sought against the bankrupt, and therefore the presence of the trustee was not necessary to a complete determination of the controversy. Kritzer v. Tracy Engineering Co., 16 Cal. App. 287, 116 P. 700.

[6] Nor can it be successfully urged that appellant is estopped by appearing before the referee and asking that the order to show cause be dismissed against her on the ground that she had a judgment for the recovery of the automobile or its value. She did. The fact that it was subsequently set aside was the result of no action taken by her. She had a right at the time to rely upon the judgment, and so expressed herself to the referee and no further.

Judgment reversed.

We concur: WORKS, P. J.; CRAIG, J.

---

95 Cal. App. 505

PUGH v. DAWSON. (Civ. 3587.)★

District Court of Appeal, Third District, California. Dec. 15, 1928.

Rehearing Denied Jan. 14, 1929. Hearing Denied by Supreme Court Feb. 11, 1929.

1. Bills and notes 🔑155—Note due one year after date was negotiable, notwithstanding clause that makers, sureties, guarantors, and indorsers consented to extension of time at or after maturity.

Where note by its terms became due one year after date, and thus definitely fixed date on which it was to mature and become payable, it was negotiable, notwithstanding provision that makers, sureties, guarantors, and indorsers of note thereby consented to extensions of time at or after maturity, since such provision did not require holder or any other person who by indorsement became payee to consent to or agree to extension of time fixed for payment.

2. Bills and notes 🔑160—Provision in note for payment of attorney's fees of 10 per cent. on amount unpaid, if placed in attorney's hands, did not render note nonnegotiable (Civ. Code, §§ 3082, 3083, subd. 5).

Provision in note for payment of attorney's fees of 10 per cent. on amount then unpaid, if placed in hands of attorney for collection, or if suit were commenced for enforcing payment, did not render note nonnegotiable, under Civ. Code, §§ 3082, 3083, subd. 5.

3. Bills and notes 🔑158—Where word "no" was inserted in note in space for interest rate, note was not uncertain as regards payment of interest, notwithstanding printed interest clauses.

Where promissory note was prepared by use of printed form, and word "no" was inserted with pen and in ink in space provided for rate of interest, note was not uncertain, in that it was uncertain under its terms whether interest should be paid thereon from and after date of its maturity until paid, notwithstanding printed provisions, relating to effect if interest should not be paid when due.

4. Bills and notes 🔑287—Where note was payable to order, indorsement of indorsee of payee to plaintiff was sufficient indorsement (Civ. Code, § 3112).

Where note was payable to order, and bore indorsement of indorsee of payee to plaintiff, indorsement was sufficient, under Civ. Code, § 3112.

5. Bills and notes 🔑524—Possession of commercial paper with indorsement makes prima facie case of delivery by indorser to holder and of latter's ownership (Civ. Code, §§ 3099, 3111).

Possession of commercial paper with indorsement makes prima facie case of delivery by indorser to holder, and of ownership of latter, under Civ. Code, §§ 3099, 3111.

6. Bills and notes 🔑523, 525—Evidence showed note sued on was transferred to plaintiff, and that he was holder in due course, without knowledge of legal infirmity.

In action on note, evidence *held* to show that note was transferred to plaintiff, and that he was holder of note in due course without knowledge of any legal infirmity which might have grown out of transaction leading to and attending its execution and delivery.

7. Bills and notes 🔑493(1)—Absent evidence to contrary, presumption that note and mortgage given for note sued on were given for valuable consideration must prevail (Civ. Code, § 1614).

There being no evidence to contrary, presumption that note and mortgage which plaintiff gave in consideration for note sued on were

---

★Rehearing denied. Hearing denied by Supreme Court.

given for valuable consideration must prevail, under Civ. Code, § 1614.

8. Bills and notes 🔑496(2)—Note and mortgage given for note sued on having been in plaintiff's possession, and he having exercised acts of ownership, presumption he was owner must prevail, absent evidence to contrary (Code Civ. Proc. § 1963, subds. 11, 12).

Note and mortgage, which plaintiff gave in consideration for note sued on, having been in possession of plaintiff, and he having exercised acts of ownership over them, presumption that he was owner of them must prevail, in absence of evidence to contrary, under Code Civ. Proc. § 1963, subds. 11, 12.

9. Bills and notes 🔑434—Plaintiff, under legal obligation to pay note given for note sued on, was not "volunteer" in paying note.

Where plaintiff was under legal obligation to pay another's note, which he gave in consideration for note he was suing on, he was not "volunteer" in payment of such note.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Volunteer.]

10. Appeal and error 🔑994(1)—Appellate court cannot declare plaintiff's testimony is entitled to no weight.

Appellate court cannot declare as matter of law that testimony of plaintiff in action on note is untrue and entitled to no weight or credit.

11. Bills and notes 🔑334—Statute relating to effect where transferee receives notice of infirmity of instrument held inapplicable, where transferee had no notice before paying note given for note sued on (Civ. Code, § 3135, as amended in 1917).

Civ. Code, § 3135, as amended in 1917, providing that, where transferee receives notice of any infirmity in instrument or defect in title of person negotiating same before he has paid full amount agreed to be paid therefor, he will be deemed holder in due course only to extent of amount paid by him, *held* inapplicable, where court found on sufficient evidence that transferee had no notice, before paying note given as consideration for transfer of note in suit to him, that latter note was procured from defendant by fraud.

12. Bills and notes 🔑373—After court's decision on plaintiff's testimony on defendant's examination that note was negotiable and that plaintiff was holder in due course, testimony regarding fraud in procurement held properly excluded (Code Civ. Proc. § 2055).

After case was submitted by both parties for decision practically on testimony alone of plaintiff, through examination by defendant's counsel under Code Civ. Proc. § 2055, and after court had decided that note was negotiable instrument, and that plaintiff purchased and received it from indorser of original payee in due course without notice of any infirmity in instrument or notice of defendant's equities, testimony offered, tending to prove fraud in procurement of note from defendant by payee, was properly excluded.

13. Trial 🔑397(1)—Where defendant attempted to prove issue of fraud in action on note as set up in answer, court was required to make finding on issue (Code Civ. Proc. §§ 632, 633).

In action on note, fact that defendant attempted to prove issue of fraud in procurement of note as set up in his answer, even though he failed in attempt, necessarily required that court make finding on issue, under Code Civ. Proc. §§ 632, 633.

14. Appeal and error 🔑1071(6)—Findings, where there is no evidence on issue made by pleadings, will not vitiate judgment.

Where findings are made, where there is no evidence whatever on material issue made by pleadings, such findings will not have effect of vitiating judgment, where the other findings are sufficient to support it.

Appeal from Superior Court, Los Angeles County; F. C. Valentine, Judge.

Action on a promissory note by L. R. Pugh against John B. Dawson. From a judgment for plaintiff, defendant appeals. Judgment modified, and, as modified, affirmed.

Edward Winterer, of Los Angeles, for appellant.

Robert J. Gardner and Bordwell, Mathews & Wadsworth, all of Los Angeles, for respondent.

HART, J. The brief of counsel for the plaintiff contains a correct general statement of the facts of the case and the proceedings at the trial culminating in the rendition of judgment for the plaintiff and we herein adopt said statement, which is as follows:

"The basis of this action is a promissory note for the sum of $2,000, made by the defendant, the appellant herein, in favor of R. B. Coleman, dated January 10, 1924, and due one year after date. The plaintiff, the respondent herein, claims to have acquired the note in due course, before maturity, for a valuable consideration, and without notice of any infirmity in or defense to it. The defendant seeks to escape his liability on the note on the ground that it was obtained fraudulently and without consideration, and maintains that the note is not negotiable in form and that the plaintiff did not acquire it in good faith, before maturity, and for value. The execution and nonpayment of the note are admitted by the defendant's answer, and upon the trial, under examination by plaintiff's counsel, the defendant admitted the execution and nonpayment of the note.

"Plaintiff, as a witness on his own behalf, testified that he acquired the note from O. J. Wigdal prior to its maturity; that he was the owner of it and that it had not been paid. The note was introduced in evidence and the plaintiff then rested.

"The plaintiff was then called by the defendant for examination under a provision of section 2055 of the Code of Civil Procedure in an effort to prove that he did not acquire the note prior to maturity for value and without notice. After an extended examination of the plaintiff, counsel for the defendant stated that he had no further testimony to offer on the question as to whether or not the plaintiff acquired the note prior to maturity, in due course and for value, and offered to introduce testimony to the effect that the defendant received no consideration for the execution of the note and that he was induced to execute it by fraud. The court then ruled that the note involved is a negotiable instrument and that the plaintiff is a bona fide holder thereof. Counsel for plaintiff thereupon moved the court for judgment in favor of the plaintiff as prayed for in the complaint, which motion was granted."

The note declared upon is in the following language:

"$2000.00

"Los Angeles, California, Jan. 10, 1924.

"One year after date, for value received, I promise to pay to R. B. Coleman or order, at Bank of America, in the City of Los Angeles, Two Thousand Dollars, with interest, payable at the rate of no per cent. per annum from date until paid, and attorney's fees of ten per cent. on the amount then unpaid, if placed in the hands of an attorney for collection, or if suit be commenced, or other proceeding be taken to enforce the payment of this note. Should the interest not be paid when due, then both principal and interest shall become immediately due and payable at the option of the holder of this note.

"Should the interest not be paid when due, it shall be compounded monthly thereafter, and bear the same rate of interest as the principal. Principal and interest payable in Gold Coin of the United States of America of the present standard. The makers, sureties, guarantors and indorsers of this note hereby consent to extensions of time at or after the maturity hereof, and hereby waive diligence, protest, demand and notice of every kind.

"Should this note be signed by more than one person, firm or corporation, all of the obligations herein contained shall be considered joint and several obligations of each signer hereof.

"John B. Dawson."

The note was indorsed as follows:

"Pay to the order of O. J. Wigdal, without recourse.

"R. B. Coleman.

"Pay to the order of L. R. Pugh, without recourse.

"O. J. Wigdal."

[1] The appellant contends that the note is a nonnegotiable instrument for two reasons: (1) Because of the following provision contained therein: "The makers, sureties, guarantors and indorsers of this note hereby consent to extensions of time *at or after the maturity hereof*." (Italics ours.) (2) Because it contains a provision for attorney's fees in case the note was turned over to an attorney for collection by suit or otherwise. The specific contention as to the proposition first stated is that the agreement obliging the maker or indorsers or others who might become obligors in some form or another on the note to consent to the postponement of the payment of the obligation to some future time or times after its maturity renders the time of payment uncertain and undeterminable, and the instrument, therefore, nonnegotiable. Civ. Code, §§ 3055 and 3265.

We cannot acquiesce in that contention. The note, it will be perceived, definitely fixes the date on which it was to mature and become payable, to wit, one year after the date of its execution, which was January 10, 1924. The provision does not require the holder, or any other person who has by indorsement become the payee, to consent to or agree to any extension of the time fixed in the note for its payment, nor, in fact, does it give or purport to vest in the makers, sureties, guarantors, or indorsers any right or authority to postpone or to compel postponement of the date definitely fixed in the instrument for its payment. Obviously, the purpose and the only purpose of the provision was to permit the holder and subsequent indorsees of the note to extend the time of payment, at or after maturity, without releasing the maker or any persons who may have indorsed the instrument prior to its maturity of the liability which has attached to them as indorsers. The question, however, is not new, although California cases in point have not been cited. In Nat. Bank of Com. v. Kenney, 98 Tex. 293, 300, 83 S. W. 368, 371, the action was to enforce a chattel mortgage given to secure a promissory note which named a certain time for its payment, but which contained a provision similar to the one in question. Holding against the contention that the effect of said provision was to render the note a nonnegotiable instrument, the court, among other things, said:

"It does not say that either the holder or the maker may extend the note. It merely makes a provision in case the time of payment may be extended. How extended? It seems to us the extension meant is that which takes place when the debtor and creditor make an agreement upon a valuable consideration for the payment of the debt on some day subsequent to that previously stipulated. The obvious purpose of the provision, taken as a whole, was merely to relieve the holder of the paper from the burdens made necessary by the rigid requirements of the mercantile law in order to secure the continued liability of the indorsers and sureties upon the paper. Therefore what was meant by the stipulation as to the extension of time was simply that, in case the holder and the maker should agree upon an extension, the sureties and indorsers should not be discharged. The holder and maker of any note may at any time agree upon an extension; therefore the fact that they may have that right does not affect the negotiability of the paper. * * * The maker of such a note has the right to pay before the day named, but the holder cannot demand payment before that day."

In First National Bank of Pomeroy v. Buttery, 17 N. D. 326, 116 N. W. 341, 16 L. R. A. (N. S.) 878, 17 Ann. Cas. 52, the note sued on was, by its terms, made payable "on or before the 1st day of October, 1903," but contained the following stipulation, which, it will be noted, was substantially the same as the one contained in the note in suit: "The makers and indorsers herein, severally waive presentment of payment and notice of protest, and consent that the time of payment may be extended without notice." The court, in that case, answering the contention that said stipulation or provision removed the note from the negotiability class of instruments of that character, said, inter alia:

"We are of the opinion that this provision does not extend the time of payment indefinitely or render it uncertain. The time of payment is already fixed. * * * To us it is clear that it has the same effect as though the note read 'on the 1st day of October, 1903, or thereafter on demand,' in which case there would be no question of its negotiability. Holders of notes do not by a secret mental process make an extension of the time of payment, but such extension, if made at all, is made by an agreement between the principal debtor and the holder of the paper, either with or without the consent of the indorsers. This provision seems to us to have been inserted to protect the holder against any release of indorsers or others, by an extension without their assent, and the word 'makers' is evidently included to prevent any misunderstanding or misconstruction of the contract or failure to distinguish between makers, indorsers, sureties, and any other parties who might be or become liable thereon under certain contingencies as makers. 7 Cyc. 614. This phrase does not express an agreement to extend time, but leaves the matter of extension optional with the holder, and not obligatory upon him, and the note on its face fixes the time when it becomes due."

See, also, City Nat. Bank v. Commission Co., 93 Mo. App. 123, dealing with a like provision in the note here sued on, and in which it was held that such a provision in a promissory note, which fixes a definite or certain time for its payment, does not make the instrument nonnegotiable.

Here it may be stated that, at the time the North Dakota case from which the foregoing excerpt is taken was decided, the Uniform Negotiable Instrument Law was in force in that state. We are, as we intimated above, in accord with the reasoning and the conclusion following therefrom in the above cases.

Counsel for the defendant cites a number of cases upon the claim that the provision in question imparted to the note herein declared upon the character of nonnegotiability. But an examination of some of the cases so cited has disclosed a clear line of distinction between them and the case at bar in the respect now being considered. One of the cases so mentioned by counsel is Cedar Rapids National Bank v. Weber, 180 Iowa, 966, reported in 164 N. W. at page 233, L. R. A. 1918A, 432. The note sued on in that case contained the following provision: "*All* parties to this note, including sureties, indorsers, and guarantors, hereby severally waive presentment for payment, notice of nonpayment and protest, and consent to extensions of time on this note." The court, with unquestioned legal propriety, held that the payee or holder of the note came within the purview of the terms of said provision.

That case is peculiarly interesting in that it exhaustively reviews many cases involving discussions of the precise question now in hand. Some of the cases so reviewed involved promissory notes containing provisions substantially in the language of the one in question, while others involved like instruments in which the stipulation for the extension of the time for the payment of the note beyond the date of its maturity as specifically fixed therein was broader in scope or legal effect, in that they included, with the indorsers, sureties and guarantors, the payee or holder of the instrument. In all the cases cited in said case the decision was planted upon the solution of the question whether the stipulation for the postponement of payment of the note beyond the date of its maturity as fixed by the instrument itself either expressly or under a rational interpretation of its language included, with the indorsers, sureties and guarantors, the payee or holder of the note. In all those cases where it appeared or it was concluded that the indorsers or sureties or the guarantors were alone bound by the extension clause, it was held that the date of payment of the note was not uncertain and that it was, therefore, negotiable in form and character. If, on the other hand, the payee or holder was found also to be a party to the extension agreement, then, obviously, the note was not negotiable in form and character.

In Glidden v. Henry, 104 Ind. 278, 1 N. E. 369, 54 Am. Rep. 316 (cited by the defendant here), the note upon which recovery was sought provided that "the payee, or his assigns, may extend the time of payment thereof from time to time indefinitely, as he or they may see fit, and receive interest in advance, or otherwise, from the maker or indorsers, for any extension or forbearance so made." The court in that case held that, notwithstanding that the note contained a promise to pay in 12 months, the provision as to the postponement of the date of its payment to an indefinite time made the time of payment uncertain and hence rendered the instrument nonnegotiable.

The other cases to which attention is called by the defendant are as readily to be distinguished from the instant case as are the above cases likewise cited. We need not specially review them herein.

[2] The contention that the provision in the note in suit for the payment of the fees of an attorney of "ten per cent. on the amount then unpaid, if placed in the hands of an attorney for collection," or if suit be commenced for enforcing the payment thereof, renders the note nonnegotiable, is devoid of merit. Section 3082 of the Civil Code, after providing that an instrument to be negotiable must be in writing and signed by the maker or drawer, declares that, among other ingredients, it must contain an unconditional promise or order to pay a sum certain in money, and must be payable on demand, or at a fixed or determinable future time. Section 3083 provides that "the sum payable is a sum certain within the meaning of this act, although it is to be paid— * * * (5) With costs of collection or an attorney's fee, in case payment shall not be made at maturity." This provision of the Civil Code itself answers the point. But it may be added that subdivision (5) of section 3083 has been considered by the reviewing courts, and it has been held that a provision in a promissory note for attorney's fee for the collection or the enforcement by legal proceedings of the payment thereof after dishonor or a default in payment at maturity, as authorized by said provision, does not destroy the negotiability of the note, notwithstanding that such a provision involves a contingent agreement. See 19 Cal. Jur. § 15, p. 810; Glenn v. Rice, 174 Cal. 269, 274, 162 P. 1020; Eastman v. Sunset Park Land Co., 35 Cal. App. 628, 170 P. 642; Fox v. Crane, 43 Cal. App. 559, 185 P. 415. See, also, in the footnotes under subdivision (5) of section 3083, in Kerr's Civil Code of the Cyclopedic Code series, cases cited from other state jurisdictions and decided after the adoption in said states, respectively, of the Uniform Negotiable Instrument Law.

[3] It is next urged that the note is uncertain because it is uncertain whether, under its terms, interest is to be paid thereon from and after the date of its maturity until paid. It is clearly certain, and, in truth, not disputed, that the instrument does not provide for or contemplate that the note should bear interest before the date of its maturity. The trial court, however, construed the language of the stipulation in the note relative to interest to mean that the instrument was to bear interest from and after the date of its maturity until paid, and so concluded as a matter of law. We think it quite clear that the trial court's construction of the instrument in that particular is incorrect. It seems plain to us that a careful reading or fair consideration of the language of the note regarding interest must lead to the conclusion that it was not intended by the original parties to the instrument that it should bear interest either before or after the date of its maturity. It was expressly stated by the attorney for the plaintiff in his brief and not denied by defendant's counsel in either of his briefs that the note was written in or prepared by the use of a printed form of promissory note, "with blank spaces to be supplied in writing," according to the terms to be embraced therein; that in the blank space for the insertion of the rate of interest, if interest was to be charged, the word "no," written with pen and in ink, was inserted. As so prepared, the note, it will be perceived, reads: "* * *, with interest payable at the rate of *no* per cent *until paid.*" It will also be noted that the same paragraph of the instrument contains this provision: "Should the interest not be paid *when due,* then both principal and interest shall become immediately due and payable at the option of the holder of this note." The second paragraph, it is to be observed, contains the following provision: "Should the interest not be paid *when due,* it shall be compounded monthly thereafter, and bear the same rate of interest as the principal. Principal and interest payable in gold coin of the United States of America of the present standard."

These several provisions of the note, say counsel, were intended to provide for interest from and after the maturity of the note, if it was not paid at maturity. Those provisions do not say so in terms, and if that meaning is to be given them, it must be by construction and in plain opposition to virtually an express stipulation in the instrument that no interest is to be charged either before or after the maturity of the note. We have been and are unable to conceive a sound reason for holding that the parties meant or intended that any other effect should be imparted to the note as to interest than that of the express provision that the instrument should bear "no interest until paid," plainly meaning, we think, that no interest was to be charged whether the note was paid at the date of its maturity or at some time thereafter. The provision that, "should the interest not be paid *when due,* then both principal and interest shall become immediately due and payable at the option of the holder of this note," is meaningless, in so far as it concerned the period of time intervening between the date of the execution and delivery and the date of the maturity of the note, for, as seen, no interest was to be charged for that period. And it would equally be meaningless after the date that it became due and payable, since, under what we conceive to be its intended meaning, the note provides that it was not to bear interest whether paid at the time of or subsequent to the date of its maturity. What we here say concerning the said provision of the note is true of the stipulation as to the compounding of interest in the second paragraph of the note as it is hereinabove quoted. That stipulation is as meaningless as the first considered. It is probable that those provisions were parts of the printed matter in the blank printed form used for writing the note on and were by inadvertence caused to remain therein. This statement is to some extent fortified by the consideration that the word "no" inserted in the blank space reserved for the specification of the rate of interest, where the note was to bear interest, was written with pen and ink, which is indicative of a deliberate purpose to charge no interest, and from this it would seem probable that, if it was the understanding by and between the original parties to the note that it was to draw interest from and after the date of its maturity, if not then paid, the parties would have caused to be likewise written in the instrument, in language too plain to be misunderstood, a provision to that effect. This would be the course naturally adopted and followed by men of long experience in business activities in all their multifarious forms, as the evidence here shows that the parties to the transactions involved herein were and are.

[4-6] There is no merit in the contention that it was not shown that the note was transferred to the plaintiff, or that he was not a holder of the note in due course or without knowledge of any legal infirmity which which have grown out of the transaction leading to and attending its execution and delivery. The note, of which a copy is hereinabove set forth, was made and is payable to order, as will be perceived. It will further be noted that it bears the indorsement of Wigdal, indorsee of the payee, to the plaintiff. This was, of course, a sufficient indorsement. Civ. Code, § 3112. The answer admits that the note was executed by the defendant, and the latter testified that the signature to the note was his. The note was offered by plaintiff and received in evidence.

"Possession of commercial paper, with indorsement, makes a prima facie case of delivery by the indorser to the holder and of ownership of the letter. In Pastene v. Pardini, 135 Cal. 431, 67 P. 681, the court said: 'The delivery was prima facie established by plaintiff's production and proffer of the note.' See note to Bedell v. Herring, 77 Cal. 572, 20 P. 129, 11 Am. St. Rep. 323, where the cases are collected. The proposition there laid down and supported by numerous cases is thus stated: 'It is well established that the mere possession of a negotiable instrument by the indorsee, or by the transferee where no indorsement is necessary, imports prima facie that he is the lawful owner, and that he has acquired it before maturity, bona fide, for value, in the usual course of business, and without any circumstances impeaching its validity.'" Linder Hdw. Co. v. Pac. Sugar Corp., 17 Cal. App. 81, 92, 118 P. 785, 789. See, also, Civ. Code, §§ 3099 and 3111; Hall v. Thurston, 176 Cal. 738, 171 P. 285; Story on Prom. Notes, § 196; Braly v. Henry, 71 Cal. 481, 482, 483, 11 P. 385, 12 P. 623, 60 Am. Rep. 543.

Besides the prima facie showing of the plaintiff's ownership of the note, the latter testified that he purchased the note from Wigdal, an indorsee, paying $1,600 therefor.

The answer sets up fraudulent representations as the means whereby Coleman, the payee, procured the execution and the delivery of the note by the defendant to him (Coleman), and alleges that the plaintiff, prior to and at the time he took the note from Wigdal, had full knowledge of such fraud or false representations, and, further, had knowledge at said time of the asserted fact that the defendant repudiated and rescinded said note. There is no evidence that Wigdal was not a holder and owner of the note, or that he did not acquire it in due course and for value. There is no evidence that either Wigdal or the plaintiff had any knowledge of any legal infirmity in the instrument or of any claim of any such infirmity at the times, respectively, that each acquired the note, Wigdal from the payee Coleman, and the plaintiff from Wigdal. If there was in point of fact fraud at the bottom of the transaction culminating in the execution and the delivery of the note to Coleman, there is absolutely no evidence that either Wigdal or the plaintiff was a party to such fraud, or knew anything of it when each in turn became the owner thereof or at any subsequent time.

"It is a rule of the law merchant, and it is provided by the Code in adopting the uniform law, that 'a holder who derives his title through a holder in due course, and who is himself not a party to any fraud or illegality affecting the instrument, has all of the rights of such former holder in respect to all parties prior to the latter.'" 19 Cal. Jur. p. 860, § 53; Civ. Code, § 3139.

[7-9] The point next discussed is that the plaintiff did not give a valuable consideration for the note. The evidence shows that the plaintiff gave Wigdal for the note $100 in money and a promissory note, secured by a mortgage on certain real property, for $1,500. This note and mortgage were executed by one Lottie Ahlstrom in favor of Wigdal and delivered by the plaintiff to said Wigdal, the indorser of the note in suit to plaintiff, on the 6th day of January, 1925, which was the date of said (Ahlstrom) note and mortgage. An effort was made by the plaintiff's counsel to obtain an explanation from both Miss Ahlstrom and the plaintiff of the connection the latter had with that transaction, but the trial court sustained objections of counsel for defendant to questions directed to the disclosure of the latter's relation thereto. The plaintiff, however, did testify that he had possession of the note and mortgage, that he did deliver them to Wigdal as in part payment for the note in suit, and that he, at some time after purchasing the note sued on, paid the Ahlstrom note to Wigdal. There was no other testimony on that question received.

In that state of the record as to the Ahlstrom transaction it cannot be said that the plaintiff was under no obligation to pay and satisfy the said note and the mortgage to secure its payment, or repay Miss Ahlstrom if she had been compelled to pay and discharge that obligation. As counsel for the plaintiff in their brief well say: "There being no evidence to the contrary, the presumption that the Ahlstrom note and mortgage were given for a valuable consideration must prevail (Civ. Code, § 1614), and they having been in the possession of the plaintiff, and he having exercised acts of ownership over them, the presumption that he was the owner of them must prevail," there being no evidence to the contrary (Code Civ. Proc. § 1963, subds. 11 and 12), "and this irrespective of the question of his ownership of the property mortgaged." If, as is thus to be presumed, the plaintiff was under legal obligation to pay the Ahlstrom note, he certainly could not be a mere volunteer in the payment of said note, as counsel for the defendant contends.

[10, 11] The defendant's counsel makes a large number of points upon the question of the good faith of the transfer of the note in suit by Wigdal to the plaintiff. We will not attempt herein to follow the ramifications of his argument in that regard and notice specially all of the many points so made. The argument, if sustained, would require us to declare, as a matter of law, that the testimony of the plaintiff is untrue, and entitled to no weight or credit. This we cannot do. While there were developed in his examination by defendant's counsel a few circumstances in connection with the transaction eventuating in the acquisition of the note by him which, unexplained, might justify suspicion that said transaction was not bona fide either on the part of the plaintiff or his indorser Wigdal, yet there was an explanation by the plaintiff of the circumstances referred to, and whether it was or was not satisfactory was a question for the trial court to determine.

We have heretofore in effect declared that the findings upon all the vital issues herein derive sufficient support from the evidence. The findings are to the effect that, before and at the time of purchasing the note in suit and so securing its transfer to him, the plaintiff had no knowledge that the transaction in which the execution and the delivery of the note by the defendant to Coleman, the payee, was characterized by fraud or malversation of any character on the part of Coleman, if such was the fact. And the findings further show that the plaintiff, after purchasing the note in suit and before paying the Ahlstrom note, received and had no notice of any infirmity in the instrument or any defect in the title of Wigdal or any other person previously owning the same. Hence, as counsel for plaintiff contend, the attempt of counsel for the defendant to invoke the application herein of section 3135 of the Civil Code, as amended in 1917, is abortive. That section provides:

"Where the transferee receives notice of any infirmity in the instrument or defect in the title of the person negotiating the same before he has paid the full amount agreed to be paid therefor, he will be deemed a holder in due course only to the extent of the amount theretofore paid by him."

It is claimed by counsel for the plaintiff that that section "has no application whatever in any case where (as they claim is true here) the assignee has given the full consideration agreed to be given for a negotiable instrument," or where, as here, the transferee gives as the consideration for the transfer of the note the note of a third party to the transferor and which the transferee promises to pay or assumes the obligation to pay. As to instances where the section has application, counsel for plaintiff cite the case of Griswold v. Morrison, 53 Cal. App. 93, 200 P. 62. It is not necessary, however, that we should pause to inquire whether the postulate of counsel's proposition here is or is not sound, for it is obvious that the section is not applicable here, since as above pointed out, the record shows that the trial court found upon sufficient evidence that the transferee had no notice, before paying the note given as a consideration for the transfer of the note in suit to him, that the latter note was procured from the defendant by means of fraud or fraudulent representation by the payee therein named.

[12] The next assignment of alleged error to be considered needs but brief consideration herein. It involves an attack upon the ruling of the court refusing to allow the defendant to introduce proof in substantiation of the allegations of the answer that the defendant was induced by the original payee of the note to execute and deliver the same to the latter through fraudulent representations. As is above shown, the offer of such proof was made after both the plaintiff and the defendant had submitted the case for decision practically upon the testimony alone of the plaintiff as it was brought into the record through an extended and exhaustive exam

ination of plaintiff by defendant's counsel under section 2055 of the Code of Civil Procedure, and after the court had decided in favor of the plaintiff the question of the negotiability of the note and the question whether the latter acquired the instrument in due course and without notice of any infirmity in the instrument. The ruling complained of was obviously sound. After the decision that the note was a negotiable instrument and that the plaintiff purchased and received it from the Wigdal, the indorsee of the original payee, in due course and without notice of any infirmity in the instrument, or notice of the defendant's equities, if any he had any testimony tending to prove fraud in the procurement of the note from the defendant by Coleman would be wholly immaterial or to no purpose.

Upon this question, the case of Goodale v. Thorn, 199 Cal. 307, 312, 313, 249 P. 11, which was an action to recover on certain assigned trade acceptances, presents a situation substantially, if not precisely, the same as the one with which we are here confronted, and settles the question here against the position of the defendant. But the defendant had an opportunity to present all the testimony available to him to support his defense of fraud, but his attorney, it seems, was perfectly willing to submit the issue of fraud upon the testimony he brought out through the examination of the plaintiff under section 2055 of the Code of Civil Procedure. He, in fact, insisted upon a decision upon the testimony of plaintiff of the question of good faith of the latter in the acquisition of ownership of the note. That question having been determined against his position, it is, indeed, strange that he should now insist that his offer to prove fraud involves a legally sound proposition. It may be suggested that had he there and then applied to the court, upon a proper showing, for an order reopening the case for the purpose of enabling him to introduce further evidence in support of his special plea in bar, refusal by the court to grant such application might present here a question of abuse of discretion on the part of the court.

There are certain other rulings on questions of the legal propriety of the examination in certain particulars of plaintiff by defendant's counsel under section 2055 of the Code of Civil Procedure which are assigned as erroneous and prejudicial. These rulings were upon objections by plaintiff to certain questions propounded by the counsel for the defendant to the plaintiff and which the court sustained. The assignments need not be specially noticed herein. The whole examination of plaintiff by the defendant's counsel was to show, if thus it could be done, that he took the note in suit with notice of its alleged invalidity, and counsel exhaustively went into that question in such examination, covering, as to most of the instances in which the rulings now referred to were made, the points which the interdicted questions were particularly designed to develop. The defendant was not prejudiced by said rulings. But we are not to be understood as holding that all the rulings now referred to were incorrect. Some of them, indeed, were technically proper, the objections thereto being addressed to the form rather than the relevancy and materiality of the testimony which it was their evident purpose to bring out.

[13, 14] Counsel for defendant asserts that, "notwithstanding the fact that there is no evidence at all in the record on the matter of fraud, the court erroneously in its findings found that the allegations in defendant's answer as to said fraud are untrue"; that "there is absolutely no evidence at all to support such findings." As seen, the issue of fraud was introduced into the case by the defendant's answer, in the form of a plea of confession and avoidance, and, as repeatedly stated herein, the defendant, as in support of that plea or issue, called the plaintiff to the witness stand under section 2055 of the Code of Civil Procedure and examined him at great length regarding the circumstances under which he took the note, the obvious object of such examination being to show by the plaintiff himself, if he could, that plaintiff took the note with notice of the asserted invalidity of the instrument by reason of fraud practiced upon the defendant by the original payee in the procurement by said payee of the note. Upon that testimony counsel for the defendant submitted the issue of fraud to the court for determination and decision. Evidently counsel believed, when so submitting that issue, that through his examination of the plaintiff he had brought forth facts and circumstances sufficient in probative force to warrant a finding that the note was the offspring of the fraud or false representations of the original payee, and that the plaintiff took the note with knowledge or notice of such fraud. In his brief filed here it is clearly shown that he still believes that the testimony of plaintiff as he (counsel) brought it out fully supports the allegations of the answer on the issue of fraud. Indeed, as shown, he insists here that this court can so hold as a matter of law.

But, however this all may be, the fact that the defendant attempted to prove the issue of fraud as set up in his answer, even though he failed in the attempt, necessarily required that the court should dispose of that issue in its decision. "Under the system of express findings now provided for (Code Civ. Proc. §§ 632 and 633), full findings, unless waived, are required on all material issues raised by the pleadings and evidence. And this is true, even though no evidence has been introduced in support of an issue, or the evidence is insufficient to sustain the issue, for in such cases the findings of fact should be against the party who has the burden of proof thereon." 24 Cal. Jur. p. 935 et seq., § 183; see, also, 2 Hayne on New Trial (Rev. Ed.) § 240, p. 1319; Taylor v. Taylor, 192 Cal. 71, 81, 218 P. 756, 51 A. L. R. 1074; 24 Cal. Jur. § 182, p. 935. It is true that where there is no evidence whatever upon a material issue made by the pleadings, omission to make a finding upon such issue will be held not to be sufficient to justify a reversal. But if findings are, nevertheless, made in the latter case, as counsel claims is true here, such findings will not have the effect of vitiating the judgment, the other findings being sufficient to support it. This rule is obviously not inconsistent with the rule first above stated with relation to the question in hand.

Our conclusion is, as is apparent from the foregoing discussion, that the findings are well supported by the proofs and that the findings support the judgment, save so much thereof as relates to interest.

In accord with the views above expressed, as to the matter of interest on the note in suit, the judgment is hereby modified, by striking therefrom the sum of $198, the sum thereby allowed as interest on said note, and, as so modified, the judgment is affirmed, appellant to recover costs.

We concur: FINCH, P. J.; PLUMMER, J.

---

95 Cal. App. 535

SILVERBERG v. BAUM. (Civ. 5001.)

District Court of Appeal, Second District, Division 2, California. Dec. 17, 1928.

1. Brokers 🔑82(1)—Complaint, not alleging plaintiff was licensed, does not state cause of action (Real Estate Broker's Act, § 20).

Under Real Estate Broker's Act (Deering's Gen. Laws 1923, Act 112) § 20, requiring issuance and possession of license to be alleged and proved in action for compensation, complaint for services as realty salesman, not alleging plaintiff had license, did not state a cause of action.

2. Pleading 🔑34(7)—When broker's complaint did not allege he had license, there was no doubt to resolve against appellant.

Where real estate salesman suing for services did not allege that he was licensed, there was no doubt as to sufficiency of the complaint to be resolved against appellant on appeal by defendant.

3. Brokers 🔑82(1)—Complaint not alleging possession of license was not sufficient on ground that services may have been rendered in another state.

In action for services as realty salesman, complaint not alleging plaintiff had license was not sufficient on ground that services might have been performed in another state, in absence of any allegation to that effect.

4. Evidence 🔑80(1)—In absence of allegation to contrary, law of another state as to necessity of license by broker will be presumed same as that of state of suit (Real Estate Broker's Act, § 20).

Even though services as realty salesman for which action was brought were rendered in another state, it would be assumed, in absence of allegations to the contrary, that laws of such state were the same as Real Estate Broker's Act (Deering's Gen. Laws 1923, Act 112) § 20, requiring allegation and proof that salesman had license.

Appeal from Superior Court, Los Angeles County; Charles S. Burnell, Judge.

Action by A. J. Silverberg against Harry Baum for services as real estate salesman. From a judgment for plaintiff, defendant appeals. Reversed.

A. W. Sorenson, of Los Angeles, for appellant.

Leland J. Allen, of Los Angeles, for respondent.

THOMPSON, J. Plaintiff brought an action in the court below to recover the sum of $1,000, in which sum he alleged the defendant had become indebted to him "for services rendered by plaintiff as a realty salesman." The defendant denied that he had become indebted to plaintiff for such or any services in any amount. There was no allegation that the plaintiff had ever procured a license as a real estate salesman. Judgment founded upon findings which are also silent upon the point was rendered for plaintiff in the sum of $750 and the defendant appeals therefrom upon the judgment roll maintaining that the complaint fails to state a cause of action.

[1] Section 20 of what is commonly known as the Real Estate Broker's Act (Deering's General Laws 1923, p. 25) reads as follows: "No person, copartnership or corporation engaged in the business or acting in the capacity of a real estate broker or a real estate salesman within this state shall bring or maintain any action in the courts of this state for the collection of compensation for the performance of any of the acts mentioned in section two hereof without alleging and proving that such person, copartnersip or corporation was a duly licensed real estate broker or real estate salesman at the time the alleged cause of action arose." It will be immediately observed that this act, unlike many others adopted for somewhat similar purposes, requires the issuance and possession of the license to be alleged and proved. Hence it may not be argued that it is a matter of defense. Appellant's contention must be upheld upon the authority of a number of precedents. Wise v. Radis, 74 Cal. App. 765, 242 P. 90; Gittelson v. Gandolfo (Cal. App.) 259 P. 340;

Wilson v. Earp (Cal. App.) 267 P. 112; Haas v. Greenwald, 196 Cal. 236, 237 P. 38.

[2] Nor does it avail respondent to argue, in the language of Houston v. Williams, 53 Cal. App. 267, 200 P. 55, that "any doubt as to the sufficiency of the complaint in the respect indicated should, of course, be resolved against the appellant" for the reason that in the instant case there is no doubt to resolve.

[3, 4] Equally untenable is his suggestion that the services may have been performed in another state, for, in the absence of an allegation to bring the plaintiff outside of the limitations, he cannot escape the language of the act. Even if the complaint alleged that the services were rendered in another state we would be obliged to assume, in the absence of allegations to the contrary, that the laws of the sister state were the same as ours. Vegetable Oil Corp. v. Twohy (Cal. App.) 260 P. 813.

Judgment reversed.

We concur: WORKS, P. J.; CRAIG, J.

---

95 Cal. App. 631

PEOPLE v. LA VERNE. (Cr. 1062.)

District Court of Appeal, Third District, California. Dec. 20, 1928.

1. Rape 🔑51(1)—Evidence held sufficient to support conviction of rape.

Prosecutrix's and physician's testimony *held* sufficient to support conviction of rape.

2. Criminal law 🔑829(1)—Refusal of instructions covered by instructions given is not error.

Refusal of requested instructions fully covered by instructions given is not error.

Appeal from Superior Court, Sacramento County; J. R. Hughes, Judge.

James La Verne was convicted of rape, and he appeals. Affirmed.

John A. McGilvray, of Sacramento, for appellant.

U. S. Webb, Atty. Gen., and J. Chas. Jones, Deputy Atty. Gen., for the People.

FINCH, P. J. The defendant was convicted of the crime of rape, accomplished with a girl of the age of 14 years. He has appealed from the judgment and the order denying a new trial.

[1] Appellant contends that the evidence is insufficient to support the verdict and judgment. The prosecuting witness testified that: The defendant "attacked" her in his automobile; that "when I was screaming * * * he told me to shut up, and he slapped me. * * * He threw me down in the seat * * * and he had intercourse." She gave other testimony of similar import. While the witness did not use the term "sexual intercourse," it is perfectly clear that she did not employ the word "intercourse" to mean merely an "interchange of thought." A physician testified to physical facts showing that some person had had sexual intercourse with the girl. The evidence is amply sufficient to show the defendant's guilt.

[2] Complaint is made of the court's refusal to give certain instructions requested by the defendant. Every proposition of law contained in the instructions so refused was fully covered by instructions which were given. Much of the argument of counsel for appellant is based on the erroneous assumption that section 1096 of the Penal Code, relating to the presumption of innocence and the question of reasonable doubt, was not read to the jury. That section is set forth at length on pages 75 and 76 of the reporter's transcript as one of the instructions given to the jury.

The judgment and the order are affirmed.

We concur: SHIELDS, Justice pro tem.; PLUMMER, J.

---

95 Cal. App. 541

PACIFIC FINANCE CORPORATION v. LAUMAN et al. (Civ. 3570.)

District Court of Appeal, Third District, California. Dec. 17, 1928.

Usury 🔑32—Dealer selling automobiles on time, price exceeding cash price by more than 12 per cent. per annum, does not violate Usury Law (Usury Law).

Dealer selling automobiles on time payments for more than he would sell same automobiles for cash, where difference between the two prices, if considered as interest on cash price, would amount to more than 12 per cent. per annum on such cash price, does not violate Usury Law (St. 1919, p. lxxxiii).

Appeal from Superior Court, Los Angeles County; Harry R. Archbald, Judge.

Two actions on a guaranty for payment of money by the Pacific Finance Corporation against Roy R. Lauman and others, which were consolidated and tried together. From a judgment for plaintiff, defendants appeal. Affirmed.

Perry F. Backus, of Los Angeles, for appellants.

Overton, Lyman & Plumb, of Los Angeles, for respondent.

PRESTON, Justice pro tem. This is an appeal by the defendants from a judgment in favor of plaintiff in two actions originally commenced on the same guaranty. The cases were consolidated and tried by the court together.

The defendants and appellants, on May 23, 1923, guaranteed to respondent, Pacific Finance Corporation, the payment of all moneys due, or to become due, from the Wilshire Motor Company. The complaint in both cases states a cause of action on this written guaranty. The Wilshire Motor Company sold automobiles to purchasers on time, under conditional sales contracts. Some 30 or 40 of these contracts were assigned by the Wilshire Motor Company to respondent, Pacific Finance Corporation, by separate assignments made at different times, each of which provided that the Wilshire Motor Company guaranteed the payment, by the purchaser of the automobile, of all moneys due, and to become due, under the conditional sales contract. In 30 or 40 cases the purchaser of the automobile defaulted in his payments. In these cases the respondent, Pacific Finance Corporation, repossessed the automobiles and sold the same pursuant to the terms of the various assignments. The automobiles did not sell for enough to pay out the original contracts. The Wilshire Motor Company refused to pay the deficiencies, and respondent commenced this action against appellants, the original guarantors of the Wilshire Motor Company, and recovered a judgment for the total deficiencies remaining due under said conditional sales contracts.

Appellants pleaded in their answer, and now contend, that each one of the conditional sales contracts between Wilshire Motor Company and the purchaser is usurious, under the California Usury Law (Stats. 1919, p. lxxxiii). The trial court found that there was no usury in any of these conditional sales contracts. One of the contracts in question, actually executed, with all the terms and conditions, was introduced in evidence, and it was stipulated that, if this contract was usurious, all of the other 30 or 40 were also usurious. Therefore we will consider the case as if this was the only contract involved. The contract in evidence recites delivery of the automobile to the purchaser at the time the contract was executed. No interest is provided for in the contract. It provides: "The seller hereby agrees to sell, and the purchaser agrees to buy, the following described personal property * * * for the sum of $532.24, gold coin of the United States of America of the present standard, payable as follows: $190.00 upon the signing of this contract, receipt of which is hereby acknowledged, and the balance as follows: $28.57 on January 2, 1924; $28.57 on February 2, 1924; $28.57 on March 2, 1924; $28.57 on April 2, 1924; $28.57 on May 2, 1924; $28.57 on June 2, 1924; $28.57 on July 2, 1924; $28.57 on August 2, 1924; $28.57 on September 2, 1924; $28.57 on October 2, 1924; $28.57 on November 2, 1924; $28.57 on December 2, 1924." In other words, the contract entered into provides for the sale of the automobile for the sum of $532.84, payable $190 in cash, and the balance, in the sum of $342.84, payable in 12 monthly installments of $28.57 each. On the reverse side of the conditional sales contract is found what is termed "Dealer's Statement," which was filled out by Wilshire Motor Company, and which designates the purchase price of $532.84 as the "time selling price," and recites that $475 is the "cash selling price," and shows the method used by the dealer in fixing the "time selling price."

The evidence clearly shows that the sale made by the Wilshire Motor Company to the purchaser in the contract in question was a bona fide sale. There is no claim that the purchaser had any right to the automobile prior to the execution of the conditional sales contract, or that the transaction was intended to take the place of a loan. In other words, the evidence is uncontradicted that it was a legitimate business transaction, involving a straight sale of personal property under a conditional sales contract, and there is no evidence that the purchaser of the automobile borrowed any money from any source. Appellants do not contend that there was a loan of money, but insist that there was a "forbearance" on the part of the Wilshire Motor Company. This claim is based entirely upon the evidence, which shows that the automobile sold had a "cash selling price" and a "time selling price," and that the difference between the cash selling price and the time selling price, if looked upon as interest, exceeded 12 per cent. per annum on the "cash price."

No agreement was entered into for a cash selling price. The only agreement entered into was for a time selling price. Therefore this question is squarely presented: Does an automobile dealer violate the Usury Law if he charges one price for an automobile when the sale is for cash and another price for the same automobile when the sale is made upon time payments, when the difference between the two prices exceeds 12 per cent. per annum? Or, to state it another way: Does the owner of property, whether it be real or personal, violate the Usury Law if he sells his property on time payments for more than he would sell the same property for cash, and the difference between the two prices, if considered as interest on the cash price, would amount to more than twelve per cent. per annum on such cash price? We think not.

When this case was tried in the court below, and when the appeal was taken, the question as to whether a transaction of this character came within the provisions of the Usury Law of this state had not been specifically passed upon by the Supreme or appellate courts. The Supreme and appellate courts have recently definitely and finally determined that, under conditions disclosed by the evidence in the case at bar, there is no infringement upon or invasion of our Usury Law. Verbeck v. Clymer et al. (Cal. Sup.) 261 P. 1017; Berger v. Lodge et al. (Cal. App.) 265 P. 515.

The judgment of the trial court was therefore correct, and should be affirmed; and it is so ordered.

We concur: FINCH, P. J.; PLUMMER, J.

---

95 Cal. App. 456

LAACK et al. v. DIMMICK et ux.
(Civ. 5813.)

District Court of Appeal, Second District, Division 1, California. Dec. 13, 1928.

1. Husband and wife 🔑138(9)—Wife held to have ratified husband's contract with brokers by authorizing tender of deed and signing notice canceling agency contract.

Where, after brokers had procured purchaser, owner authorized husband and attorneys to tender deed signed by her, and signed notice canceling and revoking the agency contract, because payment was not made in cash forthwith upon tender of the deed, she ratified her husband's execution of agency contract with the brokers.

2. Principal and agent 🔑137(1)—Party may be estopped without writing to deny authority of agent, though act requires writing (Civ. Code, § 2310).

Though, under Civ. Code, § 2310, act which requires written authority can be ratified only in writing, party may be estopped to deny agent's authority by acts without writing.

3. Husband and wife 🔑138(8)—Wife held estopped by her acts to deny husband's authority to contract with brokers.

Where owner of property whose husband signed contract employing brokers to find purchaser, after purchaser had been found and part of payment sent her and her husband, signed deed and writing revoking and canceling the brokers' agency, because of nonpayment of price upon tender of deed, she was estopped to deny her husband's authority to sign the agency contract.

4. Principal and agent 🔑166(1)—Ratification must be with full knowledge of all material facts (Civ. Code, § 2310).

Under Civ. Code, § 2310, confirmation and ratification of unauthorized acts of agent, to be effectual and binding on principal, must be made with full knowledge of all material facts, or its equivalent, and ignorance, mistake, or misapprehension of essential circumstances will absolve principal from liability.

5. Principal and agent 🔑166(6)—Ratification is presumed to have been with knowledge of facts, and mistake or misapprehension must be proved by person alleging them.

When ratification of agent's acts is proved, inference necessarily follows that it was with knowledge of facts, and any mistake or misapprehension must be shown by the party who claims the mistake or misapprehension.

6. Husband and wife 🔑138(8)—Wife held to have had full knowledge of material facts when she did acts estopping her to deny husband's authority to contract with brokers.

Owner of property *held* to have had full knowledge of all material facts at time she did acts which estopped her from denying her husband's authority to contract with brokers to find purchaser for property.

7. Husband and wife 🔑138(8)—Matters omitted from letter from brokers to owner held not to prevent owner being estopped by acts, from denying authority of husband to contract with brokers.

That letter from brokers to owner of property, advising her that sale had been negotiated and inclosing part of down payment, did not state full selling price or full amount received from purchaser, or name of one interested with ostensible purchaser, or that insurance, rents, interest, and taxes would be prorated, *held* not to prevent owner from being estopped by subsequent acts from denying husband's authority to contract with the brokers to find a purchaser.

8. Vendor and purchaser 🔑207—Contract was assignable by purchaser without vendors' consent.

Contract for sale of realty was assignable by the purchaser to any one without consent of the vendors.

9. Vendor and purchaser 🔑207—Assignment does not release assignor's personal liability to vendor.

While assignment of contract for purchase of real estate by purchaser carries with it the assignor's rights, it does not release assignor's personal liability to vendor.

10. Vendor and purchaser 🔑214(6)—When assignee of contract claims performance, he is subject to liability imposed by contract on assignor.

While mere assignment of contract for purchase of real estate does not cast upon assignee personal liabilities imposed by contract on assignor, it is otherwise if assignee claims benefits of performance.

11. Brokers 🔑84(1)—In absence of showing to contrary, it will be presumed that principals were not interested in persons who would receive title.

In real estate brokers' action for commission on sale of real estate which principals refused to consummate, it will be presumed, in absence of showing to the contrary, that principals were interested in receiving purchase price, and not in person or persons who would ultimately receive the title.

12. Vendor and purchaser 🔑3(4)—Broker's sale deposit receipt bearing purchaser's agreement to conditions was contract of sale and not option.

Where broker's sales deposit receipt, providing for payment of balance of purchase price "within * * * days" and for forfeiture if broker did not complete purchase within 30 days, bore indorsement signed by purchaser, by which he agreed to conditions therein contained, it was a binding agreement of sale and not a mere option.

13. Vendor and purchaser 🔑196, 197—Law prorates rent and interest on mortgage between parties.

Upon sale of real estate subject to mortgage, the law would prorate rents and interest between vendor and purchaser.

14. Brokers 🔑54—Purchaser need not have money in his immediate possession or to his credit to be "able" to purchase.

While purchaser procured by broker must be able to buy, and "able" means financially able, he need not have all the money in his immediate possession or to his credit at a bank, if he is able to command the necessary funds to close the deal within the time required.

[Ed. Note.—For other definitions, see Words and Phrases, First, Second, and Third Series, Able.]

15. Brokers 🔑54—Purchaser is able to pay if he has assets of value greater than price and financial rating enabling him to command funds.

Rule that purchaser procured by broker must be able to buy is satisfied if purchaser has assets of greater value than purchase price and financial rating which will enable him to command funds when needed.

16. Vendor and purchaser 🔑75—Reasonable time for payment is allowed when contract does not fix time.

Where contract for sale of realty does not fix time for final payment, as where it provides for payment "within * * * days," a reasonable time is allowed.

17. Brokers 🔑54—When no time for payment is fixed, purchaser must be ready, willing, and able to purchase within reasonable time.

Rule that purchaser procured by broker must be ready, willing, and able, means, where no time for payment is fixed in contract, that he must be ready, willing, and able to carry out purchase within reasonable time.

18. Brokers 🔑86(5)—Evidence held to show purchaser and his assignee were able to pay.

In brokers' action for commission, evidence *held* to show that purchaser procured by broker and one to whom he assigned contract were able to pay for the property.

19. Brokers 🔑54—Inconvenience to purchaser of raising money does not affect ability to pay.

If purchaser procured by broker is able to command necessary money to carry out purchase, the cost or inconvenience to the purchaser of raising the money is immaterial to the seller.

20. Brokers 🔑63(5)—Tender of cash not necessary to bind sale when contract repudiated on different ground.

Where owners' repudiation of contract for sale of realty made by brokers was not based on inability of purchaser to complete the purchase, but on brokers' lack of right to make the contract of sale, tender of cash by purchaser was not required to bind the sale.

21. Brokers 🔑54—Readiness and willingness to pay is shown by entering into binding contract.

Readiness and willingness to purchase of person procured by broker is shown where he enters into contract binding him to purchase.

22. Brokers 🔑50—Contract held not to require sale to take place within time limited.

Contract employing brokers for 30 days and until agreement was canceled in writing to negotiate sale of real estate with authority to execute an agreement of sale with purchaser obtained within time specified, did not require that sale itself, as distinguished from agreement of sale, should actually take place within the time limit of the contract.

23. Brokers 🔑14—Brokers held authorized by contract of employment to arrange for transfer of title through medium of escrow.

Contract employing brokers to negotiate sale of property with power to enter into contract of sale and requiring owners to furnish guaranty certificate of title showing title in owner at time of sale, authorized broker to arrange for transfer of title through medium of an escrow.

24. Vendor and purchaser 🔑76—Tender in afternoon of certificate of title brought down to date held not to put purchaser in default.

In view of custom of title companies in limiting their guaranties to 8:30 a. m. of day certificate of title is dated, vendor's tender in afternoon of certificate of title brought down to that date was not such a tender as would put purchaser in default.

25. Evidence 🔑21—Court will not assume ignorance of custom of title companies as to limiting guaranties of certificate of title.

Custom of title companies in limiting their guaranties to 8:30 a. m. of day certificate is dated is so universal and well known in state that court will not assume to be ignorant of it.

26. Husband and wife 🔑25(1)—Husband signing as wife's agent contract, stating title was in wife, when it was owned in joint tenancy, was liable thereon.

Where contract employing brokers to negotiate sale of property stated that property was owned by wife and for that reason it was made in name of wife and signed by husband as her agent, but property was in fact owned by husband and wife in joint tenancy, the husband was liable on the contract.

Appeal from Superior Court, Los Angeles County; Elliott Craig, Judge.

Action by A. H. Laack and another, doing business as Laack & Williams, against Frank M. Dimmick and another, to recover real estate broker's commission. From a judgment for defendants, plaintiffs appeal. Reversed, with directions.

Meserve & Meserve, of Los Angeles (Timon E. Owens, of Los Angeles, of counsel), for appellants.

Schweitzer & Hutton, of Los Angeles (B. R. Ware, of Los Angeles, of counsel), for respondents.

CRAIL, Justice pro tem. This is an action to recover a real estate broker's commission arising out of the sale of real estate. Judgment was entered in favor of both defendants, and the plaintiffs appeal.

On February 1, 1923, F. M. Dimmick individually entered into an "exclusive agency contract" with Laack & Williams by which they were employed for 30 days and until the agreement was canceled in writing to negotiate the sale of certain real property located at the northwest corner of Sixth and Westlake, in the city of Los Angeles, which real property the owner agreed to sell to such purchaser as the agents might procure within the time aforesaid, at the price of $100,000 net to the owner. The terms of sale were to be $40,000 in cash, buyer to assume a mortgage of $60,000; and further terms were that the agents were appointed attorneys in fact of the owner, with full power to execute an agreement of sale with any purchaser obtained within the time aforesaid, binding the owner to sell said property upon the terms aforesaid and to convey same to the purchaser by deed of grant and to furnish, without expense to the purchaser, a guaranty certificate of title showing title in the owner at the time of sale; also, that the agents should be entitled to a commission equivalent to the difference between the purchase price above specified and the price at which the agents might procure a purchaser, which commission the owner agreed to pay the agents when a purchaser was obtained; also, that said commission, at the option of the agents, might be retained by them out of the moneys of the owner coming into their possession on account of the purchase price; and that the title to said property then stood in the name of Lucile M. Dimmick. Later, after it became apparent that the plaintiffs would be unable to sell the property within the time agreed. Mr. Dimmick inserted a figure "5" after the "1" in the date of the contract, thereby giving an apparent additional 10 days' life to the agreement, although, as heretofore stated, the agreement was to remain in effect until canceled in writing. The contract was signed, "Lucile M. Dimmick, per F. M. Dimmick," and there was sustantial evidence that Mr. Dimmick was not authorized in advance to append her name thereto; but it is the contention of the appellants, both that she ratified the contract, and that the circumstances were such that she is estopped from denying her signature to the agreement. These matters will be hereafter discussed in this opinion.

After the execution of the contract, the plaintiffs used their best efforts to sell the property, listing and advertising the same and showing it to prospective buyers.

In a few days the plaintiffs interested George A. Eastman in the property, and thereafter persuaded C. G. Becker to join him in the purchase of it. The contract of purchase was entered into on March 16, 1923, signed by the plaintiffs on behalf of the owner and by C. G. Becker as purchaser, and was designated a "sales deposit receipt." It complied in all respects with the terms upon which the plaintiffs were authorized to sell the property, unless it were with respect to an escrow and with respect to the time within which the escrow was to be completed. These two matters will be taken up later. Eastman and Becker paid to Laack & Williams $2,500 as part payment on the purchase price; but the transaction was handled in Becker's name, although Eastman in fact was interested in the purchase. On the same day Laack & Williams mailed a letter addressed to both of the defendants and included a check for $1,000 payable to them. The check was dated March 16th, and was cashed March 20th. It was payable to the order of both defendants and had on its face a notation, "Deposit and part payment of Becker offer on northwest corner Sixth and Westlake." The letter which accompanied the check was addressed to both of the defendants. In it they were advised of the sale to Becker, and their attention was called to the fact that the sale was made under the exclusive agency contract given plaintiffs, dated February 15, 1923, and they were notified that the terms of the sale were those embodied in said exclusive agency contract; they were also advised that the necessary instructions to the title company, together with the necessary papers, would be submitted to them on the following day, and were told that the instructions provided that the escrow must be closed in the usual 30 days provided by the title company; they were also told that the $1,000 check was inclosed as deposit and part payment of the purchase price. On March 23, 1923, C. G. Becker assigned all his right, title, and interest in the contract of purchase to Eastman upon the payment to him of $1,250. On March 27th Laack & Williams gave written escrow instructions to the Title Insurance & Trust Company, and on the same day C. G. Becker, as purchaser, gave his instructions to the title company.

Two days later, March 29, 1923, defendant Dimmick and attorneys on behalf of both defendants called at the office of plaintiff Ralph O. Williams. At that conference Mr. Dimmick tendered a deed executed by both of the defendants, conveying the property described in the exclusive agency contract and in the sales deposit receipt to C. G. Becker. At the same time a certificate of title to the property, "brought down to date," was tendered to the plaintiffs. Defendants did not introduce this certificate in evidence, and it is not in the record. Later in the conference said Williams was served with a written notice addressed to Laack & Williams of the cancellation of the agency contract. This notice was signed by both defendants; and at the same conference Mr. Dimmick offered to return the $1,000. The next day, March 30, 1923, plaintiffs addressed a letter to both defendants inclosing escrow instructions dated March 27, 1923, for their signatures, and respondents received this letter on the day it was mailed. On April 12, 1923, the full amount of money necessary to complete the deal, $46,250, was deposited with the title company, as escrow holder, to complete the purchase, and on the same day the plaintiffs wrote the defendants a letter in which they advised them that on that day the purchasers had placed with the title company the necessary cash to complete the sale under the contract and demanded that the respondents immediately place in said escrow, of which they had theretofore been advised, the deed and certificate of title. Six days after the money was so deposited, the attorneys for the defendants wrote a letter to the plaintiffs, reminding them that Mr. Dimmick had tendered a deed to the property described in plaintiffs' letter of April 12th, and had given them ample time to make good on the purchase price thereof. In the same letter they also referred to the purchaser as a dummy purchaser and refused to go ahead with the deal. It will be noted that at this time all of the money was in escrow and the refusal is in a letter in which there is a reference to appellants' letter of April 12th, in which the Dimmicks were notified that the money had been deposited with the title company. On May 8, 1923, Becker and Eastman tendered performance on their part through escrow, and finally, on May 23d, upon Dimmicks' refusal to proceed, the escrow was closed and all money withdrawn.

The complaint alleged that both of the defendants entered into the exclusive agency contract, and the court found that defendant F. M. Dimmick entered into the same, and that "said F. M. Dimmick at the same time signed the said agreement with defendant Lucile M. Dimmick's name by himself, without authority." The court further found "that at the time of the execution of said agreement (sales deposit receipt or contract of sale dated March 16, 1923) by said Laack & Williams and said C. G. Becker, said C. G. Becker was not ready or able to purchase the said property by the payment of $40,000 cash therefor, and at no time or at all did C. G. Becker or George A. Eastman or anyone else ever agree to buy the said property for the sum of $40,000 cash and the assumption of a $60,000 mortgage thereon, or in accordance with the terms and conditions of the agreement (exclusive agency contract) marked Exhibit A. and attached to said complaint, and that said George A. Eastman at the time of the execution of said contract (of sale of March 16, 1923) above set out in hæc verba, was not able or ready to purchase said property by himself or in connection with said C. G. Becker, and said C. G. Becker would have been obliged to sell and dispose of certain securities before he would have been ready or able to purchase said property upon any terms whatsoever, and said George A. Eastman would have had to sell certain real property before he would have been ready or able to consummate said sale in accordance with the terms of the contract marked Exhibit A; [therefore] it is not true that said plaintiffs obtained as purchaser for said property any person who was ready or willing or able to carry out and perform the terms and conditions upon which said property could have been sold by said plaintiffs."

The findings of the court were such that judgment should have been entered in favor of the plaintiffs against both of the defendants for the full amount prayed for, except a necessary finding that Mrs. Lucile M. Dimmick was bound by the exclusive agency contract and a finding that the purchaser or purchasers were ready, willing, and able to buy upon the terms set forth in the contract of employment; and as to both of said matters we have set out above the findings of the court substantially in full.

Two questions are before us for consideration: First. Was the exclusive agency contract binding on defendant Lucile M. Dimmick, either by reason of ratification or by way of estoppel? Second. Was the purchaser whom plaintiffs obtained for the defendants able, ready, and willing to purchase the property on the terms for which defendants had authorized the plaintiffs to sell?

[1] In addition to the matters heretofore set out, there are other facts and circumstances in evidence bearing upon the question whether or not the exclusive agency contract was binding on Mrs. Dimmick. On March 29, 1923, she authorized her husband and her attorneys as her agents to tender to the plaintiffs a deed to the property which she herself had signed. On the afternoon of that date they tendered to one of the plaintiffs this deed, together with a certificate of title. And, upon his failure to produce $40,000 *in cash* forthwith, presumably out of a blue sky, they served upon him the following writing which Mrs. Dimmick had also signed for the purpose: "You are hereby notified that the exclusive agency contract executed by the undersigned Lucile Dimmick * * * to you, dated February 1st, 1923, * * * is hereby cancelled and revoked. [Signed] Frank M. Dimmick, [Signed] Lucile M. Dimmick." This was not a repudiation of the due execution of the exclusive agency contract, but a direct acknowledgment of it in writing. Furthermore,

this acknowledgment, in the light of the tender of the deed which preceded it, was a ratification in writing of the contract down to the time of the revocation of it. Or if it be not a clear ratification in writing, then it is so nearly such that it will weigh heavily in the scales on the question of whether Mrs. Dimmick was estopped from denying the due execution of the contract. This we will next consider.

[2] It is the law of California that a ratification can be made only in the manner that would have been necessary to confer an original authority for the act ratified. Civ. Code, § 2310. Since the authority to sign Mrs. Dimmick's name to the contract was required to be in writing, it follows that, to be valid, a ratification of the contract must be in writing. Herein lies the chief distinction between an authority by ratification and an authority by estoppel. Such a writing is not required in an estoppel, even though the original authority required it. 1 Cal. Jur. 731. It has been said that the statute of frauds was intended as a shield and not as a sword. And courts will not permit a litigant to use that statute as an instrument with which to perpetrate fraud or oppression. It is on this theory largely that, although an act which requires written authority can be ratified only in writing, a party may be estopped to deny his agent's authority by acts without writing. Blood v. La Serena L. & W. Co., 113 Cal. 221, 41 P. 1017, 45 P. 252; Karns v. Olney, 80 Cal. 90, 22 P. 57, 13 Am. St. Rep. 101.

[3] In this case the brokers went ahead under the terms of their contract, assuming that it was entered into by authority of Mrs. Dimmick. They spent much time and money in finding a purchaser. They bound the purchaser in a written instrument to purchase the property, and took his money as a deposit on the purchase price. They sent $1,000 to Mr. and Mrs. Dimmick as a part of the purchase price, and defendants retained the same. Mrs. Dimmick signed a deed conveying the property to the purchaser, and insisted upon the payment of the balance of the purchase price forthwith. She acknowledged in writing the execution of the contract as binding upon her, and in the same writing revoked and canceled the same. She was not depending upon the statute of frauds at that time. Rather she was seeking a stealthier method of escape from performance on her part of a solemn covenant which had already been performed in full by the other parties to it. To permit her thereafter to escape by the avenue of the statute of frauds would be to permit the perpetration of a fraud. Our courts will not sanction such a procedure.

[4-7] Respondents contend that to properly establish either a ratification or an estoppel, the action of Mr. and Mrs. Dimmick must have been predicated upon a full understanding of the facts (citing Schader v. White, 173 Cal. 441, 160 P. 557; Civ. Code, § 2310; Munroe v. Fette, 1 Cal. App. 333, 82 P. 206, and other cases). It is the rule that a confirmation or ratification of the unauthorized acts of an agent, in order to be effectual and binding on the principal, must have been made with a full knowledge of all material facts, or its equivalent, and that ignorance, mistake, or misapprehension of any of the essential circumstances relating to the particular transaction alleged to have been ratified will absolve the principal from all liability by reason of any supposed adoption of or assent to the previously unauthorized acts of an agent. 1 Cal. Jur. 778, and cases cited; Munroe v. Fette, 1 Cal. App. 333, 82 P. 206. There are three answers to this contention: (a) When ratification is proved, the inference necessarily follows that it was with knowledge of the facts, and, if there was any mistake or misapprehension, that fact must be shown by the party who claims the mistake or misapprehension. 1 Cal. Jur. 778, and cases cited. (b) Mrs. Dimmick, as well as Mr. Dimmick, had full knowledge of all material facts. The check for $1,000 of March 16, 1923, with the reference on its face to the contract of sale to Becker was made payable to both the Dimmicks and was indorsed by both. The check came in a letter addressed to both defendants, advising both that the contract of sale was made by the authority given the plaintiffs in the exclusive agency contract, and that the terms of sale were those provided in that contract. Reference was also made in the letter to the check. It necessarily follows that the payees of the check knew, or in the exercise of ordinary care should have known, the terms of the contract, in the absence, of course, of fraud or concealment, neither of which is supported by any substantial evidence. The evidence is to the contrary. Mrs. Dimmick admitted in her testimony a conversation with her husband on the evening of March 16, 1923, in which he showed her the letter and the check; and Mrs. Dimmick testified that he showed her a copy of the contract on that occasion, and also that a few days later and before the tender of the deed of March 29, 1923, he went over the letter with his wife. (c) The contract of sale entered into by the plaintiffs on behalf of the defendants complied with the terms of, and the authority vested in them by, the exclusive agency contract. There was no substantial difference in their terms, and therefore no mistake, inadvertence, or misapprehension on the part of the defendants. But this phase of the case will be more properly discussed in that part of the opinion which deals with the question whether the purchaser was able, ready, and willing to buy on the terms provided in the exclusive agency contract. And there is no substantial difference between the terms

of sale as disclosed in the letter of March 16, 1923, and either or both of said instruments. Respondents have undertaken to set out these differences, and, as is our duty, we will discuss them. Respondents contend that they were not informed by the letter and should have known: (a) That the sale price was $107,250 instead of $100,000, as stated in the letter; (b) that George A. Eastman was an interested party; (c) that the sales deposit receipt constituted a mere option to buy, and was not in itself a binding agreement of sale; (d) that $2,500 was the amount received by plaintiffs upon account, and not $1,000; and (e) the injection of the prorating of insurance, rents, interest, and taxes. There is no merit in any of these contentions.

[8-13] (a) The letter did not state the sale price at $100,000, but "at a price of $100,000 net to you," which was the sum provided for in the exclusive sales contract. (b) While the letter did not state that Mr. Eastman was an interested party, the contract of employment provided for a contract of sale with "any purchaser." Furthermore, the contract of sale held by Mr. Becker was assignable to Mr. Eastman or to any one else without the consent of the defendants. Harris v. Miller, 196 Cal. 8, 235 P. 981; Kemp v. Enemark, 194 Cal. 748, 230 P. 441; Rued v. Cooper, 109 Cal. 682, 34 P. 98. And the assignment carries with it all of the rights of the assignor (25 Cal. Jur. 700), but in no wise releases the personal liability of the assignor to the vendor. And, while the mere assignment of such a contract does not cast upon the assignee any of the personal liabilities imposed by the contract on the assignor, it is otherwise if the assignee claims the benefits of performance. Wilson v. Beazley, 186 Cal. 437, 199 P. 772. And, where the assignee stands able, ready, and willing to perform, there remains no question as to personal liability. In the absence of some showing to the contrary, it will be presumed that the defendants in selling the property were interested in receiving the purchase price, not in the person or persons who would ultimately receive the title to the property. (c) The sales deposit receipt contained an indorsement, signed by the purchaser, by which he agreed to all the conditions therein contained. It was a binding agreement of sale and was not in any sense a mere option to buy. (d) The contract of employment provided that the commission, at the option of the agents, might be retained by them out of the moneys of the owner coming into their possession on account of the purchase price. (e) As to the prorating of the rents and interest, the law would have done the same. As to the prorating of the insurance and the taxes, these were details of the contract which were beneficial, not detrimental, to the defendants. Not to have prorated these items would have caused the defendants loss, and we cannot take seriously the defendants' claims that the doctrine of estoppel does not apply, because they were not informed as to these matters.

The question whether the purchaser whom the plaintiffs obtained for the defendants was able, ready, and willing to purchase the property on the terms for which defendants had authorized the plaintiffs to sell easily divides itself into two parts. (a) Was the purchaser able to buy the property; and (b) was he ready and willing to buy the property on the terms for which defendants had authorized the plaintiffs to sell?

[14-17] It is the contention of defendants that "under the circumstances of the instant case it is apparent that the purchaser must not only be ready at the time of his announced desire to purchase, but continue to be able to respond as and when the seller presents his deed and certificate of title." It seems to be the idea of defendants that, in order for a purchaser to be able to buy, he must have the purchase price *on hand* in the form of money or to his credit at a bank at the time of his announced desire to purchase the property, and continue to keep it ready to respond as and when the seller presents his deed and certificate of title. Even at the time of the tender of the deed, the defendant Dimmick spoke up and said: "You can't buy this property. You haven't got the $40,000 here today." Such is not the law in California. That "would be to lay down too drastic a rule governing business transactions of the kind presented." Russell v. Ramm, 200 Cal. 348, 254 P. 532. Few except bank messengers or crooks carry around with them so large a sum as $46,250. The true rule in the instant case may be stated as follows: The purchaser must be able to buy; and the word "able" means financially able. This does not mean, however, that such purchaser must have all the money in his immediate possession or to his credit at a bank, but only that he must be able to command the necessary funds to close the deal within the time required. Even where the purchaser was not personally able to buy, it was said that "it is sufficient if [he] has arranged so that these funds will be available for payment when the time comes to close the transaction, although part of it be obtained on the purchased property itself." Pellaton v. Brunski, 69 Cal. App. 301, 231 P. 583. It is much more clearly sufficient if the purchaser has assets of greater value than the purchase price and a financial rating which will enable him to command the funds when needed. For in such event the purchaser is not only able to purchase, but is able to respond in damages if he refuse to go ahead with the contract. Furthermore, the contract of sale provided that the balance of the purchase price was payable "within * * * days" from date upon the execution and delivery of a deed and a guaranty cer-

tificate of title showing title in the owner. Where a contract for the sale of realty does not fix the time for final payment, a reasonable time is allowed. McGibbon v. Schmidt, 172 Cal. 70, 75, 155 P. 460. Or, to state it in other words, the rule that a purchaser must be ready, willing, and able means, where no time is fixed in the contract, that he must be ready, willing, and able to carry out the purchase within a reasonable time. Bunyard v. Farman, 176 Mo. App. 89, 161 S. W. 640.

[18, 19] Measured by the rules above set forth, both Mr. Becker and Mr. Eastman under the evidence were able to purchase the property, and there was no evidence to the contrary. Mr. Becker testified that he could have paid the purchase price on the day the contract was signed upon presentation to him of the deed and certificate of title; that his ability to have met the purchase price would not necessarily have depended upon some one else lending him the money; he had mortgages and clear land; he could have sold his mortgages and he could have sold his land; Mr. Eastman had just sold property on Berendo street for $110,000; he (Becker) had personally sold over $10,000,000 worth of property, and it had always been agreed and understood that a man was to have time to effect title; he would not pay $40,000 or $50,000 over to some one whom he did not know anything about, or when he did not know whether the title was all right without going through escrow. Mr. Eastman testified that Mr. Becker told him prior to the assignment that the discount asked on his mortgages was so big that he did not wish to sacrifice, and asked him to carry the deal, which he agreed to do, and thereupon the written assignment was made; that on April 12th he deposited the $46,250 in escrow; that, if he had known on March 29th that a tender was to be made to him, it would probably have taken him a day or two to raise the money to close the deal, and in that case he would have taken steps to raise the money and could have used the other escrow (Berendo street) as collateral. It is the sole contention of respondents in this regard that, because Becker expressed an intention to "discount his securities in San Francisco," and because Eastman "had to sell some of his property or negotiate a loan," it is apparent that neither or both were able to pay $40,000 cash. But the cost or inconvenience to the purchaser of raising money is immaterial to the seller, provided the purchaser is able to command the money. Cases which seem to lay down a different doctrine are usually cases in which the purchaser has not assets sufficient to command the purchase price or cases where this distinction is not fully discerned.

[20] There is another reason why it was not necessary for the purchasers to have the cash on their persons at the very instant of the tender of the deed. This reason is best stated in the words of respondents' brief, which are in bold black type, as follows: "Tender of March 29, 1923, was in Effect a Repudiation of Laack & Williams' Claimed Right to Make Contract Disclosed by Sales Deposit Receipt." The repudiation of defendants at that time was not based on the inability of the purchasers to complete the purchase, but upon the precedent requisite—the right of the plaintiffs to make the contract of sale. Such repudiation rendered it unnecessary for the purchasers to tender the cash required to bind the sale. Merzoian v. Kludjian et al., 183 Cal. 422, 191 P. 673; 9 Corp. Jur. 600; Smith v. Tatum, 140 Ga. 719, 79 S. E. 775; McDermott v. Mahoney, 139 Iowa, 292, 115 N. W. 32, 116 N. W. 788; Fiske v. Soule, 87 Cal. 313, 25 P. 430.

[21] Were the purchasers ready and willing to purchase the property on the terms for which defendants had authorized the plaintiffs to sell? This is the final question for consideration. The readiness and willingness of a person to purchase is shown where he enters into a contract binding him to purchase. 4 Cal. Jur. 592, and cases cited. And it remains only to consider whether the terms of the sales deposit receipt were authorized by the exclusive agency contract.

[22] One of the contentions of respondents in this regard is stated as follows: "The brokers were hired to make a sale within thirty days, and not an agreement of sale, and if an agreement of sale was made, it was essential that the sale itself actually take place within the time limit of the contract." We have set out the terms of the contract regarding this matter in full in the early part of this opinion. The contract speaks plainly for itself. It does not so read.

Another contention of respondents is that "the contract executed by Laack & Williams was not authorized because the buyer was given a thirty-day option with many other advantages." But here again the contract of sale speaks for itself. It was not an option to buy, but a binding contract of sale. It was not for 30 days, but was a contract for cash payable within a reasonable time, as we have heretofore seen, the 30-day clause being a mere forfeiture clause against the purchaser declaring a dead line beyond which a reasonable time might not extend; and there were not many other advantages or any other advantages, as we have also seen.

[23-25] The final contention of respondents in this regard, and the one most relied upon, is this, that "a transfer through escrow was not contemplated by the agency agreement." This is the last trench to which respondents run for cover from the assaults which are hurled against the judgment of the trial court. By the exclusive agency contract, the plaintiffs were authorized to execute in behalf of the defendants an agreement of sale binding the owner to convey the property to the purchaser "and to furnish, without expense to the purchaser, a guarantee certificate

of title showing title in the owner *at the time of sale* free and clear," etc. The fundamental difference between a sale and an agreement to sell is that in the former the title passes when the contract is made, while in the latter it does not pass until later. Rosenberg Bros. & Co. v. Beales, 56 Cal. App. 212, 205 P. 18; Blackwood v. Cutting, etc., Co., 76 Cal. 212, 18 P. 248, 9 Am. St. Rep. 199. The contract of employment therefore contemplated that the plaintiffs would execute a contract of sale under the terms of which the title would pass at some future time upon the payment of the purchase price by one party and the delivery by the other of a deed and a certificate of title showing title in the owner at the time title passed from the owner to the purchaser. Obviously a certificate showing title at any instant prior to the time title passed would not be one showing title in the owner at the time of sale. Obviously also the payment of the money and the delivery of the deed and certificate of title were to be simultaneous. The only practical way, known to us, by which this could be done, was by recourse to an escrow. It is common knowledge that this is the general custom used in California for the completion of such contracts. Andrews v. Waldo (Cal. App.) 265 P. 532. Escrows are continually used in such transactions to insure safety and the exercise of good faith. The escrowee is the agent of both parties. Having in its possession both the purchase price and the deed, it (usually a title company or bank) selects an instant when it can determine that title is in the vendor as the terms of the contract require; thereupon it accepts a delivery of the deed to itself as agent for the vendee and records the same and as agent of the vendor receives the purchase price, at the same time in its dual capacity delivering and receiving the certificate of title. Strictly speaking, a certificate of title brought "down to date" is not a certificate of title "showing title in the owner at the time of sale," although the words are sometimes loosely used as synonymous. Only an instant is required to record an instrument affecting the title to real estate, by which the property might be, even the property in question might have been, heavily incumbered or sold outright to an innocent purchaser. Thus it is apparent that under the terms of the contract of employment an escrow was contemplated and the demand for an escrow was not a departure from the authorized terms of sale. For the same reasons the tender in the afternoon of March 29, 1923, of a certificate of title brought down to date was not such a tender as would put the purchaser in default. The custom of title companies in limiting their guaranties to 8:30 a. m. of the day the certificate is dated is so universal and so well known to every one dealing in real property in this state that this court will not assume to be ignorant of it.

[26] While the contract of employment made the positive statement that the property was owned by the wife and for that reason it was made in the name of the wife and signed by her husband as agent, yet it developed at the trial, and the court found the fact to be, that the property was owned by husband and wife in joint tenancy. To permit the husband to escape liability under the contract upon the theory that he was not a party to it, when his sole reason for attaching his wife's name to it and not his own as principal was the false one that his wife was the sole owner of the property, would be to permit the husband to profit by his own fraud. Our courts are not so inefficient nor so futile in their efforts to dispense justice between litigants that they would permit this. To do so would be not dispensing justice but dispensing with it.

The findings of fact of the trial court which have been quoted in this opinion within quotation marks are hereby set aside. This court finds that the exclusive agency contract, dated February 15, 1923, is binding on the defendant Lucile M. Dimmick, and that she is estopped to deny the authority of her husband to sign the contract for her. This court further finds that the plaintiffs found purchasers for the defendants who were able, ready, and willing to purchase the property on terms for which defendants had authorized the plaintiffs to sell, and the plaintiffs are entitled to their commission.

For the reasons given, the judgment is reversed, with directions to the trial court to enter a judgment in favor of the plaintiffs against both defendants in the sum of $7,250, with interest from April 12, 1923.

We concur: HOUSER, Acting P. J.; YORK, J.

94 Cal. App. 782

In re NOVOTNY'S ESTATE. (Civ. 6236.)★

District Court of Appeal, Second District, Division 2, California. Dec. 11, 1928.

Hearing Denied by Supreme Court Jan. 14, 1929.

1. Appeal and error 🔑835(2)—Points made for first time on petition for rehearing will not be considered.

Points made for first time on petition for rehearing will not be considered.

2. Appeal and error 🔑882(14)—Proponent, objecting to submitting question of execution of will to jury, could not complain on appeal that question was not submitted.

Where proponent objected during will contest to submitting question of execution of will with required formalities to jury, he could not complain on appeal that question was not submitted to jury.

Appeal from Superior Court, Los Angeles County; Arthur Keetch, Judge.

On petition for rehearing. Petition denied. For former opinion, see 271 P. 923.

Winslow P. Haytt, of Los Angeles, for appellant.

Hibbard & Kleindienst, of Los Angeles, for respondent.

THOMPSON, J. [1] In his petition for a rehearing in this matter, the appellant argues that the court below assumed to decide matters that proponent was entitled to have determined by a jury. He asserts that, when the proponent has introduced sufficient testimony upon the question of the execution of a will with due formality to establish a prima facie case, the probate judge must submit the question of the due execution of the will to the jury. It would constitute a sufficient answer to appellant's contention to say that the point raised by him is now suggested for the first time. Not a word is said concerning the question in the briefs upon which the cause was submitted. "It has been repeatedly held that where a case has been decided, a rehearing will not be granted for the purpose of considering a suggestion of error made for the first time in the petition therefor," says 2 California Jurisprudence, at page 786. A number of authorities are cited to the point, from which we select only two: Prince v. Hill, 170 Cal. 192, 149 P. 578, and Estabrook Co. v. Industrial Accident Commission, 177 Cal. 767, 177 P. 848. In the latter of these precedents it is said: "It is the settled rule of this court that points made for the first time on petition for rehearing will not be considered."

[2] In addition to this rule, however, and if we were to pass upon the point, we should be obliged to call attention to the fact that it was appellant who objected during the contest to submitting the question of execution of the will with the formalities required by law to the jury. Upon the call of the contest, counsel for contestants asked leave to amend his pleading by denying the due execution of the will, asserting as his reason that he desired that issue to go to the jury. To this proposal the proponent and appellant interposed vigorous objections, on the ground that the due execution had not been made one of the grounds of contest, and insisted upon a continuance for further preparation if the court should permit the amendment. Finally, when it appeared that the court was about to grant proponent a continuance if he permitted the amendment, counsel for contestants decided to waive their request and the argument was terminated as follows:

"The Court: Now just one minute. It is understood that when we close the evidence on the contest that then the court will take up the matter of the proof as to the probate.

"Counsel for proponent: That will be very satisfactory, and that is what we expected."

Under this state of facts, appellant may not be heard to complain that the question was not submitted to the jury.

Petition for rehearing denied.

We concur: WORKS, P. J.; CRAIG, J.

---

95 Cal. App. 403

BAYER et al. v. HOAGLAND et al.† (Civ. 3641.)

District Court of Appeal, Third District, California. Dec. 12, 1928.

Rehearing Denied Jan. 11, 1929. Hearing Denied by Supreme Court Feb. 7, 1929.

1. Mortgages 🔑386—Under special circumstances, suit may be brought to foreclose deed of trust.

Deed of trust in form of absolute conveyance to trustee to secure debt with power of sale upon default may be foreclosed in court of equity when some special reason exists, as where trustee fails or refuses to act, repudiates his trust, or is guilty of breach of trust.

2. Mortgages 🔑414—Where trustee denied that there had been default, demand and refusal were not conditions precedent, and it was immaterial that demand was not in writing.

In secured creditor's suit to foreclose deed of trust, where trustee's answer denied that there had been any default, demand on trustee to sell and refusal by him were not conditions precedent to right to sue, as demand would have been unavailing, and it was immaterial that demand was oral when deed provided for written demand.

3. Mortgages 🔑414—Where notice of default and election to sell had not been recorded, there was no failure or refusal by trustee which would authorize suit to foreclose (Civ. Code, § 2924).

Under Civ. Code, § 2924, prohibiting sale by trustee under deed of trust until after recording

---

★Hearing denied by Supreme Court. †Rehearing denied. Hearing denied by Supreme Court.

of notice of breach and election to sell, where trust deed provided that beneficiary should record such notice, until such notice was recorded, refusal of trustee to sell on demand was not such failure or refusal to carry out duties as authorized beneficiary to sue for foreclosure.

4. Mortgages 🔑386—Action to foreclose deed of trust as though it were a mortgage cannot be maintained, in absence of special facts.

Deed of trust to secure debt conveys the title and not a mere lien as does a mortgage, and, in absence of special features, cannot be foreclosed by action in equity as though it were a mortgage.

5. Mortgages 🔑446—Action to foreclose deed of trust cannot be maintained on allegation that it was intended as a mortgage (Code Civ. Proc. § 744).

Though under Code Civ. Proc. § 744, suit may be maintained to have absolute deed declared a mortgage on allegation that it was intended as such, allegation that deed of trust was intended as a mortgage will not warrant foreclosure in equity, the remedy being by way of reformation if instrument does not embrace true agreement.

Appeal from Superior Court, Los Angeles County; Ira F. Thompson, Judge.

Action by Otto Bayer and another against Mary Hoagland and others to foreclose deed of trust. From a judgment for defendants, plaintiffs appeal. Affirmed.

Max Schleimer, of Los Angeles, for appellants.

O'Melveny, Millikin, Tuller & Macneil and Arthur Crum, all of Los Angeles, for respondents.

TUTTLE, Justice pro tem. This is an action brought to foreclose a deed of trust. The trial court refused to permit plaintiff to introduce any evidence, upon the ground that the complaint did not state a cause of action. Plaintiff was given an opportunity to amend his complaint, but he did not do so, and judgment was entered for defendant. From this judgment the appeal is taken.

The complaint alleges the execution of a promissory note for $4,000, and a deed of trust for the payment of the same (a copy of each of said instruments is attached to the complaint); that plaintiffs had expended the sum of $27 for insurance upon the premises described in the trust deed, and that the trustees had refused to pay the same, as provided in said trust deed; that the trustors had failed to pay two installments of $38 each, due under the terms of the promissory note in connection with which the trust deed was executed; that that trust deed was intended, and agreed by the parties to be and operate simply as a first lien or a first mortgage upon said premises, and as security for the payment of the debt; that plaintiff had requested the trustee to foreclose said trust deed, in the nature of a first lien or a first mortgage, and to sell said real estate and apply the proceeds thereof in payment of the amount due plaintiffs, and said trustee refused to do so unless it was first paid the sum of $150 on account of its fees and disbursements; that plaintiffs elect that the balance of principal and interest be immediately due and payable. Judgment is prayed that said deed of trust be adjudged to operate simply as a first lien or mortgage and as security for the payment of the debt due plaintiffs; that a commissioner be appointed to sell the premises; and that defendants be foreclosed of all equity of redemption.

A number of points are urged by appellants, but the matter to be decided is whether or not the complaint stated a cause of action. The error must be predicated upon the ruling of the trial court that plaintiffs could not introduce any evidence in support and proof of the allegations of their complaint. This ruling was based upon the ground that the complaint did not state a cause of action.

It is not contended by appellant that the trust deed contains any unusual features or provisions, nor do we find that it does. We shall proceed upon the premise that said instrument is the usual form, to wit, a conveyance, absolute in form, to a trustee, for the purpose of securing a debt, with a power of sale upon default.

[1] There is no doubt that a deed of trust such as the one we have before us may be foreclosed where some special reason exists which will justify a court of equity in exercising its peculiar powers. Instances of this character are where there are accounts to be settled or where the trustee fails or refuses to act or repudiates his trust or is guilty of a breach of trust. Curtin v. Krohn, 4 Cal. App. 131, 87 P. 243. The cases of Smith v. Davis, 90 Cal. 25, 27 P. 26, 25 Am. St. Rep. 92, and Davies v. N. Y. Cercert Co., 41 Hun (N. Y.) 492, are of this character.

[2, 3] It is contended by appellant that the complaint does come within the foregoing rule, in that it is alleged that the trustee refused to sell the property upon his demand to do so. The parties stipulated at the trial that the said demand was oral. The trust deed provides that it shall be in writing. The answer, however, denies that there was any default under the deed of trust. Under such circumstances a demand to sell would have been unavailing, and a demand and refusal would not be a condition precedent to the right of plaintiff to commence the action. Cox v. Delmas, 99 Cal. 104, 33 P. 836. While it will thus be seen that the matter of the demand upon the trustee to proceed under the deed of trust becomes immaterial because of the position taken by it in the answer, we are inclined to the view that something more was required to be done by plaintiff before

the trustee could be called upon to take any steps toward the sale of the property. The trust deed contains the following provision: "Four: Should a breach or default be made in the performance of any obligation for which this deed of trust is a security, then the holder or holders of any note or notes or indebtedness mentioned, as secured hereby, may declare all sums secured hereby immediately due and payable, and shall execute and deliver to the trustee, a written declaration of default hereunder and demand for sale, and shall thereafter record, in the office of the Recorder of the County wherein said property, or some part thereof, is situated, a notice of such breach, and of election to cause said property to be sold to satisfy said obligations." The plaintiffs stipulated in open court that they had recorded no notice of breach and of election to cause the property to be sold, as required by the terms of the trust deed upon which the action was brought, and, further, that they had made merely an oral demand upon the defendant bank, as trustee, and not a written demand, as required by said trust deed.

Section 2924 of the Civil Code provides:

"Where, by a mortgage created after July 27, 1917, of any estate in real property, other than an estate at will or for years, less than two, or in any transfer in trust made after July 27, 1917, of a like estate to secure the performance of an obligation, a power of sale is conferred upon the mortgagee, trustee, or any other person, to be exercised after a breach of the obligation for which such mortgage or transfer is a security, such power shall not be exercised, except where such mortgage or transfer is made pursuant to an order, judgment, or decree of a court of record, or to secure the payment of bonds or other evidences of indebtedness authorized or permitted to be issued by the commissioner of corporations, or is made by a public utility subject to the provisions of the public utilities act, until (a) the trustee, mortgagee or beneficiary shall first record, in the office of the recorder of the county wherein the mortgaged or trust property or some part thereof is situated, a notice of such breach and of his election to sell or cause to be sold such property to satisfy the obligation; (b) not less than three months shall thereafter elapse; and (c) the mortgagee, trustee or other person authorized to make the sale shall give notice of the time and place thereof, in the manner and for a time not less than that required by law for sales of real property upon execution."

The trust deed, as authorized by said section, provides that the holder of the note (i. e., the beneficiary) shall record the notice mentioned therein. The complaint is silent upon this point, while the answer sets up the failure of plaintiff to record said notice as a special defense. Until the said notice was recorded by plaintiff, the trustee was not called upon to take any action whatever in reference to the sale of the property under the power. There is, therefore, no showing that the trustee failed or refused to carry out and perform any duty imposed upon him by the instrument in question.

[4] We have before us, then, the bare proposition: Can a beneficiary, under an ordinary deed of trust, upon default on the part of the trustor, proceed in equity to foreclose that instrument in the same manner as though it were a mortgage? The nature of a deed of trust, and the distinction between it and a mortgage, were pointed out in the early case of Koch v. Briggs, 14 Cal. 256, 73 Am. Dec. 651, where the court, per Field, C. J., said:

"It [the trust deed] has no feature in common with a mortgage, except that it was executed to secure an indebtedness. * * * Where there is a mortgage there is a right, after condition broken, to a foreclosure on the part of the mortgagee, and a right of redemption on the part of the mortgagor. * * * These two rights are mutual and reciprocal. When the one cannot be enforced, the existence of the other is denied, and when either is wanting, the instrument, whatever its resemblance in other respects, is not a mortgage. In reference to the deed in question, no suit for a foreclosure, as in cases of mortgage in England, would lie, for there could be no forfeiture of the estate to enforce, and of course no equity as against such forfeiture to foreclose. Nor would a suit lie for a foreclosure under our system—that is, for a decree adjudging a sale of the premises and the application of the proceeds to the payment of the debt, as such suit could only be based upon the contract of the parties, and the contract here is only that, upon the happening of a certain event, the trustee shall sell. Equity could not adjudge a sale, as in case of a mortgage, without disregarding the express contract of the parties, and making a new and different one."

The foregoing decision has never been questioned in this state. It has been cited numerous times with approval. In the case of Kraft Co. v. Bryan, 140 Cal. 73, 73 P. 745, the reference is as follows:

"There are one or two other questions discussed by counsel which perhaps should be briefly noticed. One of these is as to the difference between a deed of trust and a mortgage. There are cases where the question was whether a certain particular instrument was a trust deed or a mortgage; but the instrument involved in the case at bar is a typical trust deed—running not to the creditor, but to a third party as trustee—such as the one passed on in the early case of Koch v. Briggs, 14 Cal. 256 [73 Am. Dec. 651]. It was held in that case that such a trust deed 'has no feature in common with a mortgage, except that it was executed to secure an indebtedness'; that on such an instrument a suit for a foreclosure and sale will not lie, for the contract of the parties is, that upon default the trustee should sell, and there is no equity of redemption to foreclose. This view of the nature of such a trust deed, and the difference between it and a mortgage, has not been departed from, and its validity as an instrument passing title, and not merely creating a lien as a mortgage to be foreclosed, has been constantly upheld. See Savings & Loan Society v. Burnett, 106 Cal. 514 [39 P. 922], and the many cases there cited; Grant v. Burr, 54 Cal. 298."

It will be observed that in both of the foregoing cases it is held that foreclosure will not lie upon an ordinary deed of trust. Our appellate court has taken the same view in the case of Galusha v. Meserve, 58 Cal. App. 174, 208 P. 348, where it is stated:

"We are unable to agree with the contention of appellant that the trust deed was a mortgage, under which there could be no sale without foreclosure. The instrument is a typical trust deed, running not to the creditor but to a third party as trustee. 'It has no feature in common with a mortgage except that it was executed to secure an indebtedness.' On such an instrument a suit for foreclosure and sale will not lie, for the contract of the parties is that upon default the trustee shall sell, and there is no equity of redemption to foreclose. Koch v. Briggs, 14 Cal. 256, 73 Am. Dec. 651; Herbert Kraft Co. v. Bryan, 140 Cal. 73, 80, 73 P. 745." In the case of Kinard v. Kaelin, 22 Cal. App. 383, 134 P. 370, the court states: "Finally an attack is made upon the legality of deeds of trust. In this behalf it is urged that the power of sale usually granted in such instruments, and appearing in the deed of trust in controversy here, is voidable and legally nonavailable unless preceded by proceedings to foreclose as in the case of an out and out mortgage. In short, it is the plaintiffs' contention that the deed of trust in question must as a matter of law be construed and considered as a mortgage with all of the rights, incidents, and obligations thereof. Practically this same point was presented fourteen years ago in the case of Sacramento Bank v. Alcorn, 121 Cal. 379. 53 P. 813, and there finally and definitely decided adversely to the contention made by the plaintiffs here. The decision in that case has never been overruled, modified, or criticized. On the contrary it has since been continuously adhered to, and it stands today as the settled law of this jurisdiction." In the case of Grant v. Burr, 54 Cal. 298, the court said: "The instrument annexed to the complaint, and marked 'Exhibit D,' is a deed of trust, which authorizes the trustees therein named to sell and convey the lands described, upon default in the payment of the note or interest, and is not a mortgage requiring judicial foreclosure. Koch v. Briggs, 14 Cal. 256 [73 Am. Dec. 651]. The doctrine of Koch v. Briggs has never been overthrown by subsequent decisions."

We do not agree with appellant when he states that the case of Cormerais v. Genella, 22 Cal. 116, upholds his position. That case held that a mortgage with power of sale could be foreclosed in a court of equity, and that the power of sale is a cumulative remedy. The distinction lies in the fact that a mortgage with power of sale does not vest the title in a trustee, while under a trust deed the legal title actually passes to the trustee. Powell v. Patison, 100 Cal. 234, 34 P. 676, and cases cited, supra. Where a foreclosure is allowed in other jurisdictions, it will be found that a different view relating to the effect of deeds of trust prevails. In many they are construed as mortgages with power to convey, and nothing else, and foreclosure is permitted. The cases relied upon by appellant and arising in other states are all based upon the theory that a deed of trust creates a lien and does not actually pass title. Under those conditions the lien may be foreclosed, the remedy being cumulative. It is true that in this state a deed of trust has been loosely referred to as, in effect, a mortgage with power to sell. The Supreme Court has construed this language as follows:

"In Hodgkins v. Wright, 127 Cal. 688, 60 P. 431, in speaking of such deeds, and evidently intending to epitomize the above passage from Sacramento Bank v. Alcorn, to which reference is made, the court says: 'In effect, they are mortgages with power to sell.' The statement that they are in effect, or practically, mortgages with power to sell, means only that the practical result of the enforcement of either is the same; that is, the estate held by the mortgagor at the time of the execution of the mortgage, in one case, and that of the trustor at the time of the execution of the deed of trust, in the other case, are by the respective conveyances of the sheriff on foreclosure sale, and of the trustee on trustee's sale, transferred to the respective purchasers at such sales and that in the meantime the mortgagor and trustor, respectively, have the use and enjoyment of the property. All this is true, and yet the entire estate of the trustor, for the purposes of the trust, must during the intervening period be vested as an estate, and not as a lien, in the trustee, otherwise he could not legally convey it in execution of the trust." Weber v. McCleverty, 149 Cal. 316, 86 P. 706.

It is earnestly contended by appellant that what was said by the court in the Koch Case on the question of the foreclosure of a deed of trust was not necessary to the decision. That is a debatable question. Conceding that such matter was not authoritative, we believe we have shown that the doctrine laid down in said case has been ingrafted into our system of jurisprudence so many times by judicial interpretation that it is now a firmly established rule of property. It is, as we be lieve, a natural outcome of, and corollary to, the "title" theory as applied to deeds of trust in this state.

Appellant relies upon the case of Bell Silver & Copper Mining Co. v. First National Bank of Butte, 156 U. S. 475, 15 S. Ct. 440, 39 L. Ed. 497. The opinion in that case is by Justice Field, who also wrote the opinion in the case of Koch v. Briggs, supra. The former case arose in the territory of Montana. The defendant had executed an instrument purporting to convey title to its properties, to secure the payment of certain bonds. The grantees were certain parties called trustees. It was provided that upon default in performance on the part of the trustor, the trustees should proceed to sell the property and execute a deed to the purchaser. The bonds were not paid when due, and the trustees sold the properties to plaintiff in the action, who relied upon the deed obtained under said sale, in ejectment. It was contended by defendants that foreclosure proceedings in equity were required under the said instrument, and that the power of sale conferred upon the trustees was void under the statutes of Montana, which declared that a mortgage of real property should not be deemed a conveyance, whatever its terms, so as to enable the owner of the mortgage to recover possession of the real property without foreclosure and sale. (This statute is identical with California Code Civ. Proc. § 744.) Justice Field concluded that "there is nothing in the law of mortgages, nor in the law that covers what are sometimes designated as trust deeds in the nature of mortgages, which prevents the conferring by the grantor or mortgagor in such instrument of the power to sell the premises described therein upon default in payment of the debt secured by it, and if the sale is conducted in accordance with the terms of the power the title to the premises granted by way of security passes to the purchaser upon its consummation by a conveyance. Grant v. Burr, 54 Cal. 298; Bateman v. Burr, 57 Cal. 480." Throughout the whole opinion the instrument is referred to as a "mortgage or deed of trust." No attempt is made to differentiate the two. The instrument involved is treated in all respects as a mortgage with power of sale. While several quotations are made from the Koch Case, they all had to do with defining a mortgage. The definition of the nature of a deed of trust which is found in the California case was not touched upon, but studiously ignored. The "lien" theory of a deed of trust was adopted by Justice Field, while in this state we have adhered strictly to the "title" theory, with the entire estate of the trustor, for the purposes of the trust, vesting in the trustee, nor does it vest as a lien or incumbrance. Weber v. McCleverty, 149 Cal. 316, 86 P. 706. While it is true that in California we are confronted with the anomaly of applying by statutory enactment, the "lien" theory to mortgages, and by judicial construction, the "grant" theory to deeds of trust, the two theories have become and are, the settled law of property here, and titles innumerable have been built upon them. The arm of equity is invoked where mortgages are concerned, to preserve the lien of the mortgagee and enforce the same. This is the basis of the jurisdiction in equity coupled with solicitude for the mortgagor in preserving to him his equity of redemption. As to the deed of trust such as we have here, there is no lien, and equity has no concern and no jurisdiction, in the absence of special or extraordinary features which we have pointed out. This must necessarily follow by reason of the broad construction our courts have placed upon the nature of deeds of trust.

[5] Appellant urges that the allegation in the complaint that the deed of trust was intended as a mortgage would give the court jurisdiction to proceed and would come to his aid in stating a cause of action. He points out that a complaint setting up a *deed* with this allegation, states a cause of action, and that the same rule should apply to a *deed of trust*. No authorities are cited. We are unable to agree with this contention. In an action to have a deed declared a mortgage, there is an absolute conveyance of title, with no mention made of any indebtedness or security, and consequently, no right reserved in the grantor to a defeasance. In law the grantee is the owner in fee. Equity is appealed to, so that the deed may be proved to be only part of the transaction, and evidence aliunde may be introduced to show an agreement that the deed was intended merely by way of security, and that there was a defeasance. Such suits have been brought in this state under the provisions of section 744 of the Code of Civil Procedure. It has been held that said section does not apply to deeds of trust. Bateman v. Burr, 57 Cal. 480. Furthermore, the primary object of such suits is to establish a defeasance. In the instant case the copy of the trust deed attached to the complaint preserves, by analogy, the defeasance of the mortgage. It provides that upon payment of the indebtedness the trustee shall reconvey the estate granted. This is a condition defeating the title of the grantee. 18 C. J. 457. Under these circumstances equity will not interpose, as the terms of the instrument in question preclude it from doing so. If the terms of the instrument do not embrace the true agreement made by the parties, through mistake or fraud, a remedy by way of reformation might be available to appellant. No attempt is made to state such a cause of action.

The judgment is affirmed.

We concur: FINCH, P. J.; HART, J.

95 Cal. App. 452

GOLDBERG v. REMPP et al. (Civ. 5334.)

District Court of Appeal, Second District, Division 1, California. Dec. 13, 1928.

1. Attachment 🔑344, 349—Issuance of execution was sufficient demand for redelivery, and allegation of issuance and return was sufficient allegation of demand.

In action on bond given to release property from attachment so conditioned as to require demand on principal for redelivery, issuance of execution was sufficient demand, and allegation that it was issued and returned unsatisfied was sufficient allegation of demand to sustain judgment on appeal.

2. Pleading 🔑129(2)—Denial of demand on surety on bond to release property from attachment without denial of refusal to pay judgment admitted such refusal.

In action against surety on bond to release property from attachment where complaint alleged demand for payment of judgment which was refused, answer denying demand but not denying refusal to pay was equivalent to admission of refusal to pay.

3. Appeal and error 🔑916(1)—Pleading 🔑129(1)—It is presumed on appeal that appellant has alleged case as favorably as possible, and failure to deny material averment is conclusive.

On appeal, it will be presumed that appellant in his pleading has stated his case as favorably to himself as the facts will justify, and failure to deny material averment is conclusive admission of its truth.

4. Attachment 🔑344—Refusal of surety to pay judgment waived demand and relieved plaintiff from making it.

Where surety on bond given to release property from attachment refused payment of the judgment recovered, such refusal was waiver of demand of payment and released plaintiff from necessity of making demand.

5. Attachment 🔑349—Denial of demand on surety for payment of judgment raises no issue when refusal to pay is admitted.

In action against surety on bond given to release property from attachment, where answer, by failing to deny, admitted refusal to pay judgment, denial of demand for payment raised no issue.

6. Attachment 🔑344—Where bond was joint and several, demand on one surety was not necessary to warrant judgment against another.

Where bond given to release property from attachment was a joint and several bond, demand for payment on other sureties was not necessary to support judgment against particular surety.

7. Appeal and error 🔑917(1)—On appeal from judgment after refusal to amend, every possible intendment and presumption is indulged.

On appeal from judgment rendered after refusal to amend pleading to which demurrer has been sustained, every intendment and presumption not contradicted by or inconsistent with record must be indulged in favor of judgment.

Appeal from Superior Court, Los Angeles County; Elliott Craig, Judge.

Action by Nathan Goldberg against A. Rempp and others on a bond given to release property from attachment. From a judgment for plaintiff, the defendant Thelma H. Davis appeals. Affirmed.

L. E. Dadmun, of Los Angeles, for appellant.

Nathan Goldberg and Burnett Wolfson, both of Los Angeles, for respondent.

CRAIL, Justice pro tem. This is an action upon a joint and several bond given to release certain property from an attachment. The conditions of the undertaking were such that in order to maintain the action against appellant it was necessary for the plaintiff to demand of the principal in the bond the redelivery of the attached property and to demand of the sureties the payment of the amount of the judgment in the original action. It was necessary also to allege such demands.

[1] In lieu of an allegation of the demand for the redelivery of the property the plaintiff alleged: "That on the 5th day of March, 1925, an execution was issued the sheriff of said Los Angeles County, against the property of the said A. Rempp (the principal) under said judgment, but that the sheriff made return on the 6th day of June, 1925, that no property was found and that writ of execution is wholly unsatisfied."

The facts as stated constitute a sufficient demand for the redelivery of the attached property. Hammond v. Starr, 79 Cal. 556, 21 P. 971; 3 Cal. Jur. p. 520. And the allegation of the facts was a sufficient allegation of the demand for the purpose of sustaining the judgment on appeal. No stereotyped form of allegation of demand is necessary. Mullally v. Townsend, 119 Cal. 51, 50 P. 1066. It follows that the court's order overruling appellant's demurrer to the complaint, based on the failure to allege such demand, will not be disturbed.

The allegation of the complaint with reference to the demand on the sureties is as follows: "That on the 5th day of July, 1925. the plaintiff demanded of the defendants herein (including the sureties) the payment of said judgment, *which was by each and all of them refused.*"

After the demurrer to the complaint was overruled, the appellant filed an answer denying on information and belief certain parts of plaintiff's complaint containing matters of public record. The answer also contained the following denial: "Denies that on the 5th day of July, or any other time, plaintiff demanded of said defendant, Thelma H. Davis, the payment of said judgment." But she did not deny the remainder of plaintiff's allegation, to wit, "which was by each and all of them refused." To this answer the plaintiff interposed a general demurrer. The demurrer was sustained and defendant was given 10 days to amend, which defendant declined to do. Thereafter default was entered, and judgment rendered against the defendants. Appellant's second and last contention is that the court erred in sustaining the demurrer to the answer.

[2, 3] Coupled with the allegation of demand on the sureties in plaintiff's complaint it was necessary to allege the refusal to pay; otherwise, it could not be determined that the demand had not been complied with. Thus the refusal to pay was a material allegation of the complaint. The failure to deny the allegation that payment "was by each and all of them refused" was equivalent to an admission that appellant refused to pay. For upon appeal it will be presumed that appellant in his pleading has stated his case as favorably for his side of the controversy as the facts will justify, and the failure to deny a material averment in a complaint is an admission of the truth of the fact stated, which is conclusive against the pleader. 21 Cal. Jur., sec. 29, p. 51, and sec. 106, p. 155; Code Civ. Proc. § 462.

[4] Since appellant admits in her answer that she refused to pay the judgment, a demand would have been useless and the law does not require the performance of a useless act. Northern Light Min. Co. v. Blue Goose Co., 25 Cal. App. 282, 288, 143 P. 540; Cox v. Delmas, 99 Cal. 104, 33 P. 836; Smith v. Dorn, 96 Cal. 73, 30 P. 1024. If one refuses to pay without a demand, this is a waiver of demand, an act that releases the plaintiff from the necessity of making one. Ferguson v. Hull, 136 Ind. 339, 348, 36 N. E. 254.

The legitimate object of a demand is to enable a party to perform without a suit at law. Mullally v. Townsend, 119 Cal. 47, 50 P. 1066. It is sometimes unjust and inequitable to subject a defendant to litigation without first notifying him of plaintiff's claim. Cox v. Delmas, 99 Cal. 104, 33 P. 836. But where the defendant has refused to pay, the defense of want of demand becomes a technical one; and it has been held that where it is plain from the answer that if a demand had been made it would have been refused, it does not lie in the mouth of an appellant to object that no demand was made. Turton v. Shinn, 32 Cal. App. 751, 164 P. 38; Ashton v. Dashaway Association, 84 Cal. 61, 22 P. 660, 23 P. 1091, 7 L. R. A. 809; Parrott v. Byers, 40 Cal. 614.

[5] It is equally true that where it is plain from the answer that a demand has been waived, a denial of demand will not raise an issue and will not constitute facts sufficient to raise a defense.

[6] There was also a denial in the answer, based on information and belief, that demand was made on the other defendants. But the bond was a joint and several bond; and for the purposes of a judgment against appellant, no demand for payment upon them was necessary. Ward v. Massachusetts B. & I. Co., 57 Cal. App. 623, 208 P. 188; 3 Cal. Jur. p. 519.

[7] The demurrer was properly sustained. Appellant should have availed herself of the opportunity which the trial court gave her to plead. Upon appeal from a judgment rendered after refusal to amend a pleading to which a demurrer has been sustained, every intendment and presumption not contradicted by or inconsistent with the record on appeal must be indulged in favor of the judgment of the trial court. 2 Cal. Jur. p. 852, and cases cited.

The judgment is affirmed.

We concur: HOUSER, Acting P. J.; YORK, J.

95 Cal. App. 656

WOLFE et al. v. MORGAN et al. (Civ. 5898.)

District Court of Appeal, First District, Division 2, California. Dec. 21, 1928.

1. Reformation of instruments ⚷16—Right to reform contract lies when contract does not express parties' intention either because of fraud or mistake (Civ. Code, § 3399).

Right to reform contract under Civ. Code, § 3399, applies when a written contract does not truly express the intention of the parties either because of fraud or mistake.

2. Reformation of instruments ⚷16—Whether misrepresentation inducing signature to contract is result of fraud or mistake is immaterial as regards right to reformation.

As regards right to reform contract, when a party is induced to sign through a misrepresentation as to the meaning and effect of a writing, it is immaterial whether the representation is a result of fraud or mistake, since the concern of equity is to make the contract express parties' true intention.

3. Reformation of instruments ⚷11—Purchasers held entitled to reform purchase contract to include vendor's agreement to pay assessments for street improvements either on theory of fraud or mutual mistake (Civ. Code, § 3399).

Purchasers *held* entitled to reformation of contract for purchase of lot to conform to representations of vendor's agent that vendor would pay for cost of street improvement then contemplated by city, since if agent's representations were fraudulent, vendor was chargeable therewith and reformation would be justified,

but if representations were not fraudulent, failure to provide in contract for payment of improvements was a mutual mistake authorizing reformation under Civ. Code, § 3399.

Appeal from Superior Court, Alameda County; James G. Quinn, Judge.

Action by A. D. Wolfe and another against Carrie M. Morgan and others. Judgment for plaintiffs, and defendants appeal. Affirmed.

Ward & Hutchinson, of Oakland, for appellants.

Chaplin & Jones, of Oakland (W. W. Laidley, of Oakland, of counsel), for respondents.

NOURSE, J. Plaintiffs sued for the reformation of a written contract for the purchase of a lot of real property. They had judgment and the defendant has appealed on a typewritten record.

The contract was executed by respondents and the agents of appellant, who had theretofore been authorized in writing by appellant to execute such contracts with purchasers of lots owned by appellant and placed in the hands of her agents for sale. As an inducement for the sale these agents assured respondents that the cost of street improvements then contemplated and proposed by the city had been or would be paid for by the owner (appellant) and that the purchasers would be required to meet the cost of future assessments for future street improvements. The contract between respondents and appellants' agents merely provided that "said buyer shall pay all assessments which may be levied on the premises." The theory of the complaint is that, through the mistake of the parties, the contract failed to express their real intention, and the respondents prayed that it be reformed accordingly.

On October 10, 1922, appellant entered into a written contract of employment with her agents for the subdivision and sale of a tract of land which was conditional upon appellants securing a loan in the sum of $6,900 to defray expenses to be incurred by her agents, included in which was the cost of the street improvements which is the basis of this controversy. Paragraph 7 of this contract provided that of this loan "4000 should be available *when needed* to pay the cost of the *improvement now pending* to the portion of Peralta Avenue adjoining the said property." Paragraph 4 of this contract provided that all contracts of sale of the lots should obligate the purchaser to pay all "assessments of every kind *thereafter levied* or *thereafter becoming a lien*" upon the lot sold. Paragraph 8 of this contract provides that it is "understood and agreed * * * that in the event * * * the payment of the cost by the party of the first part of the improvement of Peralta Avenue, shall exceed the said sum of $6900, then any excess cost, plus the cost of any sewer improvements and of any and all other improvements" shall be added to the price of the lots in such manner as the contracting parties should agree. Before any lots were offered for sale the appellant and her agent discussed the cost of the street work then pending on Peralta avenue and other contemplated improvements, and fixed the sale price of each lot accordingly.

[1-3] On this appeal the appellant has designated 16 specifications of error, no one of which has a shadow of merit. The only issue in the case is whether a written contract may be reformed to express the true intention of the parties when the mistake of one party has occurred through oral representations of the agent of the other. It seems to be the theory of appellant that, because the purchasers called particular attention to the clause in the contract relating to payment of assessments and objected to it until assured by appellants' agents that it referred to future assessments only, there is no mistake in the contract which would support an action to have it reformed. The right of action is statutory. Section 3399, Civ. Code. It lies when a written contract does not truly express the intention of the parties either because of fraud or mistake. When a party is induced to sign through a misrepresentation as to the meaning and effect of the writing, it is immaterial whether the misrepresentation is the result of fraud or mistake. The concern of the court of equity is to make the contract express the true intention of the parties. If the agent's representations that the cost of the Peralta avenue improvements had been paid by the owner were false or fraudulent, the fraud goes back to the appellant because of the express terms of her contract with the agent, and the respondents were entitled to have the contract reformed, because of the fraud. On the other hand, if these representations were neither false nor fraudulent, and the appellant herein intended to obligate herself to pay for the Peralta avenue improvement, the failure to so provide in the contract was a mutual mistake of the parties, which would warrant a reformation of the contract under the Code section.

For the reasons given the judgment must be affirmed, and it would serve no purpose to discuss the other points raised. In the main they are based on the false premise that the agency contract did not cover the matter of the payment of the cost of the Peralta avenue improvement and that the agent's representations relating thereto were unauthorized by the appellant.

Judgment affirmed.

We concur: KOFORD, P. J.; STURTEVANT, J.

95 Cal. App. 524

TISCHHAUSER v. JARVIS. (Civ. 6483.)★

District Court of Appeal, First District, Division 1, California. Dec. 17, 1928.

Rehearing Denied Jan. 15, 1929. Hearing Denied by Supreme Court Feb. 14, 1929.

1. Contracts 🔑108(2)—Agreement to indemnify surety on bail bond is not against public policy.

An agreement to indemnify a surety on a bail bond is not against public policy.

2. Contracts 🔑108(2)—Agreement permitting surety on bail bond to employ attorney to represent accused and enter guilty plea without accused's knowledge violates public policy.

Provision in contract to indemnify surety on bail bond, permitting surety's employment of an attorney to represent accused in substitution of his own attorney and to appear in accused's absence and enter a plea of guilty without accused's knowledge, and authorizing attorney so employed by surety to plead accused guilty to any other offense carrying a less or the same penalty as that prescribed for offense with which he is charged, is against public policy.

3. Criminal law 🔑641(1)—Absconding accused ceased to be in court's actual or constructive custody, and could not appear by own counsel or by counsel employed by surety on bail bond.

Where accused had absconded he ceased to be in actual or constructive custody of court, and had no authority to appear either by his own counsel or by counsel substituted for him by surety on his bail bond, at least not until he surrendered to the actual or constructive custody of the court.

4. Principal and surety 🔑175—Expenses of surety on bail bond in searching for accused were voluntary and not recoverable from surety's indemnitor without express agreement.

Where agreement in which defendant contracted to indemnify surety on accused's bail bond contained no express provision to indemnify surety for expense incurred for services of detectives, traveling expenses, and long distance telephone tolls in searching for accused, who had absconded, such payments, if made by surety, were purely voluntary and could not be recovered from defendant indemnitor.

5. Principal and surety 🔑175—On forfeiture of bail bonds there was no further obligation on surety's indemnitor to pay premiums or service fees, without allegation or showing additional sums were due.

After bail bonds were forfeited when accused absconded, there was no further obligation on one who agreed to indemnify surety on bail bond to pay premiums or service fees, and, in absence of allegation in surety's complaint against indemnitor or anything in record showing additional sums due therefor, it must be presumed that no such additional payments were owing, since every presumption not contradicted by or inconsistent with record on appeal must be indulged in favor of judgment.

Appeal from Superior Court, Fresno County; Charles R. Barnard, Judge.

Action by E. A. Tischhauser against Leo Jarvis. Judgment for defendant, and plaintiff appeals. Affirmed.

Hearing denied by Supreme Court: PRESTON, J., dissenting.

Samuel F. Hollins, of Fresno, for appellant.

B. M. Benson, of Fresno, for respondent.

CAMPBELL, Justice pro tem. This is an appeal from a judgment in favor of defendant, the action being one instituted by plaintiff against defendant on an alleged agreement to indemnify plaintiff and the New Amsterdam Casualty Company of New York against loss suffered in executing a bail bond to secure the appearance of one Henry Simon before the justice court of the fourth township of Fresno county, wherein Henry Simon was charged with "manufacturing intoxicating liquor" and "possessing apparatus for the manufacturing of intoxicating liquor," and who failed to appear for preliminary examination on the former and trial on the latter charge.

The second amended complaint alleges that one Henry Simon was arrested under a complaint charging him with the manufacture of intoxicating liquor, also under another complaint charging him with possessing apparatus for the manufacture of intoxicating liquor, and that he was admitted to bail in the sum of $750 under the first charge and in the sum of $250 under the second charge; that for the purpose of securing the release of Henry Simon the defendant Leo Jarvis and Henry Simon executed and delivered to this plaintiff, E. A. Tischhauser, a certain indemnity agreement, "a true copy of which said application and agreement is hereto attached and marked 'Exhibit A' and is hereby referred to and made a part hereof," wherein Leo Jarvis and Henry Simon agreed to indemnify plaintiff against all claims, demands, loss, expenses or damage which he might incur, or for which he might become liable by reason of the execution by the New Amsterdam Company of New York of such undertaking of bail; that pursuant to the application and indemnity agreement this plaintiff caused the New Amsterdam Casualty Company of New York to make, execute and acknowledge before the said justice court its undertaking of bail in the sum of $750, and that thereupon the said Simon was discharged from custody. It is further alleged that he was admitted to bail on the second charge, and thereupon the New Amsterdam Casualty Company of New York made, executed, and acknowledged before the justice its undertaking of bail in the sum of $250, and that thereupon Simon was discharged from custody; that at the time set for the hearing

---

★Rehearing denied. Hearing denied by Supreme Court.

Simon failed to appear and the bail was declared forfeited. The complaint then alleges the expenditure by the plaintiff of the sum of $574.80 in an effort to find Simon and produce him for trial, but that he was unable to find him; that thereafter he, the plaintiff, "appointed an attorney to represent the said Henry Simon; that said attorney caused to be entered on behalf of said Simon a plea of guilty to said charge of possessing apparatus for the manufacture of intoxicating liquor, and the court thereupon sentenced the said Simon to pay a fine of $100.00, which the plaintiff then and there paid; that by reason of the payment of the said fine the said attorney obtained from the said court a dismissal of the charge of manufacturing intoxicating liquor and an order revoking the forfeiture of the said bonds and exonerating the said bail; that plaintiff paid to the said attorney for his services the sum of $5.00, which said sum was a reasonable fee for said services."

"Exhibit A" attached to the second amended complaint contains the following provisions: "The undersigned jointly and severally covenant and agree to at all times indemnify and keep indemnified and save and hold the company and E. A. Tischhauser, or either of them, harmless from and against any and all claims, demands, loss, expenses or damages which they may sustain or incur, or for which they may have become liable by reason of the execution by them of said bond or undertaking, and to make good and reimburse to the company and E. A. Tischhauser all sums of money, which they, or either of them, may pay or become liable to pay in consequence thereof, including counsel and attorneys fees incurred or paid by them. It is understood and agreed and it is hereby made a condition and a part of the consideration hereof that for the purposes of this application and indemnity agreement, and of the undertaking of the undersigned to indemnify and save harmless the company and E. A. Tischhauser, or either of them, liability for claims, demands, loss, expenses or damages, shall be considered to attach to or be incurred by the company and E. A. Tischhauser, or either of them, as soon as the bail or surety bond, or either of them, herein referred to, shall have been declared forfeited by the court having jurisdiction of said cause or matter. * * * The undersigned hereby makes, constitutes and appoints any attorney at law admitted to practice in the courts of the State of California, who is selected by the New Amsterdam Casualty Company of New York or by E. A. Tischhauser, to legally represent me in substitution of my Attorney or Attorney of Record, and, if the charge be, or be reduced to a misdemeanor, to appear and go to trial in my absence, or to appear and enter a plea of guilty to the offense with which I am charged, or to any other offense included therein or to any other offense which carries as a sentence therein less or the same penalty as is prescribed for the offense or offenses with which I am now charged." etc. The prayer of the complaint is for $814.80, made up of the following items: $135 balance due as premium on bonds; $514.80 money expended in searching for Simon; $100 fine paid by the casualty company; and $5 attorney's fee.

Defendant filed a demurrer, assigning numerous reasons why the second amended complaint does not state facts sufficient to constitute a cause of action. The demurrer being overruled, defendant answered admitting the allegations of the complaint with the exception of the allegations as to the money spent in prosecuting search for Simon; the services of detectives, traveling expenses and long distance telephone calls; the appointment of an attorney to represent Simon and the payment of the fine—all of which are denied on information and belief.

When the case was called for trial the defendant objected to the introduction of any evidence on the ground that the complaint failed to state a cause of action against the defendant upon several specific grounds. The court sustained the objection and entered judgment for defendant, and from which judgment plaintiff has appealed.

[1-3] We agree with appellant that an agreement to indemnify a surety on a bail bond is not against public policy, but we are not in accord with his claim that public policy sanctions that clause in the contract of indemnity which permits the employment by the surety of an attorney to represent the defendant in substitution of his own attorney and to appear in the defendant's absence and enter a plea of guilty without the knowledge of the defendant, and which authorizes the attorney so employed by the surety to plead the defendant guilty to any other offense which carries as a sentence less or the same penalty as that prescribed for the offense with which he is charged. Such a contract permits the surety to dicker, deal and traffic with the court in order to minimize the loss which the bondsman or surety might suffer. According to the allegations of the complaint, Simon, the defendant in the criminal action, had absconded, and therefore ceased to be in the actual or constructive custody of the court. As was said in People v. Redinger, 55 Cal. 290, 36 Am. Rep. 32, in which case the court dismissed an appeal because the defendant was a fugitive:

"It would be a farce to proceed in a criminal cause, unless the court had control over the person charged, so that its judgment might be made effective. It is true that an indictment may be found against one not in custody, but steps are directed to be taken in such case to secure his person. Pen. Code, §§ 945, 979–984. And unless an arrest is effected, the cause can proceed no further. The defendant is arraigned in person, and pleads in person (section 977, Pen. Code) unless in case of misdemeanor (Id.). Every plea must be oral. Pen. Code, § 1017. By section 1253 of the Penal Code, it is provided, as to criminal causes, that 'the judgment may be affirmed if the appellant fail to appear, but can be reversed only after argument, though the respondent fail to appear'; and by section 1255, that 'the defendant need not personally appear in the appellate court.' It may be urged that, inasmuch as the defendant need not personally appear in the Appellate Court (section 1255, Pen. Code, ut supra), he has a right to appear by counsel, whether he is in custody or not. For the reasons here given, sustained by the cases cited, we think the defendant has no longer a right to appear by counsel, when he has escaped from custody, until he has returned into custody. By breaking jail and escaping, he had waived the right to have counsel appear for him. Commonw. v. Andrews, 97 Mass. [543] ut supra. In fact, his right to constitute counsel and invest him with authority no longer exists while his absence from custody continues."

In Smith v. United States, 94 U. S. 97, 24 L. Ed. 32, the court says:

"In this case it is admitted that the plaintiff in error has escaped, and is not within the control of the court below, either actually, by being in custody, or constructively, by being out on bail. If we affirm the judgment, he is not likely to appear to submit to his sentence. If we reverse it and order a new trial, he will appear or not, as he may consider most for his interest. Under such circumstances, we are not inclined to hear and decide what may prove to be only a moot case."

There is not any difference in principle between a defendant appearing by counsel in an appellate court in his absence and a defendant appearing by counsel in a justice court in his absence, both being permitted by the Penal Code; nor is there any distinction between the right of a defendant who has escaped and is no longer in actual custody to appear by counsel and a defendant who has "jumped his bail" and is no longer in constructive custody. It therefore follows that the defendant in the criminal case here, having placed himself without the constructive custody of the court, had no authority to appear either by his own counsel or by counsel substituted for him—at least not until he had surrendered to the actual or constructive custody of the court.

[4] We agree with appellant that where the consideration for a contract is valid and such contract has several distinct objects of which some are lawful and others unlawful, the contract is valid as to the lawful objects. Civ. Code, § 1599; Hedges v. Frink, 174 Cal. 552, 163 P. 884; Mack v. Jastro, 126 Cal. 130, 58 P. 372; McCahan v. McCahan, 47 Cal. App. 176, 190 P. 460. Here, however, there is no provision in the contract authorizing plaintiff to institute search for Simon or agreeing to reimburse him for money so expended. "It is elementary that a guarantor cannot be liable beyond the express terms of the contract of guaranty. San Francisco Theological Seminary v. Monterey Co. Gas & Electric Co., 179 Cal. 166, 175 P. 693. A surety has all the rights of a guarantor (Civ. Code, § 2844), and cannot be held beyond the express terms of his contract." Murphy v. Hellman Commercial, etc., Bank, 43 Cal. App. 587, 185 P. 489. "There is no escape from the principle declared in the sections of the Civil Code, above cited [sections 2819, 2840, 2844], that sureties have the right to stand upon the very terms of their contract." Michelin Tire Co. v. Bentel, 184 Cal. 321, 193 P. 773. There being no express provision in the contract under which defendant agreed to indemnify plaintiff for the expense incurred for services of detectives, traveling expenses and long-distance telephone tolls, such payments, if so made by plaintiff, were purely voluntary and cannot be recovered.

[5] As to the item of $135 alleged to be due and owing on account of premiums and service fees and which are alleged to have been paid by plaintiff, it may be said that we are unable to determine from the record whether any amount is unpaid or when the bonds were declared forfeited. The application for the bond was made on June 24, 1926, and on June 28, 1926, Simon was arraigned and released from custody, the defendant having paid the first annual premium and first semiannual service fee, which latter sum he agreed to continue to pay every six months and the premium annually until the company and Tischhauser should be discharged from liability—that is, during the life of the bond. Then follows an allegation that the time for trial on one charge and the preliminary examination on the other were regularly fixed by the court, but Simon failed to appear and the bonds were declared forfeited. Of course after the bonds were forfeited there was no further obligation on defendant to pay the annual premiums or the semiannual service fees. It is unlikely that the misdemeanor trial and the preliminary examination were set by the justice of the peace later than six months following the arraignment, at which time the bonds were declared forfeited, and, if not, no further sum as premium or service fee is due and owing according to the contract. In the absence of any allegation in the complaint or anything in the record showing additional sums due as annual premiums or semiannual service fees, it will be presumed that no such additional payments are due or owing, as "every intendment and presumption not contradicted by or inconsistent with the record on appeal must be indulged in favor of the orders and judgments of the superior court." 2 Cal. Jur. 852; Finkelstein v. Cosgrove, 83 Cal. App. 203, 256 P. 609.

The judgment is affirmed.

We concur: TYLER, P. J.; KNIGHT, J.

95 Cal. App. 752

BALTHES v. BOGIGIAN et al. (Civ. 6484.)★

District Court of Appeal, First District, Division 2, California. Dec. 24, 1928.

As Modified on Denial of Rehearing, Jan. 23, 1929. Hearing Denied by Supreme Court Feb. 21, 1929.

Banks and banking 🔑154(8)—Evidence sustained finding that money deposited with bank holding mortgage on fig crop was only for application on purchase price of figs.

Evidence *held* to sustain finding that money was deposited with bank only for application on purchase price of figs at certain specified rate per ton, and not otherwise, so that bank was not authorized, after repudiation of contract, to apply deposit on chattel mortgage which it held on the fig crop.

Appeal from Superior Court, Fresno County; C. E. Beaumont, Judge.

Action by Mrs. Gustaf A. Balthes against Lusentak B. Bogigian and the First National Bank in Fresno on a written contract of sale of figs. From a judgment for plaintiff, defendant bank appeals. Affirmed.

Cosgrave & Barstow, of Fresno, for appellant.

Lindsay & Gearhart, of Fresno, for respondent.

NOURSE, J. Plaintiff sued to recover $1,000 paid by her into the defendant bank in connection with a written contract between plaintiff and defendant Bogigian for the sale of a quantity of figs. Plaintiff had judgment against the bank for $862.50, and against Bogigian for $137.50. The bank alone has appealed from the judgment on a typewritten transcript under section 953a et seq., Code of Civil Procedure.

The contract called for the sale to the plaintiff of the entire 1925 crop of figs grown on Bogigian's land at a stipulated price and provided that, upon the execution of the contract, the plaintiff should pay to the defendant bank the sum of $1,000, "which sum shall be applied to the purchase price as follows: The second party (Balthes) shall pay on each ton $50.00 less than the amount owing under this contract until the said deposit is exhausted, that is to say, the deposit shall be applied to the purchase price at the rate of $50.00 per ton."

The first delivery of figs under the contract was quarantined as unfit, and the defendant Bogigian thereupon repudiated the contract and refused to make any further deliveries. The plaintiff then notified the bank of the breach by Bogigian and demanded the return of the deposit. The bank applied the deposit upon a chattel mortgage on the fig crop which it held against the defendant Bogigian.

The trial court found that the bank received the money in order that it might be applied to the purchase price of the figs at the rate of $50 per ton and not otherwise. On this appeal the bank contends that this finding is not supported by the evidence. The contract itself discloses that the payment was intended merely as a deposit to be applied to the purchase price on delivery, of each ton of figs at the rate of $50 per ton, and this agreement was made with the full knowledge and consent of the bank. No evidence is cited tending to show that there was any uncertainty in the intention of the parties as expressed in this contract or that there was any misunderstanding on the part of the bank of its position in the transaction.

The judgment is affirmed.

We concur: KOFORD, P. J.; STURTEVANT, J.

95 Cal. App. 641

In re CASSIDY'S GUARDIANSHIP.

LERIGER v. CASSIDY.

(Civ. 5998.)

District Court of Appeal, First District, Division 1, California. Dec. 21, 1928.

1. Insane persons 🔑12—Petition for appointment of guardian sufficiently alleged mental incompetency to give court jurisdiction (Code Civ. Proc. §§ 1763, 1764, 1767).

Petition for appointment of guardian of incompetent person, alleging that by reason of old age and weakness of mind such person was unable to properly manage himself and property and was likely to be deceived by designing persons, *held* sufficient to give court jurisdiction to appoint guardian and sufficiently to allege mental incompetency of such person to manage property as required by Code Civ. Proc. § 1763, considered in connection with sections 1764 and 1767, though petition did not specifically allege incompetent was insane or mentally incompetent to manage property.

2. Insane persons 🔑30—Guardian may be appointed when mental weakness exists making incompetent easy prey for designing persons, it being unnecessary to wait until loss occurs (Code Civ. Proc. §§ 1763, 1764, 1767).

In proceeding for appointment of guardian for incompetent person, it is not necessary to wait until actual loss or damage has been suffered before provisions of Code Civ. Proc. §§ 1763, 1764, 1767, are invoked, but it is sufficient if mental weakness exists which makes such person easy prey for designing persons.

★Rehearing denied. Hearing denied by Supreme Court.

3. Insane persons 🔑33(1)—Evidence of alleged incompetent's willingness to enter into strange business and inability to understand transactions supported finding for appointment of guardian.

In proceeding for appointment of guardian over alleged incompetent person, evidence of willingness of incompetent to accept statement of others and rely on their promises of big money in building business in which incompetent was not experienced, and testimony that incompetent was unable to understand various business and general transactions and was unable to carry on complete conversation, *held* sufficient to support finding that guardian should be appointed.

4. Insane persons 🔑34—Stepdaughter held under no statutory disability to act as guardian of stepfather.

Stepdaughter *held* under no statutory disability of disqualification to act as guardian of stepfather.

5. Insane persons 🔑34—Court has broad discretion in appointment of guardian.

Court has broad discretion in appointment of guardian.

6. Insane persons 🔑34—Stepdaughter shown to be proper person held not disqualified from being guardian of stepfather because she was guardian of estate of her mother (Code Civ. Proc. § 1763).

Stepdaughter *held* not disqualified under Code Civ. Proc. § 1763, from being appointed guardian of stepfather because she was also guardian of estate of her mother, under evidence showing she was proper person familiar with affairs of stepfather and his wife and was possessed of ordinary business ability.

7. Insane persons 🔑34—Selection of person as guardian for incompetent is within discretion of court, not required to give any weight to wishes of ward.

Court has authority to select proper person as guardian for incompetent, and selection of person is within its discretion, court not being required to give any weight to wishes of ward.

Appeal from Superior Court, Marin County; Edward I. Butler, Judge.

Petition by Helen Leriger for appointment as guardian of Andrew Cassidy and wife, incompetent persons. From an order appointing the petitioner as guardian, Andrew Cassidy appeals. Affirmed.

James F. Sheehan, of San Francisco, for appellant.

Jordan L. Martinelli, of San Rafael, for respondent.

BARNARD, Justice pro tem. This is an appeal from an order appointing Helen Leriger as guardian of the person and estate of her stepfather, Andrew Cassidy. The petition of the respondent stepdaughter seeks the appointment of herself as guardian of the persons and estates of both her mother, Catherine Cassidy, and her stepfather, Andrew Cassidy, who are husband and wife, and each alleged to be 73 years of age. The petition alleges: "That both said Andrew Cassidy and Catherine Cassidy, his wife, *by reason of old age and weakness of mind* are and each is unable, unassisted, to properly manage and take care of himself or herself and of their respective property, and by reason thereof they are each likely to be deceived or imposed upon by artful or designing persons." (Italics ours.) In his answer the appellant denies all the allegations of the petition going to show the necessity for the appointment of a guardian, and in addition requests the court, in the event a guardian is held to be necessary, to appoint the Crocker First Federal Trust Company of San Francisco as such guardian, in lieu of respondent. Respondent was appointed guardian of the persons and estates of both Andrew Cassidy and Catherine Cassidy, but Andrew Cassidy alone appeals.

The trial court, among other things, found "that all of the allegations contained in the petition are true"; and further: "That Andrew Cassidy is seventy-three years of age * * * and that by reason of old age and weakness of mind said Andrew Cassidy is unable unassisted to properly manage and take care of himself and/or his property and estate, and by reason thereof is likely to be deceived or imposed upon by artful or designing persons." Three points are raised by the appellant as reasons why the order complained of should be reversed.

The first point urged is that, upon the petition as filed, the court had no jurisdiction to hear or determine the matter or appoint a guardian, for the reason that the petition absolutely fails to allege or "represent" to the court that Andrew Cassidy was "insane, or from any cause *mentally incompetent* to manage his property" as required by section 1763 of the Code of Civil Procedure, nor does it state facts fully equivalent to the words "mentally incompetent" required by said section.

[1] While it must be represented to the court that such a mental condition as is described in section 1763 of the Code of Civil Procedure exists in the person for whom guardianship is sought, the specific language used in that section is not essential. That section is to be considered in connection with sections 1764 and 1767 of the same Code. Section 1764 of this Code provides that a guardian shall be appointed when it appears to the court that the person in question "is incapable of taking care of himself and managing his property." And section 1767 furnishes a definition of the terms used in sections 1763 and 1764 and involved in this proceeding. These two sections, in effect, provide a test by which the condition of the alleged incompetent is to be measured. This test is whether or not he "is, by reason of old age, disease, weakness of mind, or from

any other cause unable, unassisted, to properly manage and take care of himself or his property, and by reason thereof would be likely to be deceived or imposed upon by artful or designing persons."

While the petition in this case does not allege the mental incompetency of appellant in the exact words of section 1763 of the Code, the language of the petition and of the order appealed from is almost identical with the definition of these words furnished by section 1767. It would seem reasonable that no stronger language is requisite in the petition for appointment of a guardian than is sufficient in the order appointing such a guardian. This appointment is provided for in section 1764 of the Code of Civil Procedure, which is partially quoted above. And the kind of "incapability" referred to in this section is defined in section 1767. The petition herein uses, in this respect, practically the language of sections 1764 and 1767 of this Code. As was said by the Supreme Court of Michigan, in Re Storick, 64 Mich. 685, 31 N. W. 582, and referred to in Re Colburn, 11 Cal. App. 604, at 608, 105 P. 924, 926: "The statute does not say merely 'incompetent' but 'mentally incompetent.' * * * Unless the petition either follows the words of the statute, *or uses language and states facts fully equivalent*, it can not give jurisdiction." (Italics ours.) In our opinion, the petition herein does use language and states facts fully equivalent to the words of the statute, and the mental incompetency to manage property required by section 1763 of the Code of Civil Procedure is sufficiently alleged to give the court jurisdiction of the proceedings.

In his second contention, the appellant claims the evidence is not sufficient to support the findings of the court which are hereinabove quoted. The claim is that the evidence is not sufficient to show that appellant is, by reason of mental weakness, incompetent to care for himself or his property. Among other things, there is evidence as follows: That appellant has about $7,000 in the bank, and also owns jointly with his wife a home worth $3,500 or thereabouts, a lot and barn in San Francisco, value not shown, and a promissory note for $3,000. That he was at the time of the hearing seventy-three years old, and at that time had been ill and confined in a hospital for about four months. That he had periods of crying when there was no apparent occasion, and would cry on being asked a question. That on one day he would offer to sell his home for $1,400, and send people to look at it, and the next day would change the price to $4,500. That he was constantly talking of going into different lines of business, first the trucking business, and soon thereafter the business of building and selling cheap houses, stating that he was just as good a carpenter as men in the business who had learned the trade, and next he would plan to get a job in the Crocker bank. That he was constantly planning to get into some business and get some one to go into partnership with him. That he had a loan of $3,000, and insisted he was to receive only $210 interest thereon for three years, instead of $210 a year, and was unable to understand the difference when it was explained to him. That in making a loan he gave a check for $3,000 to a stranger before receiving any papers. That many people were trying to get loans from him. That he was unable to understand certain ordinary transactions with a bank. That more recently he could not carry on a complete or connected conversation. Appellant himself testified:

"Q. If some one told you you could make double your money by building houses and selling them, would you do that? A. Of course I would, you would, too.

"Q. Have you had any experience in building houses, Mr. Cassidy? A. Not a bit, not a bit."

[2, 3] In cases of this kind it is not necessary to wait until actual loss or damage has been suffered before the beneficient provisions of these statutes may be invoked. It is sufficient when the mental weakness exists, which makes the unfortunate one an easy prey for the designing. The willingness of appellant to accept the statement of other and perhaps interested parties and rely on their promises of big money in the building business, in which he was not experienced, was, in his apparent condition, a dangerous symptom, and this alone, but especially in the light of the other testimony, may well have convinced the trial court that appellant would be easily imposed upon by artful and designing persons. The trial court had, in addition to the other testimony, the opportunity of hearing and observing the appellant. Without quoting more of the testimony, the above facts are sufficient to show there was evidence to support the findings of the court, and the well-known rule applies.

[4-6] As a third ground for reversal, appellant claims the appointment of the stepdaughter was erroneous, for the reason that respondent is disqualified, since she is also the guardian of the estate of her mother, the wife of appellant; that her interests would thus be conflicting; and that she is not a relative or friend of appellant, but is actually hostile to him. Respondent is under no statutory disability or disqualification to act as such guardian. The court has a broad discretion in the appointment of a guardian. In re Crocker, 174 Cal. 660, 163 P. 1015. There is nothing in the record to show any such conflict of interest as would disqualify her, and the court may well have considered it as an advantage that she was also the guardian of the estate of her mother, wife of appellant, in view of the joint ownership of some of the properties and the economy and convenience of having the interests of both handled by the same person. The evidence shows respondent is a proper person to act as guardian, that she is familiar with the affairs of respondent and his wife, and is possessed of ordinary business ability.

It is urged that respondent, being a stepdaughter, is not a "relative," and that she has shown such hostility toward appellant as precludes her from being considered a "friend" to him and, therefore, under section 1763 of the Code of Civil Procedure, she could not file a petition. While she is not a blood relative, the section itself does not specify a blood relative, and it might well be held that this fairly common relationship was within the purpose and intent of the statute. Whether or not this is true, we think the evidence shows she at least is such a friend as is contemplated by the section. Without quoting the scattered testimony on this point, we may say that it shows no hostility on the part of respondent toward appellant, and any slight conflict in the evidence, as to friendliness, has been resolved by the trial court in favor of the respondent.

[7] In connection with the matters just referred to, it is finally urged by appellant that, if a guardian is needed at all, the trial court should be required to appoint as guardian either the nominee of appellant, the Crocker First Federal Trust Company, or some competent person other than respondent. This is a matter within the discretion of the trial court. The court has authority to select a proper person as guardian, and under no existing provision is the court required to give any weight to the wishes of the ward, as is the case in appointing guardians for minors. Even the appointment of a stranger as such guardian, in preference to the nominee of the incompetent, has been held valid. Matter of Coburn, 165 Cal. 202, 218, 131 P. 352. No abuse of this discretion appears from the record.

The order appealed from is affirmed.

We concur: TYLER, P. J.; KNIGHT, J.

---

95 Cal. App. 394

BRIDGES v. PRICE et al. (Civ. 6567.)★

District Court of Appeal, First District, Division 2, California. Dec. 12, 1928.

Rehearing Denied Jan. 11, 1929. Hearing Denied by Supreme Court Feb. 7, 1929.

1. Brokers ⇨4—Law in force at date of giving broker's bond held part thereof.

Law in force at date of giving broker's bond was a part of it as effectually as if provisions of the law were in words inserted in bond.

2. Evidence ⇨65—Surety executing broker's bond was presumed to know that statute had been amended (Corporate Securities Act, § 5).

Surety, executing broker's bond under Corporate Securities Act (St. 1917, p. 673) § 5, was presumed to know the law, and hence to know that the statute under which the bond was given had been again amended in 1925 (St. 1925, p. 967), where the statute, as amended in 1923 (St. 1923, p. 90), had ceased to exist.

3. Reformation of instruments ⇨30—Obvious mistake in contract can be corrected by court in action at law.

Where obvious mistake appears on face of contract, it can be corrected by court in action at law, and without recourse to equity.

4. Reformation of instruments ⇨30—Court in action on broker's bond could correct mistake reciting that bond was given under amendment which had ceased to exist, due to subsequent amendment (Corporate Securities Act, § 5).

Where broker's bond, given under Corporate Securities Act (St. 1917, p. 673) § 5, recited that it was given under the act as amended in 1923, whereas the statute as amended in 1923 (St. 1923, p. 90) had no existence, since superseded by an amendment of 1925 (St. 1925, p. 967), court was authorized to correct the mistake in an action on the bond.

5. Principal and surety ⇨59—Rule of strictissimi juris as to surety contracts applies only after meaning thereof has been ascertained as provided in statute (Civ. Code, § 2837).

Under Civ. Code, § 2837, it is only after the meaning of the surety contract has been ascertained, as provided in statute, that the rule of strictissimi juris comes into operation to prevent the extending of the obligation beyond the fair meaning so ascertained.

6. Brokers ⇨4—Broker's failure to account in sale and purchase of securities held covered by bond (Corporate Securities Act, § 5, par. 3, as amended by St. 1925, p. 967).

Broker's failure to account to plaintiff in the sale and purchase of securities for him *held* covered by bond executed under Corporate Securities Act (St. 1917, p. 673) § 5, par. 3, as amended in 1925 (St. 1925, p. 967), conditioned on broker's faithful and honest performance of all obligations and undertakings in purchase and sale of securities, irrespective of fraud.

7. Brokers ⇨4—Obligation of surety under broker's bond held not discharged because plaintiff took note as conditional payment for securities sold by broker (Corporate Securities Act, § 5, par. 3, as amended by St. 1925, p. 967).

Obligation of surety on broker's bond executed under Corporate Securities Act (St. 1917, p. 673) § 5, par. 3, as amended in 1925 (St. 1925, p. 967), conditioned on broker's performance of all obligations in purchase and sale of securities, *held* not discharged because plaintiff took promissory note from broker as conditional payment for securities sold by broker, and for which he had failed to account to plaintiff.

8. Pleading ⇨406(9)—That complaint was insufficient held immaterial, where evidence introduced without objection fully supported judgment.

Contention that complaint failed to state cause of action *held* without merit, where evi-

---

★Rehearing denied. Hearing denied by Supreme Court.

dence which was introduced without objection fully supported judgment and thereby cured defect.

Appeal from Superior Court, Alameda County; James G. Quinn, Judge.

Action by H. A. Bridges against E. L. Price and another. Judgment for plaintiff, and defendant Continental Casualty Company appeals. Affirmed.

J. Hampton Hoge, of San Francisco, for appellant.

Grant R. Bennett, of San José, for respondent.

DOOLING, Justice pro tem. This is an appeal by defendant Continental Casualty Company from a judgment in favor of plaintiff upon a broker's bond given by appellant under the provisions of the Corporate Securities Act (St. 1917, p. 673) as surety for defendant Price. The evidence showed that on September 29, 1925, respondent Bridges delivered to one Ormond, as agent for Price, 210 shares of capital stock of National Automatic Music Company, to be exchanged for 336 shares of Monolith Portland Cement Company stock. Subsequently Price admitted to Bridges that he had sold his Music Company stock and had not procured the Cement Company stock, and on November 19, 1925, Price persuaded respondent to take his (Price's) promissory note for the value of the stock, payable 27 days after date. The note was never paid, and after its maturity this action was brought on the original obligation, and appellant was joined as a defendant upon its bond. Judgment followed against both defendants.

The bond here in question recites that it is given as "required under the provisions of paragraph 3 of section 5 of said act [Corporate Securities Act] as amended in 1923." As a matter of fact, prior to the execution and delivery of the bond, that paragraph had again been amended in 1925 (St. 1925, p. 967), so as to enlarge the surety's liability on the bond. Because of this recital appellant insists that its obligations are to be measured by the provisions of the act as it read in 1923 (St. 1923, p. 90), and prior to the amendment of 1925. Under those provisions it clearly would not be liable in this action. Blumenthal v. Larson, 79 Cal. App. 726, 248 P. 681; Mitchell v. Smith (Cal. Sup.) 267 P. 540.

[1-4] This contention, in our judgment, is not tenable. The bond was a statutory bond, and the law in force at the date of its giving is a part of it as effectually as if such provisions were in words inserted in it. Milliron v. Dittman, 180 Cal. 443, 181 P. 779. Appellant is presumed to know the law, and hence to know that the statute under which the bond was given had been again amended in 1925. The statute as amended in 1923 had ceased to have existence. It was superseded by the amendment of 1925. Either the reference was intended as a reference to the statute of 1925, or the bond was a nullity, because no bond was any longer required or provided for by the statute of 1923. It has frequently been held, in construing amendments to statutes which were incorrectly referred to in the amending statute, that, if the court can clearly see that the reference was intended for a particular statute, the amendment will be construed to carry out its evident intent, in spite of the mistake in the reference contained in the amending act. People v. King, 28 Cal. 265; Estate of Campbell, 143 Cal. 623, 77 P. 674; People v. Bradford, 1 Cal. App. 41, 81 P. 712; People v. Camp, 42 Cal. App. 411, 183 P. 845; People v. Troutman, 187 Cal. 313, 201 P. 928. We can see no good reason why the same rule should not be applied in the construction of a contract. Where an obvious mistake appears on the face of a contract, it can be corrected by the court in an action at law and without recourse to equity. Wagenblast v. Washburn, 12 Cal. 208; Sprague v. Edwards, 48 Cal. 239; Wilcoxson v. Miller, 49 Cal. 193; Gray v. Maier & Zobelein Brewery, 2 Cal. App. 657, 84 P. 280; Black Eagle Oil Co. v. Belcher, 22 Cal. App. 258, 133 P. 1153; Hunt v. Barker, 27 Cal. App. 776, 778, 151 P. 165. The reference to the statute as amended in 1923 is so obviously a mistaken reference to the statute as amended in 1925 that it must be so read, under the authorities above cited, and as a matter of plain common sense. Further support for this construction of the bond is found in Town of Mill Valley v. Massachusetts, etc., Co., 68 Cal. App. 372, 229 P. 891.

[5] Appellant insists that, since surety contracts are to be construed strictissimi juris, it cannot be held beyond the express letter of the bond. It is a sufficient answer to this contention to refer to section 2837 of the Civil Code, which provides: "In interpreting the terms of a contract of suretyship, the same rules are to be observed as in the case of other contracts." It is only after the meaning of the terms of the contract has thus been ascertained that the rule of strictissimi juris comes into operation to prevent the extending of the obligation beyond the fair meaning so ascertained. Roberts v. Security T. & S. Bank, 196 Cal. 557, 566, 238 P. 673. Having determined that the measure of appellant's liability is to be determined from the provisions of the act as it read in 1925, when the bond was given, the language of that act must be construed in order to determine whether it fairly covers the facts of this case.

[6] Paragraph 3 of section 5 of the Corporate Securities Act provided, before its amendment in 1925, that "said bond shall be conditioned upon the faithful compliance with the provisions of law by said applicant

and by all agents representing the said applicant." This language was construed in Blumenthal v. Larson, supra, and Mitchell v. Smith, supra, to limit the liability on the bond to cases where the broker was guilty of fraud in the sale of securities as defined by section 14 of the act. The 1925 amendment added to the language above quoted the following: "And the honest and faithful application of all funds received and the faithful and honest performance of all obligations and undertakings in the purchase or sale of securities." The purpose and effect of this amendment was obviously to extend the liability upon such bonds beyond that which was imposed by the statute before the amendment. Whatever may be meant by the word "honest," the "faithful performance of all obligations and undertakings" means no more than performance of those obligations and undertakings according to their terms. Bonds conditioned for the "faithful performance" of a contract have always been construed as being breached by any failure of performance in the principal contract. Garrett v. Dodson (Tex. Civ. App.) 199 S. W. 675, 682; General Bonding, etc., Co. v. Hill (Tex. Civ. App.) 195 S. W. 873; Lamson v. Maryland Casualty Co., 196 Iowa, 1185, 194 N. W. 70; Trinity Parish v. Ætna Indemnity Co., 37 Wash. 515, 79 P. 1097; Long v. American Surety Co., 23 N. D. 492, 137 N. W. 41; Hensley v. School District, 97 Kan. 56, 154 P. 253. In fact, such bonds are frequently referred to as "faithful performance bonds." Price having failed in the faithful performance of his obligation in the sale and purchase of securities for Bridges, appellant became liable to Bridges upon its bond.

[7] It is further argued by appellant that the taking of the promissory note from Price amounted to an extension of time on the principal contract, and hence discharged appellant from its obligation as surety. It is true that the taking of a promissory note for an indebtedness postpones the time of payment of the original obligation (Gnarini v. Swiss American Bank, 162 Cal. 181, 121 P. 726), and ordinarily an extension of time on the principal contract discharges the surety. (Tuohy v. Woods, 122 Cal. 665, 55 P. 683.) But appellant misconceives the nature of its obligation. Its bond is conditioned on "the faithful and honest performance of *all* obligations and undertakings in the purchase and sale of securities." When the original contract was entered into, the bond covered the performance of the obligations of that contract. When the promissory note was taken, it was in conditional payment for securities sold by Price for Bridges, and the bond likewise covered its performance. The legal effect of the taking of the note was that Price agreed to pay the note at maturity or to be liable upon the original obligation at the option of Bridges. 20 Cal. Jur. pp. 920-925, § 13. That was likewise an undertaking in the purchase and sale of securities within the meaning of the section, and so was covered by the bond. No matter how many successive agreements Bridges and Price might have made concerning their stock transaction, the bond would have covered each of them in turn. Appellant's argument would be good, if it had furnished an undertaking to secure the performance of a single obligation. It fails because, under the provisions of the statute, the bond was security for the performance, not of one, but of all, obligations in the purchase and sale of securities.

[8] Appellant's final contention, that the complaint fails to state a cause of action, is sufficiently answered by the fact that the evidence, which was introduced without objection, fully supports the judgment. If the complaint was defective the admission of this evidence without objection cured the defect. Slaughter v. Goldberg, Bowen & Co., 26 Cal. App. 318, 147 P. 90. A retrial on this ground could only result in an amendment to the complaint and a new judgment for plaintiff.

Judgment affirmed.

We concur: KOFORD, P. J.; STURTEVANT, J.

95 Cal. App. 400

HEMMEON v. AMALGAMATED COPPER MINES CO. (Civ. 5005.)

District Court of Appeal, Second District, Division 2, California. Dec. 12, 1928.

1. Contracts ⚷139—Purchaser of worthless notes, issued by foreign corporation without permit, held not in pari delicto (Code Civ. Proc. § 1963).

Purchaser of worthless notes, issued by foreign corporation without permit, must be presumed to have known that law required permit, but not that corporation had violated law, and hence is not precluded from recovering amount thereof on ground that she and corporation were in pari delicto; presumption being that law has been obeyed until contrary appears, under Code Civ. Proc. § 1963.

2. Limitation of actions ⚷127(4)—One suing on corporation notes purchased by her could set up count for money had and received by amendment after expiration of limitation period (Code Civ. Proc. § 339).

One suing on contract for amount of corporation notes purchased by her *held* entitled to set up count for money had and received by amendment of complaint after expiration of two-year period of limitation prescribed by Code Civ. Proc. § 339; no different or additional relief being prayed.

Appeal from Superior Court, Los Angeles County; Pat R. Parker, Judge.

Action by Mary Elizabeth Hemmeon against the Amalgamated Copper Mines Company. Judgment for plaintiff, and defendant appeals. Affirmed.

Clark & Law, of Los Angeles, for appellant.
Ford, Bodkin, Watt & Herlihy, of Los Angeles, for respondent.

CRAIG, J. The appellant was incorporated and had its principal place of business in the state of Arizona, and also maintained an office and conducted business in Los Angeles county, Cal. On January 15, 1920, at Phœnix, Ariz., there were issued by appellant for public sale generally $50,000 worth of its promissory notes of the denomination of $250 each, and on or about July 1, 1920, respondent purchased four of said notes, payable January 15, 1922, with interest at 7 per cent. per annum. On May 24, 1922, this action was instituted for the collection of all four notes, with interest. Thereafter and on April 17, 1923, an amended complaint was served and filed, containing an additional count or cause of action for money had and received. Judgment was rendered in favor of the plaintiff for the full amount demanded, and the defendant appealed therefrom.

[1] It is first contended that the trial court could not award any judgment to the plaintiff, for the reason that said corporation had not obtained from the commissioner of corporations a permit to issue or sell said securities, and that since they were issued and sold in violation of law, they were void and unindorsable. In support of this proposition appellant cites authorities holding that while one who has received the benefit of an illegal private contract is estopped to plead its invalidity, such rule does not apply to contracts which are void as against public policy; that the plaintiff and defendant herein were in pari delicto, and should have been left as the court found them. The trial court found, and it is not denied by appellant, that the respondent had no knowledge of the failure to obtain a permit, but it is argued that she must be presumed to have known the law and that the notes were void; that, having failed to demand proof of the existence of a permit, respondent "passively if not actively became a participant in violating the law."

True, respondent must be presumed to have known the law requiring the possession of a permit as a prerequisite to the issuance and sale of securities, but it does not follow that she should be presumed to have known the *fact* that appellant had violated the law. The statute does not make it an offense innocently to *buy* securities issued without a permit first having been obtained by the seller, nor does it require that it shall be exhibited to the purchaser. Until the contrary appears, it will be presumed that a person is innocent of crime or wrong, and that the law has been obeyed. Code Civ. Proc. § 1963. Respondent was entitled to assume that the law had been complied with. We can conceive of no just theory upon which a corporation could be upheld in retaining moneys fraudulently obtained from an innocent member of the general public by asserting that he was equally guilty because he bought worthless securities which public policy forbade the corporation to sell as genuine. To so hold would be but to penalize those for whose benefit such laws are established. In Smith v. Bach, 183 Cal. 259, 191 P. 14, the same question was presented. The Supreme Court there said:

"There are authorities which, while not denying the general rule that an illegal contract cannot be enforced whether malum in se or malum prohibitum, hold that all the consequences which attend a contract contrary to public morals do not attend one which is purely malum prohibitum, and that in the latter case courts will take notice of the circumstances and will give relief if justice and equity require a restoration of money received by either party thereunder. 13 Corpus Juris, p. 411, § 341. In such a case the complaining party is protected, the prohibition being for his benefit, and not being in pari delicto he is entitled to relief. Id., p. 501, § 443. By the weight of authority where money has been paid in consideration of an executory contract which is illegal, the party who has paid it may repudiate the agreement at any time before it is executed and reclaim the money. In such a case it is the duty of the court in furtherance of justice to aid one not in pari delicto though to some extent involved in the illegality, but who, as here, is comparatively the more innocent, and to permit him to recover back money paid on a contract as the circumstances of the case may require"—citing authorities.

[2] It is next argued that the plaintiff was not entitled to set up her count for money had and received by amendment more than two years after the two-year period of limitation has expired. As we have observed, the plaintiff first sued for $1,000 and interest upon the contract, and thereafter added a cause of action, which, when filed, was barred by section 339 of the Code of Civil Procedure. Had the plaintiff dismissed her action and attempted by a subsequent suit to recover by a common count the relief first sought by an action upon contract, doubtless the trial court would properly have declined to entertain the action. But such is not the case. No different or additional relief was prayed. The same relief was demanded in a different way. This question was presented in Cowell v. Snyder, 171 Cal. 291, 152 P. 920, and Union Lumber Co. v. J. W. Schouten & Co., 25 Cal. App. 80, 142 P. 910, and it was held that such amendments are not subject to the objection interposed, even though the amount demand-

ed be increased by including items formerly overlooked. In the case last cited it was said, upon abundant authority:

"* * * Both causes of action had the same and identical purpose; hence the amended complaint cannot be held to have set forth a new cause of action. * * * As both complaints were for the recovery of the price of the same lot of goods, the action itself, irrespective of the theory on which the right to recover is based, must be regarded as having been commenced when the original complaint was filed. There is no merit therefore in defendant's point that the statute of limitations had run against the cause of action set forth in the amended complaint."

The judgment is affirmed.

We concur: WORKS, P. J; THOMPSON, J.

---

95 Cal. App. 428

GREGORIEV v. NORTHWESTERN PAC. R. CO. (Civ. 6257.) ★

District Court of Appeal, First District, Division 1, California. Dec. 13, 1928.

Hearing Denied by Supreme Court Feb. 11, 1929.

1. Railroads 🔑328(1)—Failure of stranger traveling along unfamiliar highway to stop, look, and listen at railroad crossing is not negligent, where track is obscured and there is nothing to indicate presence of crossing.

Stranger traveling upon highway crossed by railroad track is not guilty of negligence by reason of failure to stop, look, and listen, where track is obscured and there is nothing to indicate its presence or warn him of its existence, notwithstanding general rule that person approaching railroad crossing must stop, look, and listen for approaching trains.

2. Railroads 🔑348(9)—Evidence sustained jury's finding in automobile driver's action for injuries at railroad crossing that plaintiff was not contributorily negligent in failing to see obscured crossing.

In automobile driver's action for injuries sustained at railroad crossing, evidence *held* to sustain jury's finding that failure of plaintiff to observe railroad track obscured by orchard and not marked by crossing signs was not due to want of ordinary care on his part so as to prevent recovery.

3. Railroads 🔑350(22)—Contributory negligence of automobile driver failing to stop at obscured crossing held for jury.

Contributory negligence of automobile driver who failed to stop at crossing, in suit for injuries sustained as result of collision at railroad crossing, *held* question of fact for jury, under evidence that plaintiff was unfamiliar with road, that railroad maintained no crossing signs, and that crossing was obscured by trees so that it could not readily be seen.

4. Negligence 🔑136(9)—Contributory negligence is for jury, unless no fact is left in doubt, and no inference other than that of plaintiff's negligence can be drawn from evidence.

It is only where there is no fact left in doubt, and no deduction or inference, other than that of plaintiff's negligence, can be drawn from evidence, by reasonable minds, that court can say as matter of law that contributory negligence is established; question being generally one of fact for the jury.

5. Railroads 🔑350(2)—Value of photograph of railroad crossing as evidence held for jury in action for injuries in crossing collision.

Value of photograph of railroad crossing, introduced in action against railroad for injuries sustained in crossing collision, was question for determination of jury, together with other evidence.

6. Railroads 🔑350(5)—Presence of gate built by railroad at crossing did not, as matter of law, warn automobile driver of existence of crossing, where gate was permitted to remain open and signs thereon were not visible.

In action against railroad for injury sustained in crossing collision, presence of wooden gate, which defendant had built to extend across road, *held* not, as matter of law, sufficient to warn plaintiff driving automobile of existence of railroad crossing, where gate was allowed to remain open and sign thereon "private crossing" was therefore not visible to the public.

7. Witnesses 🔑392(1)—Letter written by witness to railroad urging the placing of sign at crossing held admissible to impeach witness testifying that view of crossing was unobscured.

In action against railroad for injuries sustained in collision at crossing, letter urging railroad to construct crossing sign at that point *held* competent for impeachment purposes, where witness at trial testified that view of tracks and crossing was not obscured.

8. Witnesses 🔑379(1)—Prior declaration of witness, though not directly contradicting a present statement, is admissible for impeachment, where belief of witness, as indicated by the respective declarations, reveals inconsistency.

Direct contradiction between former and present statements of witness is not essential to render former statement admissible for impeachment purposes, provided there is substantial inconsistency between belief of witness as to certain matters, as indicated by his previous declarations, and that which would naturally be shown by his testimony.

9. Witnesses 🔑392(1)—Letter to railroad urging construction of signs at crossing was not rendered inadmissible for impeachment purposes, in crossing collision case, by evidence of railroad's subsequent removal of obstructions at crossing.

Letter written by witness to railroad company, urging construction of signs at crossing, was not rendered inadmissible, in action for injuries at crossing, by virtue of railroad com-

---

★Hearing denied by Supreme Court.

pany's subsequent removal of obstructions near the scene of the crossing; evidence as to the effect of the removal of the obstructions was conflicting, removal of obstructions relating to weight and not to admissibility of the evidence.

10. Appeal and error 🔑1060(2)—Improper use of letter introduced for impeachment purposes to persuade jury of defendant's negligence held not ground for reversal, where negligence was not claimed not shown otherwise.

Counsel's improper use of letter to railroad, urging construction of crossing signs, admitted for purpose of impeachment in an effort to persuade jury, in crossing collision case, that railroad's failure to erect signs was negligence, *held* not to require reversal, where other evidence as to defendant's negligent maintenance of crossing was in conflict, and no claim was made that evidence, aside from contents of letter, was insufficient to support finding in plaintiff's favor.

11. Trial 🔑296(8)—Instruction defining satisfactory evidence under repealed statute, if error, held harmless, where full and correct instructions on preponderance of evidence were also given (Code Civ. Proc. § 1835, repealed in 1923).

Instruction defining satisfactory evidence, under Code of Civ. Proc. § 1835, repealed in 1923, *held* not reversible error as to defendant, where court fully and correctly instructed jury upon subject of preponderance of evidence, especially where other instructions fully protected defendant, and error, if any, was favorable to defendant, as requiring plaintiff to establish his case by greater degree of proof than law required.

12. Trial 🔑295(1)—Charge, meaning of which, read as a whole, with reasonable construction of its parts, would be apparent to man of ordinary intelligence, cannot be held misleading.

Charge of trial court must be viewed in light of common understanding, and cannot be held misleading if its meaning as a whole, as determined from reasonable construction of various parts and their relation to each other, would be apparent to man of ordinary intelligence.

13. Railroads 🔑312(6)—Railroad was under obligation to sound warning at open crossing used generally by public as part of road dedicated and accepted by public, though railroad had not expressly consented to dedication (Civ. Code, § 486).

Where railroad crossing was open and was being used generally by the public as part of a road dedicated to and accepted by the public, railroad company was required to ring bell or sound whistle when approaching the crossing, under Civ. Code, § 486, requiring warnings to be sounded on all streets, roads, or highways, though there was no evidence to establish that railroad company expressly consented to the dedication and acceptance of the road.

14. Railroads 🔑351(9)—Instructing, that railroad was required to give warning signals at road crossings and that particular road was private way, held not erroneous in crossing collision case (Civ. Code, § 486).

In action against railroad for injuries sustained at crossing, action of court in giving instructions as to railroad's duty to sound warning at all crossings of public roads, and instruction that particular roadway was private way, *held* not erroneous as misleading or misconstruing Civ. Code, § 486, which requires warnings to be sounded on all streets, highways, or roads.

15. Appeal and error 🔑1004(1)—Award of damages may not be set aside, unless so grossly disproportionate as to shock sense of justice and indicate that award was result of passion or prejudice.

Award of damages may not be set aside, unless so grossly disproportionate as to shock sense of justice and indicate that award was result of passion or prejudice, and mere fact that amount is larger than that ordinarily allowed in such cases is not controlling.

16. Appeal and error 🔑1004(1)—Existence of passion or prejudice, requiring that verdict be set aside as excessive, may be determined only by comparing award with evidence, and question is one primarily for trial court.

Only means of discovering existence of passion or prejudice as influencing award of damages is by comparing amount of award with evidence, question being primarily for the trial court's determination.

17. Damages 🔑130(1)—$7,000 special damages to plaintiff, for destruction of automobile in crossing collision, medical and hospital expenses in treatment of plaintiff suffering punctured skull and of his family, and for loss of his earnings and services of daughter whose back was broken, held not excessive.

$7,000 award to plaintiff for special damages, including destruction of automobile in crossing collision, medical and hospital expenses in treatment of plaintiff who suffered puncturing of skull, and family loss of plaintiff's earnings, and loss of services of his daughter whose back was broken, *held* not excessive.

18. Damages 🔑132(1)—$10,500 general damages to plaintiff for injuries to himself and daughter, held not excessive where plaintiff suffered puncture of skull causing dizziness, headaches, defective hearing, and substantially postponing return to trade, and daughter's broken back required expensive hospitalization.

$10,500 for general damages resulting from injuries to plaintiff and his daughter in crossing collision *held* not excessive under evidence that plaintiff suffered puncture of skull causing dizziness, headaches, and defective hearing preventing him from following trade for some time, and that injuries to daughter, suffering broken back, required much expensive medical and surgical treatment and hospitalization.

Appeal from Superior Court, Sonoma County; R. L. Thompson, Judge.

Action by Ben Gregoriev against the Northwestern Pacific Railroad Company. Judgment for plaintiff, and defendant appeals. Affirmed.

Goodfellow, Eells & Orrick, R. W. Palmer, and Stanley Moore, all of San Francisco, and Geary & Geary, of Santa Rosa, for appellant.

Hilliard Comstock, of Santa Rosa, and Bell & Simmons, of San Francisco, for respondent.

KNIGHT, J. Respondent's sedan automobile was struck and demolished by one of the appellant's trains on June 18, 1925, at a grade crossing between Guerneville and Rionido station, Sonoma county, and as a result of the collision respondent, who was driving the sedan at the time, sustained an injured skull, his wife was killed, and his two daughters and a son, aged 12, 11, and 6 years, respecttively, who were the other occupants of the machine, were more or less injured, one of his daughters having suffered a fractured spine. Thereafter respondent commenced this action for damages, and upon trial before a jury was awarded a verdict, the amount of which was reduced by the trial court on motion for a new trial, to which reduction respondent consented; whereupon judgment for the reduced amount was entered in respondent's favor, from which judgment the railroad company has appealed.

The complaint alleged and evidence on behalf of respondent was adduced at the trial to prove that the collision was proximately caused by the railroad company's failure to maintain said crossing in a safe condition, and by the negligent operation of its train thereover. Appellant makes no point on this appeal as to the sufficiency of the evidence relating to either of the foregoing issues, but contends that respondent took no precautions whatever to observe the approach of trains before attempting to cross the track, and therefore was shown to be guilty of contributory negligence as a matter of law.

[1] It is doubtless a well-settled principle of law that a person approaching a railroad crossing is bound to stop and look and listen for approaching trains, because, as has been frequently stated, the track of a steam train is in itself a warning of danger, and a person about to cross the same must take precautions for his own safety (Herbert v. Southern Pacific Co., 121 Cal. 227, 53 P. 651; Loftus v. Pacific Electric R. Co., 166 Cal. 464, 137 P. 34); but the courts have also declared that this conceded rule is grounded upon the assumption that such person knew or should in reason have known that he was approaching a railroad crossing (Lawrence v. Southern Pacific Co., 189 Cal. 434, 208 P. 966; McClure v. Southern Pacific Co., 41 Cal. App. 652, 183 P. 248); in other words, as stated in the latter case: "It cannot be said as a matter of law that a stranger traveling upon a highway over which, unknown to him, a railway track crosses, is, by reason of his failure to stop and look and listen, guilty of negligence, where such track is obscured and there is nothing to indicate its presence or warn him of its existence." See, also, Rosenbloom v. Southern Pacific Co., 59 Cal. App. 109, 210 P. 53.

[2] The evidence here shows that respondent did not stop before attempting to cross the track, but it further shows without conflict that he was a total stranger to the regions where the accident occurred; and testimony was introduced which reasonably supports the inference that he was in fact unaware of the existence of the railroad crossing until he was too close to it to avoid being struck by the train. Indeed, appellant does not question the truth of such testimony, its position being, as stated in its brief, that it "may be true that plaintiff did not see the crossing, but," appellant asserts, "it cannot be said in the face of the record here that he could not have seen the same had he exercised any degree of care and caution."

The jury concluded, however, after hearing and considering all of the circumstances attending the accident, especially those relating to the physical conditions present at the scene thereof, that respondent's failure to observe the railroad track was not due to a lack of exercise of ordinary care on his part, and in our opinion the evidence is legally sufficient to support such conclusion.

The essential features of the evidence sustaining this view are as follows: Respondent, a resident of Contra Costa and Alameda counties for upwards of 15 years, was on his way to Fort Ross, Sonoma county, but was intending to spend the night at a camp on the Russian River, between Guerneville and Rionido, owned by a Mr. Coon. Accompanying respondent on the trip, besides the members of his family, but traveling in a separate automobile, were two others named Tsaregradsky and Sakovich. They had stopped at this particular camp the year before, and were driving a short distance ahead of respondent to show him the way. They proceeded along the main county highway out of Guerneville for some distance, and then turned into Bonita avenue, which led through Coon's property and to the camp grounds, and was the road on which the accident happened. Bonita avenue extended at right angles from the Guerneville highway southerly in a straight line for about 230 feet, and then crossed the railroad track squarely and continued on down into the Coon property. It was a narrow road having a traveled bed of only 7 feet in width, which lay in the center of a right of way 16½ feet wide. It had been constructed many years before, and originally was a private road, but long prior to the accident had been laid out and dedicated to the public on a recorded map of a subdivision of land, and formally accepted by the county, after which the road was maintained by the county and traveled generally by the public, and was the only road leading to Coon's camp grounds. The railroad company maintained no crossing signs along Bonita avenue, nor on its right of way, to call attention to the existence of the railroad crossing, nor were cattle guards constructed at the crossing, which might have indicated the presence of a railroad track. Neither was any kind of crossing signal operated at that point to give warning of the approach of trains, nor was any whistling post erected on the railroad right of way requiring engine crews to sound warning of the approach of trains, and evidence was adduced to prove that this particular train sounded no warning of any kind until instantly before the crash.

The automobile driven by Tsaregradsky and his companion was a delivery type Ford with a box back and a top. The road was dusty, and the automobiles were traveling approximately 9 miles an hour. The evidence fails to show with any degree of certainty how close behind the Ford respondent traveled down Bonita avenue, various witnesses having fixed the distance from 65 to 100 feet. But just before respondent's sedan reached the track the occupants of the Ford, having already crossed the track, suddenly saw the train approaching from the east, traveling, as the engineer afterwards testified, at a speed of 35 miles an hour. Tsaregradsky at once waved his hand through the broken window in the rear of the Ford top in an effort to warn respondent of the impending danger, but respondent did not understand the meaning of the signal. Immediately thereafter, however, he heard and saw the train, and instantly applied his brakes and turned quickly to the right in an effort to avoid being struck, but the projecting cross timber on the front of the locomotive caught the front end of the sedan, hurled it around, and it was crushed between the side of the locomotive and a large redwood stump standing in the railroad right of way a few feet from the track, with the result already described.

The physical conditions present, other than those mentioned, which respondent claims and the jury found obstructed the view of the railroad and obscured the crossing, were shown to be substantially as follows: Extending along both sides of Bonita avenue from the Guerneville highway to the railroad crossing was an apple orchard which grew close to, and some of the tree branches extended for a considerable distance over the fence on each side of, the right of way. The trees were fully matured, being 8 or 9 feet high, in good condition, and at this particular season of the year were dense with foliage; and standing among the trees, close to the right of way on the easterly side, were several large redwood stumps; and along and within both rights of way there was a considerable growth of weeds and wormwood brush, which along the fences grew fence high. Where the roadbed crossed the track the railroad company had laid planking between the rails flush therewith and with the grade of Bonita avenue, but more or less grass was growing between the planking and the rails, and between the ties; and dirt and gravel had been tracked upon and across the planks by the county road crew in scraping and grading the approaches to the railroad crossing shortly prior to the accident. In connection with the foregoing physical conditions, testimony was introduced to the effect that because of them the railroad right of way on both sides of the crossing could not be readily seen, and that the crossing itself was not plainly discernible to persons traveling from the Guerneville highway down to Bonita avenue toward said crossing.

[3, 4] Such being the facts and circumstances, we are not prepared to hold as a matter of law, contrary to the finding of the jury, that a reasonably prudent person, situated as respondent was, would have observed said crossing in time to have averted a collision. As often said, rarely is a set of circumstances presented which enables a court to say, as a matter of law, that negligence has been shown. It is usually a question of fact for the jury, an inference to be deduced from the circumstances of each particular case. Gregg v. Western Pacific R. Co., 193 Cal. 212, 223 P. 553; Seller v. Market-Street R. Co., 139 Cal. 268, 72 P. 1006. Even where there is no conflict in the evidence, if different conclusions upon the subject can be rationally drawn therefrom, the jury's determination is controlling. If only one conclusion is reasonably deducible from the evidence, then, of course, it becomes a question of law for the court, "but if one sensible and impartial man might decide that the plaintiff had exercised ordinary care, and another equally sensible and impartial man that he had not exercised such care, it must be left to the jury." Herbert v. Southern Pacific Co., supra; Hoff v. Los Angeles Pacific Co., 158 Cal. 596, 112 P. 53. Therefore, it is only where no fact is left in doubt, and no deduction or inference other than negligence can be drawn by the jury from the evidence, that the court can say, as a matter of law, that contributory negligence is established; and, even where the facts are undisputed, if reasonable minds might draw different conclusions upon the question of negligence, the question is one of fact for the jury. Johnson v. Southern Pacific R. Co., 154 Cal. 285, 97 P. 520; Zibbell v. Southern Pacific Co., 160 Cal. 237, 116 P. 513; Seller v. Market-Street R. Co., supra. At most, the evidence here is such that reasonable minds might draw different conclusions therefrom, and, that being so, on appeal, the jury's determination cannot be set aside. Rosenbloom v. Southern Pacific Co., supra; Zibbell v. Southern Pacific Co., supra;

Alloggi v. Southern Pacific Co., 37 Cal. App. 72, 173 P. 1117; Wing v. Western Pacific R. Co., 41 Cal. App. 251, 182 P. 969; Lawrence v. Southern Pacific Co., supra.

[5, 6] Appellant introduced in evidence a photograph of the railroad crossing taken from Bonita avenue at a point about 75 feet northerly of the crossing, which it claims constitutes "the most important piece of evidence covering this feature of the case, and settles without conflict the question of whether or not the rails were obscured." A similar contention was made with reference to a like photograph in the case of Vaca v. Southern Pacific Co. (Cal. App.) 267 P. 346, but was disposed of adversely in the following language: "The value * * * of a photograph as evidence is not for this court to determine, for, as was said in People v. Crandall, 125 Cal. 129, 133, 57 P. 785, 787: 'We may assume that everyone now understands the limitations upon the use of the photograph. It presents but one point of view, and may sometimes make an unfair representation of the points at issue. Like any other diagram, its value must be determined by the jury, from all the evidence.'" Much reliance is also placed upon the fact that the railroad company had built a wooden gate along the northerly side of its right of way to extend across Bonita avenue, and that on one side of the top board had painted a sign reading: "Keep This Gate Closed," and on the board next below had painted a smaller sign reading: "Private Crossing." But in this connection, the evidence reveals that for a long time prior to the accident, and on the day thereof, this gate, on account of being out of repair, was allowed to remain open, having been swung toward the railroad track so as to form a continuation in a straight line of the easterly right of way fence of Bonita avenue, and that as a consequence the signs were not plainly visible to persons traveling southerly along Bonita avenue; moreover, even though the signs were visible, there was nothing in the wording of them indicating the presence of a railroad crossing; and, as respondent explained, when he saw the machine ahead pass through the open gateway without stopping and proceed toward the house beyond, he believed the gateway simply marked the entrance to the camp ground. Under the circumstances stated it cannot be fairly held as a matter of law that the presence of the gate under the conditions above described was sufficient in itself to warn respondent of the existence of the railroad crossing.

Other evidence was introduced by appellant to prove that, after having entered the railroad right of way, a person was able to see approaching trains for a considerable distance down the track, but the testimony on this point was conflicting, other evidence having been adduced to show that the view was more or less obstructed by the wooden gate and by a growth of suckers approximately 7 feet high, which had sprouted from the stumps of the apple trees standing within the railroad right of way. In any event, the matters above referred to only added to the conflict already existing upon the question of whether respondent, as an ordinarily prudent man, should have observed the crossing, and are not sufficient of themselves to nullify the finding of the jury on that issue.

[7, 8] Appellant assigns as error a ruling made during the cross-examination of Mr. Coon, admitting in evidence, over appellant's objection, a letter dated July 26, 1922, written by Coon to the railroad company, which read as follows: "Would like very much to get a crossing sign placed at North side of Track on Bonita avenue, El Bonita Ranch, between Guerneville and Rionido. The crossing is being used more now than before, and believe for 'Safety First' would be the thing to do. Will be more than pleased to assist in any way for the general good of all." The letter was admitted as impeachment evidence, and we think the ruling proper. Mr. Coon was called as a witness for appellant and in part testified as follows: "Q. A person driving in an automobile turning into that roadway off the Guerneville-Rionido Highway could see at all times as they proceeded toward the railroad tracks the railroad crossing across the roadway? A. I think they could. * * * Q. Would you say, looking down that road, based upon your experience, all the time you used it, there was no obstruction between the rails and the county highway? A. Not to my knowledge. * * * Q. You say the view was quite open there, Mr. Coon? A. The view of the crossing? Q. Yes. A. It was."

The clear impression created by the foregoing testimony, and more to the same effect, was that at the time of the accident the railroad crossing was open and visible at all times to persons traveling south on Bonita avenue, and consequently was safe without the maintenance of a crossing sign thereat; whereas the plain effect of the letter, which apparently was written and sent for the sole purpose of having a crossing sign erected at that point, was that without such sign the crossing was not safe. A substantial inconsistency appears, therefore, between the testimony of the witness and the statements made in said letter which in our opinion justified the admission of the letter in evidence. Hanton v. Pacific Electric R. Co., 178 Cal. 616, 174 P. 61; Worley v. Spreckels Bros. Co., 163 Cal. 60, 124 P. 697. In the former case the court held that it was not necessary that there should be contrariety in terms between the testimony given and the asserted impeaching statement, but it was only necessary in order to render it admissible that the statement should have a tendency to contradict or disprove the testimony or any inference to be deduced from it. And in Worley v. Spreckels Bros. Co., supra, the court quoted approvingly the following rule from Wigmore, Evidence (vol. II, § 1040): "As a general principle, it is to be understood that this inconsistency is to be determined, not by individual words or phrases alone, but by the whole impression or effect of what has been said or done. On a comparison of the two utterances, are they in effect inconsistent? Do the two expressions appear to have been produced by inconsistent beliefs?" One of the cases cited by the author in support of the foregoing text is Foster v. Worthing, 146 Mass. 607, 16 N. E. 572, which seems particularly pertinent here. It is there said: "It is not necessary, in order to make the letter competent, that there should be a contradiction in plain terms. It is enough if the letter, taken as a whole, either by what it says or by what it omits to say, affords some presumption that the fact was different from his testimony. And in determining this question, much must be left to the discretion of the presiding judge." The rule stated in Cyc. is to the effect that there need be no direct contradiction between the two statements if they differ in any material particular, and that accordingly, "if there is an inconsistency between the belief of the witness as to certain matters as indicated by his previous declarations, and that which would naturally be indicated by his testimony, such prior declaration may be shown, although not directly contradictory of any specific statement made on his examination. * * * 40 Cyc. p. 2701. It may be conceded that a somewhat narrower rule was declared in People v. Collum, 122 Cal. 186, 54 P. 589, upon which appellant seems to rely, but the rule as there stated was in effect disapproved in Worley v. Spreckels Bros. Co., supra, in the following language: "We are aware that there are some expressions in the opinion in People v. Collum, 122 Cal. 186 [54 P. 589], that may appear inconsistent with our ruling on this question. In so far as that opinion may be construed as holding that notwithstanding the natural effect and impression of inconsistency, nevertheless if both statements (the one on the trial and the prior statement) may be literally true on some conceivable hypothesis, the prior statement may not be shown, we think it goes too far and does not state the correct rule."

[9] Appellant claims also that the letter was inadmissible, because subsequent to its date and prior to the accident the railroad company removed some of the obstructions near the scene of the crossing, and thus avoided the necessity of erecting a crossing sign. But there is a conflict in the evidence as to the effect of the removal of said obstructions, and, aside from such conflict, the point mentioned would have relation only to the weight which should be given to the letter as impeachment evidence, and would not affect its admissibility.

[10] Appellant further complains that, although the letter was admitted for the purpose of impeachment, respondent afterwards wrongfully used it in his argument in an effort to persuade the jury that the railroad company had negligently failed to erect a crossing sign after having been warned of the increased travel on Bonita avenue. Even though such use of the letter was improper, the impropriety would not call for a reversal of the judgment, because, when put to such use, the letter only added another circumstance to the already existing conflict bearing upon the question of the negligent maintenance of the crossing, and appellant makes no contention on this appeal that, aside from the contents of said letter, the evidence is insufficient to support the finding of the jury on that issue.

[11, 12] The court instructed the jury in part as follows: "In civil cases the affirmative of the issue must be proven. In this case the affirmative rests upon the plaintiff, and he must establish every material allegation of his complaint by a preponderance of the evidence, except as to the question of contributory negligence on the part of plaintiff, which must be proven by the defendant railroad, unless the evidence of plaintiff affirmatively shows such contributory negligence. Preponderance means, not the greater number of witnesses, but the greater weight of evidence. You are not compelled to decide in accordance with the testimony of any number of witnesses unless their evidence carries conviction to your minds. The direct evidence of a single witness, who is entitled to full credit or legal presumptions which may apply or any other competent evidence which is adduced, may be convincing or satisfactory to you as to the truth of the particular issue. *Evidence is satisfactory which ordinarily produces moral certainty or conviction in an unprejudiced mind; such evidence alone will justify a verdict.* It is unnecessary for your minds to be free from all doubt. It is your duty to decide in favor of the party on whose side the weight of evidence preponderates, and according to the reasonable weight and effect of the evidence adduced." (Italics ours.)

Appellant contends that the instruction as given violated the fundamental principle that the affirmative of the issue in civil cases shall be established by a "preponderance of the evidence," and gave to the jury an erroneous definition of that term, citing People v. Miller, 171 Cal. 649, 154 P. 468, and In re Estate of Ross, 179 Cal. 629, 178 P. 510.

The italicized portion of the instruction is doubtless a restatement in exact language of the definition of "satisfactory evidence" set forth in section 1835 of the Code of Civil Procedure which was repealed in 1923, apparently for the purpose of preventing continual confusion of the definition of satisfactory evidence with that of the preponderance of evidence. For that reason it would seem that the italicized portion of said instruction should have been omitted. But, as will be observed, preceding and following the italicized portion defining satisfactory evidence, the jury was fully and correctly instructed upon the subject of preponderance of evidence, and was given a correct definition of that term. Therefore, as held in the cases hereinafter cited, the insertion of the matter relating to satisfactory evidence does not constitute reversible error. Boa v. San Francisco, etc., Terminal Rys., 182 Cal. 93, 187 P. 2; Lawrence v. Goodwill, 44 Cal. App. 440, 186 P. 781; Fidelity Co. v. Paraffine Paint Co., 188 Cal. 184, 204 P. 1076. Besides, the jury was instructed that there "can be no recovery for damages for injuries sustained by a person who was struck by a railroad train at a grade crossing where a preponderance of the evidence shows that even though the train might have been moving at an excessive rate of speed without warning that the proximate cause of the accident was the negligence of the injured party in approaching such crossing without exercising the care and caution which the law requires"; and it was also instructed repeatedly, at appellant's request, that, if it found that plaintiff was guilty of negligence "which contributed in any manner or even in the slightest degree directly or proximately to the injuries sustained by him," he could not recover, and that the verdict should be in favor of the railroad company. It would seem, therefore, that the jury could not have been misled by the insertion of the former code definition of satisfactory evidence. As held in Hayden v. Consolidated Min. Co., 3 Cal. App. 136, 84 P. 422, the charge must be viewed in the light of common understanding, and the practical administration of justice should not be defeated by a too rigid adherence to close or technical analysis of the whole or any part thereof; and if, by taking the charge by its four corners and placing a reasonable, unstrained construction on each of its several parts as viewed in the light of the general context and the relation of each part to the other, a man of ordinary intelligence, reading the charge intended for his guidance, would be able to ascertain its meaning as a whole, the instruction cannot be said to be misleading.

Moreover, even though it be assumed that the instruction be subject to the criticism appellant makes against it, the ill effect thereof doubtless operated more to the detriment of respondent than it did to appellant, because, if given the construction appellant contends for, it required respondent to establish his case of negligence against appellant by a greater degree of proof than the law demanded.

The instruction given in the present case is easily differentiated from those given in the cases cited and relied upon by appellant. People v. Miller, supra, and In re Estate of Ross, supra. In each of those cases, as will be noted by comparing the former code definition of satisfactory evidence with the objectionable instructions given in those cases, the trial court, in defining the term preponderance of evidence, gave virtually the code definition of "satisfactory evidence"; and in neither case was any other instruction given upon the subject of preponderance of evidence. It is evident, therefore, that the juries in those cases must have been misled as to the law relating to the degree of evidence necessary to warrant a finding on the facts. Here, as pointed out, in the forepart of its instructions, as well as in the latter part thereof, the term preponderance of evidence was correctly defined, and the jury rightly instructed upon that subject. Therefore, under the authority of the cases hereinabove cited, even though it be deemed that the insertion of the former code definition of satisfactory evidence was improper, a reversal of the judgment on that ground is not warranted.

[13, 14] The court also gave certain instructions relating to the duty imposed upon a railroad company by the provisions of section 486 of the Civil Code to ring a locomotive bell and sound a whistle, a certain distance from the place where the railroad crosses "any street, road, or highway," etc. In this regard the court stated, among other things, that such requirement applied not only to crossings of "roads or highways which have been dedicated to the public, and are regularly maintained as county roads, but applies to all public roads, upon which the public generally are entitled to travel"; furthermore, that "wherever a road which crosses a railroad is apparently open to the public and is used by it with the assent and acquiescence of the railroad company, if you find such to be the facts, it is its duty to give signals for the benefit of travelers on the road when approaching such crossings; and that this is true whether or not the road has been legally established by dedication, prescription, or acquiescence." At appellant's request the jury was further instructed "as a matter of law that the roadway known * * * as Bonita Avenue was at the time of the accident * * * a private way *over and cross the right of way of the Northwestern Pacific Railroad Company.*" (Italics ours.) But the court refused to give another instruction proposed by appellant to the effect that Bonita avenue was not a "public highway," and that consequently appellant was not compelled by said code section "to give any warning of the approach of the train at a crossing of the character involved in this case." Appellant contends that the instructions as given were not only conflicting, but that the evidence shows that the Bonita avenue crossing was merely a "farm crossing" and not a "street, road or highway" crossing within the meaning of the said code section; and that therefore no duty

was imposed upon the railroad company under said section 486 to ring a bell or sound a whistle when approaching said crossing, and that the jury should have been so instructed. We find no merit in either contention. Summarizing the instructions, the plain meaning thereof was that, even though Bonita avenue was a private way "over and across the right of way" of the railroad, the company was nevertheless obliged to comply with the requirements of section 486 if the jury found that the crossing was open to and used generally by the public "with the assent and acquiescence of the railroad company. * * *" As thus interpreted the instructions appear to be in entire harmony with appellant's construction of said code section, as stated in its brief, for it is there said: "The statute (Civil Code, section 486) provides that the warnings be sounded at all streets, highways, or roads and does not specifically state that such streets, highways or roads be public thoroughfares. This statute has been construed in this state in Orcutt v. Pacific Coast Ry. Co., 85 Cal. 291, 24 P. 661, and Vance v. Atchison, T. & S. F. R. Co., 9 Cal. App. 20, 98 P. 41, and both of these cases hold that, if the crossing is an open one and the road is one in general use by the public, the statutory warnings should be sounded, regardless of whether or not there had been a formal dedication of the road to public use." The evidence here establishes a legal dedication and acceptance of Bonita avenue, and a constant use of it thereafter by the general public; and, although there is no evidence to show that the railroad company expressly consented to such dedication and acceptance, it does appear, without substantial conflict, that, since the acceptance of said road, work has been done by Sonoma county along the entire length of it, including the portion which crosses the railroad right of way; also that the crossing was an open one because of the fact that, for a long time prior to the accident, appellant allowed its gate to fall into disrepair and to stand open continuously; that standard crossing planking was placed between the rails, and that appellant's train crews had knowledge of the increased use of the road by the general public, particularly during the summer months, at which time this accident occurred. Therefore, even assuming, as the court instructed at appellant's request, that the particular portion of Bonita avenue where it crossed the railroad's right of way remained "a private way," nevertheless, the evidence shows that the crossing was an open one and was being used generally by the public as part of a road dedicated to and accepted by the public; consequently, even under appellant's construction of the law, the status of the crossing has been brought within the provisions of said code section.

The jury awarded damages in the sum of $25,000, but, by court order, acquiesced in by respondent, the amount was reduced to $17,500; and appellant contends that even as reduced the amount is excessive. The evidence supports an allowance of approximately $7,000 for special damages, including destruction of property, medical and hospital expenses necessarily incurred up to the time of trial in the treatment of respondent and his family; loss of respondent's earnings up to the time of trial, and loss of services of his daughter, whose back was broken. This would leave $10,500 to be accounted for in general damages, which would include those necessarily flowing from respondent's personal injuries and the expenses to be incurred by him in providing necessary medical and surgical treatment, and hospitalization for his injured daughter.

With reference to respondent's injuries, the evidence shows that they were severe, painful, and some of them doubtless permanent. The outer shell of his skull, protecting the sinus, was punctured, the wound being three inches long on the surface and two inches long where the sinus was penetrated; and he suffered numerous lacerations about the forehead and face, some of which will leave permanent scars. The injury to the sinus developed a case of chronic sinusitis, causing dizziness, headaches, defective hearing, and a constant discharge through the nose. He also sustained a nervous shock, which the testimony shows would prevent him for some time at least from following his trade as a shoemaker, out of which he had been making clear earnings of $300 a month for more than 10 years. His daughter's injuries, it was shown, would necessarily require much expensive medical and surgical treatment and hospitalization. Her back was broken by being "jackknifed" or crushed forward, thereby also injuring certain internal organs and paralyzing one leg. Since the accident she had been compelled to wear a steel jacket to prevent further deformity and to allow the bones of the spine to "become solid," and her doctor testified that when the bones reach that stage certain operations would be necessary, the object being "to take out the gristle from between these bones and let the bones come together, and take a portion of the bone and strap them and lay them down close so they all become one solid mass, bridging the broken bone in the middle to the good bone above and the good bones below"; and that for at least two months following the operation the girl would be compelled to lie on her back in a specially arranged bed, with her body covered with a plaster cast extending from her chest to her hips, during which period she would require the attention of special nurses.

[15, 16] The rule is well settled that awards for personal injuries cannot be declared excessive, as a matter of law, merely because the amount may be larger than is ordinarily allowed in such cases. James v. Oakland

Traction Co., 10 Cal. App. 785, 103 P. 1082. It is only when the award is so grossly disproportionate as to shock the sense of justice and indicate that the award was the result of passion or prejudice that it may be set aside (Averdieck v. Barris, 63 Cal. App. 495, 218 P. 786; Harrison v. Sutter St. Ry. Co., 116 Cal. 156, 47 P. 1019; Martin v. Shea, 182 Cal. 130, 187 P. 23; Anstead v. Pacific Gas & Electric Co. [Cal. Sup.] 265 P. 487), and the only means of discovering the existence of passion or prejudice as influencing the award is by comparing the amount of the award with the evidence, the question being primarily one to be determined by the trial court (Zibbell v. Southern Pacific Co., supra).

[17, 18] After having heard all of the evidence relating to respondent's personal injuries, and having had the opportunity to observe his physical and mental condition while testifying in court, and having also heard the evidence as to the future medical and surgical treatment required to be given respondent's injured daughter, the trial court reduced the amount awarded by the jury to such sum as it believed was fair and just; and, in view of the facts above narrated, we cannot say as a matter of law that the amount finally allowed is unwarranted and unreasonable.

The judgment is affirmed.

We concur: TYLER, P. J.; CASHIN, J.

---

95 Cal. App. 447

GREGORIEV v. NORTHWESTERN PAC. R. CO. (Civ. 6530.)★

District Court of Appeal, First District, Division 1, California. Dec. 13, 1928.

Hearing Denied by Supreme Court Feb. 11, 1929.

1. Death ⇨64—Evidence of permanent afflictions of child existing at death of parent, as result of which a child has right to expect greater measure of care and assistance, is admissible to aid in determination in action for parent's death.

Evidence of permanent afflictions of child existing at time of death of parent, by reason of which child had right to expect from parent greater measure of care and assistance, is admissible to aid jury in determination of appropriate damages, and is proper element to be considered in determining value of parent's life to child in action for death of parent.

2. Death ⇨64—In death action, evidence of crippled condition of daughter, resulting from same accident which brought about subsequent death of mother, held admissible in question of damages.

In father's action, as administrator of mother's estate, to recover damages on behalf of himself and minor children on account of death of wife in crossing accident, in which daughter was permanently crippled and mother received injuries which later caused death, evidence of child's crippled condition at time of death of mother *held* admissible in determining extent of her pecuniary loss, in view of likelihood that mother would supply greater measure of care and assistance than otherwise.

3. Appeal and error ⇨1052(5)—Admission of evidence of crippled condition of child held harmless in action for mother's death, where trial court's written opinion showed no extra allowance was made on that ground.

Where it appeared from written opinion, filed by trial court in action for death, that trial court made no extra allowance for damages to children because of crippled condition of one child, admission of evidence, that such child was permanently crippled, for purpose of increasing award of damages, if error, was not prejudicial.

4. Appeal and error ⇨533(1)—Trial court's written opinion, though not part of record on appeal, may be cited by counsel.

While written opinion of trial court constitutes no part of record on appeal, counsel may cite in argument, and it may sometimes aid the court in the solution of question which it is cited.

5. Railroads ⇨347(9)—Recorded map, showing way on which crossing collision occurred had been dedicated to public use and accepted by county and treated as open crossing by railroad, was admissible to show necessity of railroad companies sounding warning (Civ. Code, § 486).

In action for death resulting from crossing collision, recorded map, which showed that road on both sides of boundaries on railroad's right of way had been dedicated to public use and accepted by county, and that railroad treated crossing as an open one, *held* admissible to show that the way was a street, road, or highway within Civ. Code, § 486, requiring railroad companies to sound warning at crossings by locomotive bell or whistle.

6. Railroads ⇨312(6)—Railroad was required to sound warning at crossing on way dedicated to public, where it recognized crossing as an open one, though railroad may not have expressly joined in dedication (Civ. Code, § 486).

Way which had been dedicated to public use by owners of land and accepted on behalf of county was "street, road, or highway," on crossing, which railroad was required to sound warning by locomotive bell or whistle, under Civ. Code, § 486, where railroad treated crossing as open one with knowledge of its general use by the public, though railroad may not have expressly joined in dedication of that part of way lying within its right of way.

Appeal from Superior Court, Sonoma County; R. L. Thompson, Judge.

Action by Ben Gregoriev, as administrator of estate of Ksani Gregoriev, deceased, against the Northwestern Pacific Railroad Company. Judgment for plaintiff, and defendant appeals. Affirmed.

★Hearing denied by Supreme Court.

Goodfellow, Eells & Orrick and R. W. Palmer, all of San Francisco, and Geary & Geary, of Santa Rosa, for appellant.

Hilliard Comstock, of Santa Rosa, and Bell & Simmons, of San Francisco, for respondent.

KNIGHT, J. This is an action for damages, and is a companion case to one entitled Gregoriev v. Northwestern Pacific R. R. Co., Civil No. 6257, 273 P. 76, wherein the judgment in favor of the plaintiff has been this day affirmed by this court. The actions arose out of a collision which occurred between Gregoriev's automobile and the steam train of appellant at a grade crossing, near Guerneville, Sonoma county. At the time of the accident Gregoriev was driving his own automobile, a seven-passenger sedan, and riding with him were his wife, two daughters, aged 12 and 11 years, respectively, and a son, aged 6 years. As a result of the collision, Gregoriev's wife sustained injuries from which she died within a few hours after the accident, and Gregoriev and the children were all more or less severely hurt, one of the girls being permanently crippled by having suffered a fractured spine.

The companion action was commenced by Gregoriev in his own right to recover damages which he claims to have sustained on account of his personal injuries, the destruction of his property, expenses incurred by him in providing medical treatment and hospitalization for his family, and loss of his daughter's services. It was tried before a jury, and a verdict was rendered in respondent's favor; and from the judgment entered thereon the railroad company appealed, with the result above stated. The present action was brought by Gregoriev, as administrator, to recover damages on behalf of himself and minor children on account of the death of his wife. It was tried before the court sitting without a jury, and judgment was given in respondent's favor, from which the railroad company also appealed.

The two main grounds urged for reversal here are that respondent was guilty of contributory negligence, as a matter of law, in that he drove upon the railroad crossing, as appellant claims, without taking precautions for his own safety and that of his family; and that the trial court erred in admitting in evidence, over appellant's objection, a letter, dated July 26, 1922, written by R. S. Coon to the appellant company, requesting the erection and maintenance of railroad crossing signs at the crossing where the collision occurred.

The evidence adduced at both trials as to the circumstances leading up to and attending the accident was substantially the same, and the two identical points now urged for reversal were fully presented on the other appeal upon the same argument and authorities now submitted; but it was there held that the same were not maintainable. Therefore, in accordance with our decision in that case, and upon the grounds and for the reasons set forth in the opinion rendered therein, it must be held here that said points are without substantial merit.

[1] Appellant urges also that the trial court erred in allowing respondent to introduce testimony concerning the injuries received by respondent's daughter, and in admitting in evidence a map which will be hereinafter referred to. With respect to the admissibility of said testimony, the well-recognized rule is that evidence of permanent afflictions of a child, existing at the time of the death of the parent, by reason of which the child had a right to expect from the parent, had the parent lived, a greater measure of comfort, care, and assistance than had such affliction not existed, may be introduced to aid the jury in its determination of the appropriate damages, and is a proper element to be considered in determining the value of the parent's life to the child, and as measuring the child's pecuniary loss. 8 Cal. Jur. p. 1036; Simoneau v. Pacific Electric R. Co., 166 Cal. 264, 136 P. 544, 49 L. R. A. (N. S.) 737. Appellant does not question the foregoing rule, except that it contends that such evidence is admissible only where the permanent afflictions existed at the time of the commission of the tortious act, and not where the same arose subsequent thereto, even though they may have existed at the time of death. Appellant cites no authority to support its contention, and the rule as stated in Simoneau v. Pacific Electric R. Co., supra, appears to be otherwise, for it is there said: "The cause of action of the family of the deceased arose immediately upon his death and the defendant became then responsible to them in damages for the probable pecuniary loss suffered by them in being deprived of the future support, care, comfort, and society of the deceased. But this pecuniary loss was to be determined by conditions *existing at the time of the death of the deceased*, taking into consideration in measuring it these prospective benefits which the members of the family were deprived of by his death." (Italics ours.)

[2-4] In the case at bar the daughter's affliction did not arise subsequent to the death of her mother. She was permanently crippled by the identical blow which brought about the subsequent death of the mother, and this condition continued up to and existed at the time of such death, at which time only did the cause of action in favor of the child, as an heir, arise. If, therefore, as declared in the case cited, the pecuniary loss to the child is "to be determined by conditions existing at the time of the death of the deceased," the evidence was admissible. Moreover, the main reason given by the courts for the exclusion of evidence of permanent afflictions of an heir, which occurred after the

death of the deceased, is that it has a tendency to "arouse the sympathy of the jury to the end that they might improperly enhance the amount of damages to be awarded beyond what the competent evidence in the case would have permitted" (Simoneau v. Pacific Electric R. Co., supra; Green v. Southern Pacific Co., 122 Cal. 564, 55 P. 577); but it is evident that in the present case the testimony in question, even if erroneously admitted, did not operate to appellant's injury, for the reason that it appears from the written opinion filed by the trial court that, in measuring the probable pecuniary loss which it believed the three children sustained on account of their mother's death, it treated the condition of all three children on an equal basis, as being normal, and made no extra allowance because of the crippled condition of this particular child; and although, as appellant suggests, a written opinion of the trial court constitutes no part of the record on appeal, still, as has been held, counsel may cite it in argument, as they may any other opinion given at nisi, and it may sometimes aid the court in a solution of the question upon or to which it is cited. White v. Merrill, 82 Cal. 14, 22 P. 1129.

[5, 6] The map which appellant claims should have been excluded is the recorded map referred to in our decision in the other case. It was offered and received in evidence in the present case with relation to the issue as to whether Bonita avenue crossing, where the accident occurred, was of the character contemplated by the provisions of section 486 of the Civil Code, which requires railroad companies to sound warning by locomotive bell or whistle, upon the approach of its trains at the crossing of "any street, road, or highway"; and we are of the opinion that for such purpose the map was clearly admissible. It showed that Bonita avenue, on both sides of the boundaries of the railroad's right of way, had been dedicated to public use by the owners of the land over which it was laid out and built, and duly accepted on behalf of the county by the board of supervisors many years prior to the happening of the accident; and it was further shown in connection therewith that, although the railroad company may not have expressly joined in the dedication of that portion of Bonita avenue lying exclusively within the confines of the railroad's right of way, it nevertheless treated said crossing, for a considerable length of time prior to the accident, as an open one, and had knowledge of its general use by the public. Therefore, under the authorities cited in our decision in the companion case, Bonita avenue was to all intents and purposes a "street, road, or highway" within the meaning of said section 486 of the Civil Code, irrespective of whether the particular portion thereof lying within the boundaries of the railroad's right of way was a public highway, as found by the trial court, or a private way, as appellant contends.

The judgment is affirmed.

We concur: TYLER, P. J.; CASHIN, J.

95 Cal. App. 690

CHADWICK v. CHADWICK. (Civ. 3659.)

District Court of Appeal, Third District, California. Dec. 21, 1928.

1. Divorce 🔑236—Irrespective of validity of wife's agreement releasing all claims against husband, trial court held authorized to award permanent alimony in subsequent divorce action (Civ. Code, §§ 139, 159).

Irrespective of validity as property settlement under Civ. Code, § 159, of written agreement between husband and wife, who had previously separated, and which agreement merely purported to relinquish all wife's claims against husband, his heirs, executors, and administrators, without making any provision for support of wife, trial court had power under section 139 to make provision for support of wife by granting permanent alimony in subsequent divorce action.

2. Husband and wife 🔑30—As to consideration for property settlement, "illegality" implies moral turpitude, "invalidity," legislative prohibition, and "inadequacy," something rendering settlement unenforceable (Civ. Code, § 159).

As applied to consideration for property settlement between husband and wife under Civ. Code, § 159, word "illegality" implies that instrument is not only contrary to law, but contains some element of moral turpitude, while instrument may be "invalid" simply because in interests of society Legislature has prohibited making or entering into such agreement, and "inadequacy" imports nothing of illegality, but may be of such minor quantity as to render instrument invalid or unenforceable.

[Ed. Note.—For other definitions, see Words and Phrases, First, Second, and Third Series, Illegality; Inadequacy; Invalid.]

3. Divorce 🔑236—Rigor of rule as to confidential relations is somewhat lessened when husband and wife are separated and negotiating at arm's length for property settlement (Civ. Code, §§ 158, 159).

Under Civ. Code, § 158, rule as to confidential relations exists as between husband and wife, but rigor of its application is somewhat lessened when husband and wife are separated and particularly where they have been separated for a considerable period of time and, though still husband and wife, are negotiating more or less at arm's length for property settlement under section 159.

4. Divorce 🔑236—Wife could not complain in divorce action because she failed to read instrument making property settlement, where she was represented by attorney (Civ. Code, § 159).

Wife cannot complain in divorce action because she failed to read terms of instrument purporting to be a property settlement within Civ. Code, § 159, executed after she separated from husband, where she was represented in transaction by an attorney.

5. Divorce ⚷236—Wife's written release of all claims against husband, from whom she was separated, for $1,850 held valid in absence of showing of unfair advantage.

Written instrument whereby wife, who had previously separated from husband, conveyed realty to him and any right, title, or interest she might have in his property, or property which he might thereafter acquire, in consideration of husband's cash payment to her of $1,850, *held* based on adequate consideration, in absence of showing that husband took unfair advantage of marital relation to secure execution of instrument.

6. Divorce ⚷236—Husband and wife who had separated could contract with each other for property settlement (Civ. Code, §§ 158, 159).

Under Civ. Code, §§ 158, 159, husband and wife were not prohibited from contracting with each other respecting property settlement, where they had previously separated.

7. Divorce ⚷236—Invalidity of one of two instruments relating to property settlement executed between husband and wife at same time did not affect validity of other relating to different matters.

Where wife's release of all claims against husband from whom she was separated and another instrument purporting to make property settlement between parties related to different subject-matters, invalidity of one of such instruments did not affect validity of the other, though they were executed at same time and as part of same transaction.

Appeals from Superior Court, San Diego County; W. P. Cary, Judge.

Divorce action by Ida Chadwick against William J. Chadwick, for whom on his death was substituted his executor, Richard W. Chadwick. From the judgment, both parties appeal. Affirmed.

Crouch & Sanders and F. G. Blood, all of San Diego, for plaintiff.

Sweet, Stearns & Forward, Richard M. Kew, and Sherman Lacey, all of San Diego, for defendant.

PLUMMER, J. In this action both parties have appealed from that portion of the judgment considered adverse to the interest of the party appealing. Both appeals are presented upon the same transcript and argued in the same briefs. For convenience, we will refer to the parties as "plaintiff" and "defendant," just as the title to this cause appeared in the trial court.

The action was brought by the plaintiff to secure a divorce from the defendant and division of alleged community property, and involves the question of the validity of two certain agreements dated May 23, 1908. The action for divorce was begun on July 10, 1924. The trial court found one of the instruments, designated as "Exhibit Number 1," valid, as being simply a property settlement, and determined that the instrument designated as "Exhibit Number 2" was invalid in that it violated the provisions of section 159 of the Civil Code. The decree awarded the plaintiff a divorce and $50 a month as permanent alimony. The appeal of the plaintiff involves the instrument designated as "Exhibit Number 1," while the appeal of the defendant relates to that part of the judgment declaring Exhibit No. 2 invalid. Exhibit No. 1 is in the words and figures following, to wit:

"I, Ida Chadwick, the wife of William J. Chadwick, of the County of Los Angeles, State of California, for and in consideration of the sum of Eighteen Hundred and Fifty Dollars, United States Gold Coin, to me in hand paid this day by said William J. Chadwick, do, by these presents, grant, bargain, sell and convey unto the said William J. Chadwick, of the City of San Diego, County of San Diego, State of California, all those certain pieces or parcels of land situated in the City of San Diego, County of San Diego, State of California, and described as follows, to wit: Lots numbered twenty-three and twenty-four, in Block numbered Seven, of Cleveland Heights Addition, in the City of San Diego, County of San Diego, State of California, according to map thereof No. 621, filed in the office of the County Recorder of said County of San Diego, February 4th, 1890. Also any right, title, interest, and estate, of every name and nature whatsoever which the said grantor, Ida Chadwick, now has, in or to any and all property of the said William J. Chadwick, which he now has or which he may hereafter acquire, whether the same be located in the State of California, or in any other state in the United States of America, and whether the same be real property, mixed property, or personal property. In Witness Whereof, I have hereunto set my hand and seal this 23rd day of May, 1908. [Seal.] Ida Chadwick."

This instrument bears the certificate of H. E. Doolittle, a notary public in and for the county of San Diego, setting forth that it was duly acknowledged by the said Ida Chadwick on the 23d day of May, 1908, the date of its execution.

Exhibit No. 2 is in these words:

"This Indenture made this 23rd day of May, 1908, between Ida Chadwick, of the County of Los Angeles, State of California, the wife of William J. Chadwick, hereinafter described, party of the first part, and William J. Chadwick, of the County of San Diego, State of California, party of the second part, Witnesseth: That the said party of the first part, for and in consideration of the sum of ten dollars, to her in hand paid, the receipt

---

⚷For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

whereof is hereby acknowledged, as well as for other valuable considerations to her moving and by her received, does hereby release and forever discharge, for herself, her heirs, executors, and administrators, the said William J. Chadwick, his heirs, executors, and administrators, of and from all debts, dues, sums of money, accounts, agreements, promises, damages, judgments, executions, claims and demands whatsoever, in law or in equity, against the said William J. Chadwick, which she, the said party of the first part now has, or which she ever had, or which she, or her heirs, executors or administrators can, shall, or may have, in, upon or by reason of any matter, cause or thing whatsoever, by virtue of being his wife, or otherwise. In Witness Whereof, the said party of the first part has hereunto set her hand and seal this 23rd day of May, 1908, [Seal.] Ida Chadwick. Witness: H. E. Doolittle."

This instrument also bears the certificate of H. E. Doolittle, notary public in and for the county of San Diego, reciting that it was duly acknowledged by the maker thereof, before him on the said 23d day of May, 1908.

The transcript shows that the plaintiff and defendant intermarried at Council Bluffs, Iowa, on or about the 11th day of May, 1904, both parties having been previously married. No children were born of this marriage, though both the plaintiff and defendant had children by a prior marriage. For a time after the marriage of said parties they lived in South Omaha, Neb., where the defendant conducted a grocery store and meat market. Later, they moved to Sioux City, Iowa, where, according to the testimony set forth in the record, the defendant deserted the plaintiff on or about October, 1905. From that time until about 1908, it appears that the plaintiff had no knowledge of the whereabouts of the defendant, but having learned from some source that the defendant was in California, came to Oakland in the year 1908 and was informed by friends that the defendant was in San Diego. The plaintiff then returned to Los Angeles, where she had been living for some time, and employed an attorney to ascertain the whereabouts of the defendant. The record shows that through the efforts of this attorney the defendant was located in San Diego in the year 1908. The attorney for plaintiff then demanded of the defendant some monetary settlement, or that some provision be made for the plaintiff, who appears, at that time, to have been in ill health. Upon receipt of such demand, the defendant employed an attorney, and through the attorneys thus retained by the respective parties, negotiations were carried on which finally culminated in the signing of the instruments which we have hereinbefore set forth, on the day mentioned, and the payment by the defendant, through his attorney, to the attorney for the plaintiff, of the sum of $1,850. Of this sum it appears that plaintiff's attorney delivered to the plaintiff the sum of $1,500, apparently retaining $350 to cover his fees and expenses. The negotiations were entirely carried on by the attorneys for the respective parties. The record shows that not a word was exchanged between the plaintiff and defendant; they not only did not discuss the terms and conditions of the instruments set forth herein or the consideration therefor, but they did not even speak to each other. In fact, the record shows practically no communication of any kind between the plaintiff and defendant, after October, 1905, although it appears that after the execution of the instruments herein referred to, the plaintiff moved to San Diego, and resided there until the beginning of this action.

The plaintiff's complaint, among other things, alleges that the defendant willfully deserted her on or about October, 1905, and then attacks the instrument designated as Exhibit No. 1, as follows: "That upon locating the said defendant in the City of San Diego, the said defendant stated to plaintiff that he only owned two lots in the City of San Diego, and that he would sell them and give her $1,850.00 if she would give him a property settlement and deed releasing all of her claim upon his estate, and that he, the said defendant, could not sell the said property unless the said plaintiff signed the said deed in settlement; that said statement by the defendant was false and fraudulent, and made wilfully and maliciously and with an intent to deceive the plaintiff and to procure her signature to an agreement releasing her interest, as defendant's wife, in the community property of plaintiff and defendant." It is then alleged that the defendant had other community property than the lots referred to. No mention is made in the plaintiff's complaint of the instrument designated as Exhibit No. 2. The complaint further sets forth that the defendant is possessed of property of the value of $175,000. The answer of the defendant denies the allegations of misrepresentation, etc., sets up the two instruments referred to, and alleges that they were executed as a full, final and complete settlement of all differences and property rights between the parties; also, denies that the defendant is possessed of property of the value of $175,000, or of any property of a greater value than $42,000. The finding of the trial court was, in this respect, that the property possessed by the defendant at the time of the trial was of the value of $40,884.89. The trial court likewise found that there was no fraud or misrepresentation on the part of the defendant, and also that the defendant had exercised no duress or undue influence over the plaintiff in order to induce her to sign the two instruments referred to herein. As to the value of the property possessed by the defendant on the 23d day of May, 1908, the trial court found the same to be $3,700, and that it was not true that the defendant possessed any other community property than the two lots mentioned in Exhibit No. 1. The trial court likewise found that the plaintiff did not sign either of said agreements on account of any representations made by the defendant or by the defendant's attorney. At the time of the trial, the attorneys representing the respective parties on May 23, 1908, were deceased, and therefore what took place between them does not appear in the record, save and except that the record does show that the plaintiff was represented by an attorney by the name of Kemp, and the defendant was represented by an attorney by the name of Doolittle, from which the conclusion would be justified that both the parties to this action had independent advice. The record likewise shows that the defendant is now deceased, and that Richard W. Chadwick, executor of his last will and testament, has been substituted as the party defendant in this action. The trial court found that both of the documents herein set forth were executed at the same time, as a part of the same transaction, and for the same consideration.

[1] For convenience we will first consider the defendant's appeal from that part of the judgment which holds invalid Exhibit No. 2, as violative of the provisions of section 159 of the Civil Code, in that it does not contain an agreement for an immediate separation of the parties, nor make any provision for the support of the wife. That section provides that a husband and wife cannot, by any contract, alter their legal relations, except as to property, and except that they may agree in writing to an immediate separation and make provision for the support of either of them, etc. The defendant, in support of his appeal, calls attention to the fact that the agreement in this case was made long after the separation; that it is not controlled by the conditions set forth in section 159 of the Civil Code relative to making provision for the support of the wife; and cites a number of authorities having to do with agreements based upon section 159 of the Civil Code, making provision for support of the wife, and also containing stipulations relative to divorce. These cases, however, are not strictly in point. In this action the plaintiff was seeking a decree of divorce, and, irrespective of whether the instrument referred to as Exhibit No. 2 is or is not valid, the court had power, under section 139 of the Civil Code, to make provision for the support of the wife where there existed no such provision by reason of any agreement of the parties. It cannot be questioned that Exhibit No. 2 makes no provision for the support of the wife. So far as that instrument is concerned, the wife is left absolutely penniless. Even though the instrument had been drawn strictly according to the terms of section 159 of the Civil Code, the trial court in the divorce action had jurisdiction to either adopt the instrument as making an equitable provision for the support of the wife, or to disregard its terms and make such suitable allowance as the necessities of the case required. The defendant has entirely overlooked section 139 of the Civil Code, and also the cases which hold that in a divorce action where an agreement is presented to the trial court purporting, in terms, to make provision for the support of the wife, the trial court may add thereto or subtract therefrom, as the circumstances and conditions shown by the testimony may require. In the recent case of Smith v. Smith, 270 P. 463, decided by this court, and a hearing thereafter denied by the Supreme Court, the power of the court in a divorce proceeding to make an additional allowance to the wife, other than that mentioned in an agreement, was considered at length, and it was there held that a husband and wife executing an agreement for the support of the wife prior to divorce, are "presumed to have contracted with reference to the power of the trial court to modify the agreement." It was likewise held that the power of the court, under section 139 of the Civil Code, is not limited to community property rights in making provision for the support of the wife. The case of McCahan v. McCahan, 47 Cal. App. 176, 190 P. 460, was relied upon, wherein it is said:

"Such pretended agreements, if they are to have any force, must be subjected to the examination of the divorce court, and derive their sanction from a decree made by the court with a knowledge of the facts."

The opinion also cites, with approval, the case of Hughes v. Hughes, 68 Cal. App. 195, 228 P. 675, where the court, in considering the powers that might be exercised under section 139 of the Civil Code, held as follows: "The superior court, in an action for divorce, has jurisdiction to make, on the application of a husband, an order modifying an interlocutory decree by reducing the amount of maintenance awarded thereby, notwithstanding the fact that the parties have previously made an agreement settling their property rights wherein the husband agreed to pay to the wife a stipulated monthly sum," etc. This court then said: "If this is true, where provision has been made by the agreement for the support of the wife by the husband, with stronger reasoning must the rule apply that the court has power to act under section 139, Civil Code, where no provision has been made and the circumstances equitably require such action." In the case at bar, as we have stated, no provision is made for the support of the wife. It does not purport to follow the terms of section 159, Civil Code. It simply stands out as a paper executed by the wife alone, purporting to relinquish all claims of the plaintiff against the defendant, his heirs, executors and administrators, and from all debts, dues, sums of money which he now has, or may have, etc., and does not reach the standard of an equitable provision considered in any of the cases cited and relied upon in Smith v. Smith, supra, where the power of the court to disregard such agreements is set forth and upheld. In the recent case of Moog v. Moog (Cal. Sup.) 264 P. 490, cited in Smith v. Smith, supra, the power of the court to disregard agreements which in fact have made provision for support of the wife, is clearly and explicitly set forth, and its exercise held proper when the circumstances require the equitable interposition of the court. The court in that case held as follows (we quote from the syllabus): "In actions for divorce there is a very large discretion vested in the trial court to allow permanent support for [the] wife where she is granted [a] divorce, even in the face of contracts of settlement between the parties, and such contracts must be subjected to the court's examination and derive their sanction from a decree made by the court with knowledge of all the facts."

Irrespective of whether Exhibit No. 2 was correctly held invalid by the trial court, the decision of this court in the case of Smith v. Smith, supra, and the cases there cited, is conclusive against the defendant upon his appeal from the order awarding the plaintiff permanent alimony in the sum of $50 a month. No question is raised as to its being excessive, and, in view of the finding of the court as to the property possessed by the defendant, it is quite evident that no such contention could be made.

[2] The plaintiff's appeal tenders the question of the binding force and effect of Exhibit No. 1. Before considering the plaintiff's argument in support of her appeal it may be stated that there is a distinction between the terms "illegality," "invalidity," and "inadequacy" of consideration. To be illegal carries with it the idea that the instrument is not only contrary to law, but contains some element of moral turpitude, while an instrument may be invalid simply because, in the interests of society, the Legislature has prohibited the making or entering into the same. Inadequacy of consideration imports nothing of illegality, but may be of such a minor quantity as to render the instrument invalid or unenforceable. We mention this because the plaintiff has called our attention to a number of cases where the instruments under consideration before the court in the cases cited were in most instances either based upon a previous gambling debt or an instrument constituting a renewal of an instrument based upon such a transaction, or a transaction tainted with a like moral turpitude. In so far as Exhibit No. 1 is concerned, we find nothing illegal in any of its terms. Whether it was or was not based upon an adequate consideration was not tendered to the trial court, and, so far as the record is concerned, no effort was made to show any such lack. The complaint alleges the possession by the defendant of property elsewhere than the two lots named in Exhibit No. 1, but there is no testimony of the existence of any such property, and we think there is sufficient testimony in the record to support the finding of the trial court that the defendant possessed only the two lots in question, and also, that their value was not in excess of that found by the trial court. Under such circumstances, the conclusion is well supported that on the 23d day of May, 1908, the defendant delivered to the plaintiff, or to the plaintiff's attorney, a sum of money which equaled one-half of the property owned by him on that date. On the part of the plaintiff, the only question really presented to the trial court, and as we have shown by the record, was that the instrument had been secured to be executed by the wife by reason of fraud and willful misrepresentation on the part of the defendant, and as we have stated heretofore, the record shows that the defendant absolutely said nothing; that the transaction was entirely conducted by his counsel, with counsel representing the plaintiff.

[3-5] Upon this appeal it is urged that the defendant did not make a full disclosure, and that confidential relations existed between the plaintiff and defendant which necessitated a full and complete statement on his part of the property possessed by him. The rule as to confidential relations does exist as between husband and wife, but the rigor of its application is somewhat lessened when the husband and wife are separated, and, as in this case, had been separated for a considerable period of time, and, though still husband and wife, were negotiating, more or less, at arm's length. In the recent case of Dale v. Dale (Cal. App.) 262 P. 339, it is said:

"In transactions between a husband and wife, the rule with respect to confidential relations obtains (Civil Code, § 158), and precludes either from obtaining an unfair advantage of the other through fraud, mistake, or undue influence. Such transactions are considered subject to the rules which affect the relationship between a trustee and beneficiary; their relationship is in fact presumed to be confidential (13 Cal. Jur. 860, § 54; Estate of Cover, 188 Cal. 133, 143, 204 P. 583), and, where either obtains an advantage over the other, the transaction is presumed to have been without adequate consideration and to have been secured through undue influence, and the burden is then cast upon him who has the advantage to show that it was fair and free from fraud or undue influence. [Citing a number of cases.] But where dissension exists between a husband and wife, and they have become estranged on that account, the execution of a conveyance of property from the husband to the wife, which is free from fraud or undue influence, made as an inducement for reconciliation, harmony, and the renewal of marital relations, constitutes a sufficient consideration for the execution of the instrument."

The court, further, in the consideration of that case, dealing with an objection which is urged here, that the plaintiff did not read Exhibit No. 1, held as follows:

"Under the facts of this case the respondent may not complain because he failed to read or understand the terms of the instruments. This duty was imposed upon his attorney whom he employed to draw the documents. A grantor who executes a deed of conveyance, in the absence of a showing of fraud or mistake, will not be relieved from the effect of the clear terms of the instrument, merely because he neglected to read it, or even if he is unable to read or understand it. Reasonable prudence requires one to either read the document he proposes to execute, or, if he is unable to do so, to procure the assistance of some one who can read and explain its terms. [Citing a number of cases.]"

Again, in the case of Hensley v. Hensley, 179 Cal. 284, 183 P. 445, the Supreme Court, in considering the subject of confidential relations and the extent to which it affected negotiations between husband and wife who had been living separate and apart for some time, used the following language:

"The husband and wife had been living apart for years. That they were in hostility the suit for maintenance sufficiently proves. The transactions for settlement of her claim were conducted through her agents and his, so there was no chance for personal influence to be exercised by him upon her. There was no presumption of confidential relation such as was found to exist in cases like Brison v. Brison, 75 Cal. 525 (7 Am. St. Rep. 189, 17 P. 689), and Brison v. Brison, 90 Cal. 323 (27 P. 186). The parties to the contract were dealing 'at arm's-length' [citing cases]. The language used in the decision in Dimond v. Sanderson, 103 Cal. 97, 102 (37 P. 189), in which it was contended that a wife declaring on a note given by her husband must overcome a presumption of fraud seems applicable to the facts in this case. 'It must appear upon the face of the transaction, or by proof, that there was no consideration, or that the marital confidence was used to take an unfair advantage, or that this confidence was subsequently violated, before the burden is cast upon the plaintiff of sustaining the fairness and the consideration of the transaction against the presumption invoked by appellant.'"

Thus, to apply the language to the present case, it would have to appear that there was no consideration or that the marital relation was taken advantage of by the husband to obtain from the plaintiff an unfair advantage and secure the execution of an instrument without adequate consideration. As we have stated, no testimony was introduced showing inadequacy of the consideration. The instrument purports to be based upon a consideration of $1,850 in cash. The testimony shows that this sum was paid. Out of this sum the plaintiff remunerated her own counsel.

[6, 7] It is further contended on the part of the plaintiff that Exhibit No. 1 is violative of the terms of section 159, Civil Code, in that it was not made in contemplation of an immediate separation. If the instrument in question were an agreement at all, which it is not—it is simply a conveyance executed by the wife to the husband for an expressed consideration—the case of Brown v. Brown, 83 Cal. App. 74, 256 P. 595, would be a complete answer to the plaintiff's contention. In the case of Brown v. Brown, supra, this court had before it the question of the validity of an agreement between husband and wife relative to a settlement of property rights, executed after the separation of the parties. It was there held that section 158, and not section 159, of the Civil Code, applied. This court there said (quoting from a previous opinion): "The plain terms of the statute authorize the husband or the wife to convey to the other all title and interest in either separate or community property." We do not need to enter into a consideration of the cases cited and applied in Brown v. Brown, supra, but will content ourselves with citing that case in which a hearing was denied by the Supreme Court, as a full and complete answer to the plaintiff's contention, in so far as it is argued that the instrument is violative of either section 159 or 158 of the Civil Code. While executed at the same time and as a part of the same transaction, the two exhibits which we have considered herein show conclusively that they relate to different subject-matters, and therefore the validity of either does not depend upon the validity of both. Even though we read both exhibits as one instrument, the conclusion that Exhibit No. 2 is void does not necessitate a like result as to Exhibit No. 1. It has been held several times that agreements between husband and wife which contain an invalid provision, if the invalid provision can be read out of the instrument without violence as to the remainder thereof, such provision will simply be disregarded. A case in point where two instruments were executed between husband and wife, one held valid and the other held void, appears in Estate of Sloan, 179 Cal. 393, 177 P. 150. Other cases might be cited, but this one is sufficient. Some of the cases not cited ruled that a property settlement which contains a provision awarding counsel fees in the event of a divorce, may be upheld, even though that portion of the agreement relating to counsel fees must be disregarded.

Some minor contentions have been made by the plaintiff as to the sufficiency of the evidence to support certain of the findings. What we have said shows that the court found sufficient to dispose of the case, and the fact that some of the immaterial findings are not technically supported by the evidence, if such is true, may be disregarded, such as the finding of the court that the plaintiff went to San Diego for the purpose of effecting a full, final and complete settlement of their property rights. It is wholly immaterial for what purpose the plaintiff went to San Diego on May 23, 1908. All that is material is what was done at that time. If the plaintiff executed Exhibit No. 1 on that date, making the conveyance therein set forth, for a valid consideration, it is of no moment for what purpose the journey was taken to San Diego. What was accomplished or what was done is all that need to have been found by the trial court, and, as we have stated, the record shows no attempt to establish inadequacy of consideration at the time of the execution of the instrument. The extent of the defendant's property possessions at the date of the trial constituted a basis only for determining the allowance to be made to the plaintiff for her support. The extent of this property, whatever it was, accrued and was acquired after the date of the execution of Exhibit No. 1.

It follows from what we have said that the judgment of the trial court must be affirmed in whole, including that part appealed from by the plaintiff, as well as that part appealed from by the defendant. Neither party to recover costs.

We concur: HART, Acting P. J.; JAMISON, Justice pro tem.

---

95 Cal. App. 580

In re ROSE'S ESTATE. (Civ. 6237.)★

District Court of Appeal, Second District, Division 2, California. Dec. 18, 1928.

Rehearing Denied Jan. 17, 1929. Hearing Denied by Supreme Court Feb. 14, 1929.

1. Wills 🔑439—Testator's intention governs in construction of will.

Intention of testator governs in construction of will.

2. Wills 🔑181—Will wherein testator declared it was his last will and that all others were void "revoked" earlier will, though both were complete (Civ. Code, § 1292, par. 1, and § 1296).

Subsequent will, wherein testator declared that it was his last will and testament, and that all others were null and void, constituted revocation of an earlier will under Civ. Code, § 1292, par. 1, and section 1296, though both wills were complete and if taken separately complied with all formalities required by law in making will.

[Ed. Note.—For other definitions, see Words and Phrases, First, Second, and Third Series, Revoke; Revocation.]

3. Wills 🔑182—Earlier will with specific legacy to testator's son held revoked by subsequent will making wife sole beneficiary (Civ. Code, § 1296).

Prior will which provided for specific legacy to testator's son, residue going to the wife if she were alive to take it, otherwise all the estate going to the son, *held* revoked by subsequent will under Civ. Code, § 1296, showing testator's intention to make his wife the sole beneficiary.

Appeal from Superior Court, Los Angeles County; Walter J. Desmond, Judge.

In the matter of the estate of Emmason C. Rose, also known as E. C. Rose, deceased. From an order of the probate court denying the petition of Beatrice S. Rose, also known as Betty S. Rose, to probate the will of deceased, proponent appeals. Order affirmed.

Bordwell, Mathews & Wadsworth, Ray W. Bruce, and John H. Mathews, all of Los Angeles, for appellant.

Joseph N. Owen, of Los Angeles, for respondent.

KEETCH, Justice pro tem. Emmason C. Rose, the husband of appellant herein, died June 10, 1927, in the city of Los Angeles. Prior thereto he executed two holographic wills, one dated April 16, 1927, and the other June 4, 1927—the latter six days prior to his death. The will of April 16th reads as follows:

"I, Emmason C. Rose, being of sound and disposing mind and healthy body, herewith declare this my last will and testament and declare all others null and void.

"First: I direct that my wife, Betty S. Rose, be appointed executor and administrator of this my last will and testament and that she serve without bond and that my wife, Betty S. Rose, be given power to mortgage, sell, lease, or dispose of all or any part of my estate without first obtaining consent of court, but subject to approval of court thereafter.

"Second: I direct all my just debts be paid.

"Third: 'I direct my funeral expenses be moderate in cost and that my remains be placed in a burial vault at Forest Lawn.

"Fourth: I appoint my wife, Betty S. Rose, guardian of my son, Watson S. Rose.

"Fifth: I direct my wife, Betty S. Rose, to place Five Thousand ($5000.00) Dollars in at least four different preferred stocks or bonds, and hold same in trust and administer the same in trust, my wife to receive the income thereof until my son, Watson S.

★Rehearing denied. Hearing denied by Supreme Court.

Rose, becomes twenty-one years of age, when I direct the principal so invested, be given to Watson S. Rose, for his possession to have and hold. Should, however, Watson S. Rose not attain the age of twenty-one, then this trust becomes the possession of my wife, Betty S. Rose, to have and hold.

"Sixth: I herewith give and bequeath to my wife, Betty S. Rose, all my remainder possessions, both real and personal, wherever situated, to have and hold as her separate and own possession.

"Seventh: Should, however, my wife, Betty S. Rose, die before my death, then I request the Court to appoint the Farmers and Merchants National Bank of Los Angeles as my executor and I direct them to administer my estate for the benefit of my son, Watson S. Rose, giving him the interest my said estate until he reaches the age of twenty-one years, when Watson S. Rose is to receive the entire possession of the principal and interest without any trust whatever, and for his own possession.

"I herewith subscribe my name to this document on the sixteenth day of April, 1927, at Los Angeles, California.

"Emmason C. Rose."

The will of June 4th reads:

"I, Emmason C. Rose, herewith declare this my Last Will and Testament, and that all others are null and void.

"I direct that my just debts be paid, and I desire to be interred in Forest Lawn, and I request that my wife, Betty S. Rose, be made executor and administrator of this my last Will and Testament.

"I herewith give my wife, Betty S. Rose, all my possessions, both real and personal, and request that she serve without bond and that she be permitted to execute deeds and transfer any property.

"I herewith place my hand and seal this 4th day of June, 1927.

"Emmason C. Rose."

The deceased left surviving him his wife, the appellant herein, and Watson S. Rose, a son, 17 years of age.

The last will was admitted to probate on July 5, 1927. Thereafter and on October 20, 1927, the appellant, Mrs. Rose, petitioned the probate court to admit the will of April 16th to probate as a part of the last will. Probate was denied by the judge of the probate department of the superior court of Los Angeles county upon the ground that the will of April 16th was revoked by the will of June 4th. It is from this order denying probate to the first will that the appeal is taken. No question is raised respecting the capacity of the testator, the form or the execution of the documents by him. The sole question to be decided is, Did the last will revoke the prior will?

It will be noted that in the first will the testator provided that the sum of $5,000 be set aside in trust for his son, Watson S. Rose, the wife, if she survived, to receive the income from this sum until Watson became 21, at which time the principal was to be given him. In the last will the son is not mentioned, the effect of which is to give to him that share in the estate to which he would have been entitled had his father died intestate.

It is urged by appellant that the two documents should be read together as constituting the last will and testament, and as one of the reasons therefor it is suggested that the law does not favor intestacy—citing Le Breton v. Cook, 107 Cal. 410, 416, 40 P. 552, and Estate of O'Gorman, 161 Cal. 654, 658, 120 P. 33. Counsel for respondent—who was appointed guardian ad litem by the court upon the commendable request of the appellant in order that the question might be presented in justice to all concerned—also suggests that "it would also in all fairness from an inspection of the two writings seem true that by failing to read the two wills together and to consider them as one document that the last expressed intent of the testator would be thwarted simply because of his ignorance of or other failure to observe the plain mandate of the law." At the same time counsel, after a full, fair and able presentation of his points and authorities in behalf of the respondent, reaches the definite conclusion that the two wills cannot stand together, for the reasons: (1) That the second will is a complete, separate document and not a codicil; (2) that it is a formal holographic will; (3) that it is an attempted (although ineffectual) disposal of all of the property of the decedent; and (4) that it was expressly intended to revoke, cancel, and make void all other wills. From our perusal and consideration of the language of the two documents we are forced to the same conclusion, and in so doing we are not unmindful of the suggestion that wherever reasonably possible wills should be construed to avoid intestacy.

[1, 2] It is, perhaps, unnecessary to say that it is always the intention of the testator that must govern, and where that is clearly expressed it must operate. That is the sole question here, and the language used admits of but one answer. Both wills are complete, if taken separately, and comply with all the formalities required by the law in the making of such wills. Paragraph 1 of section 1292 of the Civil Code provides that a written will may be revoked "by a written will, or other writing of the testator, declaring such revocation or alteration, and executed with the same formalities with which a will should be executed by such testator." Section 1296 of the same Code provides that "a prior will is not revoked by a subsequent will, *unless the latter contains an express revocation*, or provisions wholly inconsistent with the terms of the former will." (Italics ours.) In the will of June 4th the language of the revoking clause, which is a part of the will itself, reads: "I, Emmason C. Rose, herewith declare this *my last* will and testament and that *all others are null and void.*" He may or may not have known the legal effect of his failure to mention his son in his will, but as a clear and unambiguous expression of his intent to revoke "all other" wills it leaves nothing to question or argument. In such a case the prior will is revoked eo instante.

In the case of Estate of Iburg, 196 Cal. 337, 238 P. 74, the court says: "In Re Edward Fisher, 4 Wis. 254, 65 Am. Dec. 309, 312, it was said that a man cannot have two independent wills at the same time, each acting upon the same subject matter and each professing to make a distinct and full disposition thereof. Therefore, the court held that where each of two testamentary instruments is a distinct, substantive will of itself, and one is not in the nature of a supplement or codicil to the other, and the later in time is competent to make, and does in fact make a different and full disposition of the testator's property, it revokes the earlier, and is the will of the deceased."

In 40 Cyc., at page 1177, it is said that "an express revocatory clause will operate as such notwithstanding certain devises or legacies in the subsequent will fail to take effect on account of the incapacity of the devisee or legatee to take, or on account of the illegality or indefiniteness of the bequests"—citing cases. "As a general rule, the presence of a revoking clause in a later writing is accepted as conclusive proof of an intention on the part of the decedent to nullify the provisions of an earlier instrument." 26 Cal. Jur. 811, § 144, citing Estate of Holloway, 195 Cal. 711, 235 P. 1012. "If the later writing purports to make disposition of all of the decedent's property the earlier instrument is deemed to be revoked." Estate of Bassett, 196 Cal. 576, 238 P. 666; Estate of Scott, 141 Cal. 485, 75 P. 44.

In the case of Lasier v. Wright, 304 Ill. 130, 136 N. E. 545, 28 A. L. R. 674, it is said: "The word 'declare' means primarily to make known, to make manifest, to make clear, so that a will properly executed, and stating that it is the last will and testament of the testator, declares a purpose to revoke." In the same case the court further says: "Upon the question of revocation of a former will by a later will, the English courts established, and have universally followed, two rules of construction which have never been departed from by those courts so far as we have been able to ascertain, and both rules prevailed before and since the enactment of the English Statute of Frauds and the English Wills Act of 1837. The first rule is that, where the testator has in the later will used express words in terms revoking the former will or wills, such words are to be taken to mean what he has expressed, and that such words will be operative, although the later will contained no inconsistent disposition of the property. This rule is the rule both at law and in equity."

In Page on Wills, the author, in section 267, says: "If that later will contains an express clause of revocation, the earlier will is thereby rendered invalid, irrespective of the disposition of the property made by the second will; and this is true even if the other provisions of the revoking will proved ineffectual."

[3] It is also urged by counsel for respondent that in addition to the express revocatory clause of the last will its depository terms are wholly inconsistent with those of the prior will, and therefore the latter is subject to revocation under section 1296, supra. As already stated, the will of April 16th, the prior will, provided for a specific legacy to the son of the testator, the residue going to the wife in the event she was alive to take it, otherwise all of the estate was to go to the son. As stated by respondent, under this will, after payment of the debts of the estate and the legacy referred to, the wife might not have received anything. On the other hand, by the provisions of the will of June 4th, the subsequent will, it is apparent from the language of the testator that it was his intention to make his wife the principal and sole beneficiary—in other words, a complete disposal of his property wholly inconsistent with the prior will.

We have considered the cases cited by appellant, but they all have application to some other circumstances or conditions than that of a subsequent will expressly revoking a former will, or where the two wills are wholly inconsistent, as in the present case.

The order denying probate to the will of April 16th is affirmed.

We concur: CRAIG, Acting P. J.; THOMPSON, J.

95 Cal. App. 704

SCOTT v. LOS ANGELES RY. CORPORATION. (Civ. 3554.) ★

District Court of Appeal, Third District, California. Dec. 21, 1928.

Rehearing Denied Jan. 19, 1929. Hearing Denied by Supreme Court Feb. 18, 1929.

1. Street railroads ⇨114(9)—Evidence held to show negligence of street railroad in operating engine pushing cars ahead, resulting in collision with plaintiff's automobile.

In action for damages sustained by automobile driver in collision with engine on street railroad pushing flat cars ahead, evidence *held* to show defendant's negligence.

2. Street railroads ⇨117(24)—Whether driver of automobile colliding with engine on street railroad pushing flat cars ahead was contributorily negligent held for jury.

Whether driver of automobile colliding with engine on street railroad pushing cars ahead, where tendency of headlight of engine shining over cars was to obscure them and any red lights from view of driver, was guilty of contributory negligence *held* question of fact for jury.

3. Negligence ⇨65—Defendant cannot impute to plaintiff want of care produced by defendant's own negligence.

Defendant cannot impute to plaintiff a want of care or vigilance which has been produced by defendant's own negligence.

4. Street railroads ⇨117(24)—Whether driver colliding with engine and cars on street railroad was contributorily negligent for violation of act requiring driving near right-hand curb held for jury (Motor Vehicle Act, § 122).

Whether driver of motor vehicle colliding with engine pushing cars ahead on street railroad was guilty of contributory negligence for violation of Motor Vehicle Act (St. 1923, p. 517) § 122, requiring motor vehicles to be driven close to the right-hand edge of the curb of the highway, where driver drove at all times well to the right of the medial line of the street, *held* for jury.

5. Street railroads ⇨99(5)—Driving automobile upon car tracks of street is not negligence per se.

It is not negligence per se to drive automobile upon the car tracks of a street.

6. Street railroads ⇨118(3)—Instruction that street railroad's maintenance of dangerous situation constituted negligence unless warning was given to approaching vehicles held not erroneous as submitting issue not tendered by complaint.

In action for damages sustained by automobile driver in collision with engine and cars on street railroad, instruction that maintenance of alleged dangerous situation constituted negligence unless defendant exercised ordinary care in warning approaching vehicles *held* not erroneous as submitting to jury an issue not tendered by the complaint but to be based on specific allegations of negligence therein.

7. Appeal and error ⇨1170(9)—Inaccurate instruction as to street railroad's duty to keep lookout for approaching vehicles did not require reversal in view of another instruction (Const. art. 6, § 4½).

In action for damages sustained by automobile driver in collision with engine and cars on street railroad, instruction as to defendant's duty to keep lookout to avoid injuries to others, while not accurately worded, *held* not to require reversal, under Const. art. 6, § 4½, in view of another instruction requiring plaintiff to exercise ordinary care in maintaining a lookout.

Appeal from Superior Court, Los Angeles County; Walton J. Wood, Judge.

Action by Millard Scott against the Los Angeles Railway Corporation. Judgment for plaintiff, and defendant appeals. Affirmed.

Gibson, Dunn & Crutcher, of Los Angeles (Philip C. Sterry, of Los Angeles, of counsel), for appellant.

R. T. Walters and R. Goer, both of Whittier (Arthur G. Wray, of Whittier, of counsel), for respondent.

FINCH, P. J. The plaintiff was given judgment for damages sustained in a collision of an automobile driven by him with one of the defendant's cars. The defendant has appealed.

The collision occurred in the city of Los Angeles, on Whittier boulevard, which extends east and west and is 75 feet wide. The defendant maintains double tracks along the middle of the boulevard. The accident occurred about 2 o'clock in the morning. Immediately prior to the accident, a work train of the defendant, consisting of an electric engine and three flat cars, had been moving westerly on the south track, the three flat cars being pushed ahead of the engine, which had a bright headlight on the north side thereof shining "over and above the flat cars." The evidence is conflicting as to whether the train was moving at the moment of the accident, but it was moving slowly, if at all. There was at least "a little bit of an oil light, a little red oil light that they had on the end of the flat car * * * on the left side," the north side. The plaintiff testified:

"Going out Whittier boulevard, * * * you come up over a rise; the street is more or less up and down there for 6 or 7 blocks. * * * You can see down the slope, down to where I seen this big headlight. I was proceeding eastward, the left side of my car just on the inside of the south rail. I noticed at the time that the bright light was on the north track, * * * that was the impression given to me. It appeared the same to me until after the accident occurred a block and a half further down the street. I would not say the light was brilliant, but there was a fog that was on; it just kind of penetrated in the fog in such a way it just

---

★Rehearing denied. Hearing denied by Supreme Court.

blinded me from seeing anything near the light; that is what it seemed to me. * * * As we proceeded down the street * * * I never knew anything about flat cars or any cars whatsoever between the light and myself until I heard a crash. I never took my foot off the throttle. * * * I did not see anyone give any warning before I struck the corner of the flat car. * * * I never seen a light on the flat cars until after I was hit. * * * I had been using Whittier boulevard every day, and I knew that the street car tracks were being repaired down along there. * * * At the time of the collision, I was going just about 20 or 25 miles an hour. * * * The light did not dazzle my vision so I could not see in front; it gave me the impression that it was on the other track so there was nothing for me to be alarmed about. Of course I know now that the light dazzled my eyes so I could not see. My vision must have been blinded by the light because I never realized at the time I ran into those big flat cars in that light. I could see about 60 feet in front of me. * * * It was foggy the night of the accident. It was not so foggy that under the circumstances I felt I would be in danger if it was not for something caused me to be in danger."

A witness who was riding with the plaintiff at the time of the collision testified that the headlight seemed to be on the north track; that "it was a very bright light. * * * I did not see the flat cars before we struck them. I was looking in the direction of the street car track and the headlight at the time. * * * It was foggy that night, but there was no mist on the windshield; just a little bit, but he had a swipe. I could see out of my side and that didn't have any swipe—on my side. The mist did not obstruct my vision very much. * * * There was nothing to prevent our driving over near the curb only there was a sort of a little viaduct, but it was * * * darker on either side, and it was easier to run just along the tracks rather than run closer to the side. * * * The light (headlight) seemed to be coming toward us all the time. The street there is slightly down hill and the light seemed to be coming slow. * * * Before the collision * * * I saw no light on the flat cars, except the bright light on the engine. It was an electric engine. The flat cars were about three feet in height." The motorman who was in charge of the defendant's train testified: "The headlight on the motor shines over and above the flat cars. The headlight was on the right-hand side of the motor, going west." The defendant introduced testimony in contradiction of some of that quoted, but the question under consideration is whether there is sufficient evidence to warrant the verdict and judgment, not whether the preponderance thereof is on the one side or the other.

[1, 2] The evidence is sufficient to show negligence on the part of the defendant. The natural effect of placing the three flat cars, each 35 feet in length, in front of the engine, with its bright headlight shining "over and above the flat cars," was to obscure them and any red lights thereon from the view of the plaintiff. These facts were entitled to consideration by the jury in determining the question of the defendant's negligence and that of the alleged contributory negligence of the plaintiff. Simoneau v. Pacific Electric Ry. Co., 166 Cal. 264, 271, 136 P. 544, 49 L. R. A. (N. S.) 737. The placing of these flat cars ahead of the engine with the headlight turned in a westerly direction on the south track was as a matter of common knowledge, contrary to the usual practice. In Adamson v. San Francisco, 66 Cal. App. 256, 260, 225 P. 875, 876, in discussing a similar question, it is said: "Where * * * one of the parties has, to the discomfiture of the other, without notice, departed from the usual custom or practice, the courts have by an unbroken line of decisions held that the question of negligence on the part of the defendant, and the question of contributory negligence on the part of the plaintiff, are both questions for the jury to determine in the light of all of the facts."

The fact that the headlight was on the north side of the engine, facing west and shining through the fog, may well have created the impression, as asserted by the plaintiff, that the engine was on the north track. Whether or not the plaintiff, under the facts and circumstances shown, was guilty of contributory negligence was a question of fact for the jury. Wurl v. Watson, 67 Cal. App. 625, 630, 228 P. 43; Adamson v. San Francisco, supra; Haynes v. Doxie, 52 Cal. App. 133, 135, 198 P. 39; Indemnity Co. v. Wasco Land & Stock Co., 51 Cal. App. 672, 675, 197 P. 390; Ham v. County of Los Angeles, 46 Cal. App. 148, 158, 189 P. 462. Appellant relies on Hatzakorzian v. Rucker-Fuller Desk Co., 197 Cal. 82, 239 P. 709, 41 A. L. R. 1027. The facts of that case were essentially different from those of this, only one of which differences need be noticed. In that case the defendant, while blinded by the headlights of another automobile, drove his own machine forward until he struck and killed a pedestrian who was walking on the highway. The pedestrian, of course, had done nothing to obscure the defendant's view of him. In this case the confusion which misled the plaintiff was caused by the negligence of the defendant.

[3] In Thompson on Negligence, § 192, it is said: "The defendant cannot impute to the plaintiff a want of care or vigilance which has been produced by the defendant's own negligence." See, also, Ernst v. Hudson River Railroad Co., 35 N. Y. 9, 28, 90 Am. Dec. 761; Morrissey v. Wiggins Ferry Co.,

47 Mo. 521, 523; Pennsylvania Railroad Co. v. Ogier, 35 Pa. 60, 72, 78 Am. Dec. 322; Kinney v. Folkerts, 78 Mich. 687, 697, 44 N. W. 152. In Robinson v. W. P. R. R. Co., 48 Cal. 409, 421, it is said that it cannot be imputed as negligence that the plaintiff did not anticipate culpable negligence on the part of the defendant. The defendant's negligence, of course, did not excuse the plaintiff from the exercise of ordinary care. Whether he exercised such care is to be determined from all the facts and circumstances surrounding him at the time of the collision, one of which is that he was misled into a feeling of false safety by the negligent acts of the defendant, any want of vigilance on his part being induced by the defendant's own negligence. It cannot be held, therefore, as a matter of law, that the plaintiff was guilty of contributory negligence.

[4, 5] Section 122 of the Motor Vehicle Act provides: "On all occasions, the driver of a vehicle shall drive the same upon the right half of a public highway and close to the right-hand edge or curb of such highway, unless it is impracticable to travel on such side of the highway." Stats. 1923, p. 517. Whether or not this provision was intended to apply to city streets and the meaning of the phrase "close to the right-hand edge or curb" need not be determined, because it was for the jury to decide whether the facts shown by the evidence rendered it impracticable to drive close to the edge or curb of the street. Appellant did not request the court to instruct the jury on that question, and it cannot be said as a matter of law that the plaintiff was negligent in that respect. The plaintiff drove his automobile at all times well to the right of the medial line of the street. It is not negligence per se to drive an automobile upon the car tracks of a street. Berguin v. Pacific Electric Ry. Co. (Cal. Sup.) 263 P. 220, 223.

[6] The court instructed the jury as follows:

"If you find that the defendant placed its train of cars upon the tracks as described in the complaint and answer in such a position that the servants, agents and employees of said defendant knew, or in the exercise of ordinary care should have known that an accident was likely to result, and if you further find that said defendant failed to exercise ordinary care in giving warning to approaching vehicles, then I instruct you that said defendant was guilty of negligence."

Appellant contends that by this instruction the court submitted to the jury an issue not tendered by the complaint. The complaint alleges negligence generally and then alleges specifically that "the defendant carelessly, negligently, and recklessly maintained and had an electric light on said engine shining west and immediately over said flat cars, and that as a result of which plaintiff was blinded and was unable to see the flat cars." The instruction in question does not submit to the jury an issue not tendered by the complaint, but it is based on the foregoing specific allegations of negligence. In effect it states that the maintenance of the alleged dangerous situation constituted negligence unless the defendant exercised "ordinary care in giving warning to approaching vehicles."

[7] Similar complaint is made of another instruction to the effect that, under the circumstances alleged, "it was the duty of defendant's employees in charge of the electric motor and flat cars, * * * upon and along said Whittier boulevard * * * to exercise reasonable care and keep a careful lookout in order to avoid possible injury to persons or vehicles which might be on said Whittier boulevard. If you find from the evidence that the defendant's employees did not exercise reasonable care for the safety of persons and vehicles used on said boulevard, so as to avoid a collision with said electric motor and flat cars, and that by reason of such negligence of the employees of said defendant the plaintiff sustained injuries and damages as alleged in his complaint, then the plaintiff is entitled to recover in this case." Particular objection is made to the statement that it was the defendant's duty to "keep a careful lookout in order to avoid possible injury to persons or vehicles which might be on said Whittier boulevard." The court doubtless intended to say that it was the duty of those in charge of the train to "keep a careful lookout" when the train was in motion, and the jury probably so understood the instruction. It is the duty of those in charge of any moving vehicle to exercise such care at all times. In similar language, the court instructed the jury that it was the duty of the plaintiff "to exercise ordinary care in maintaining a lookout." The word "lookout," as used in both instructions, clearly means a looking or watching. While the instruction in question should have been more accurately worded, an examination of the entire cause, including the evidence, does not lead to the opinion that the alleged error, or any error complained of, has resulted in a miscarriage of justice. Const. art. 6, § 4½.

Complaint is made of the court's refusal to give a number of instructions requested by the defendant. These proposed instructions and those given by the court have been carefully considered and, while those refused are too numerous to be specifically discussed, it may be stated generally that it does not appear that the action of the court in relation thereto has prejudiced the rights of defendant. The instructions given by the court fairly and fully stated the law applicable to the facts proved.

The judgment is affirmed.

We concur: **PLUMMER, J.**; **HART, J.**

95 Cal. App. 749

McCARTHY v. CIVIL SERVICE COMMISSION OF CITY AND COUNTY OF SAN FRANCISCO et al. (Civ. 6456.)★

District Court of Appeal, First District, Division 2, California. Dec. 24, 1928.

Rehearing Denied Jan. 22, 1929. Hearing Denied by Supreme Court Feb. 21, 1929.

Municipal corporations ⇐217(3)—Veteran in municipal service before July 1, 1920, held entitled to additional credits in promotional examination, though service had not been continuous; "shall have been" (San Francisco Charter, art. 13, § 22).

Petitioner, employed in municipal service from September, 1917, to March, 1921, except while in army, and who returned to service as hoseman in fire department in August, 1926, *held* entitled, under San Francisco Charter, art. 13, § 22, authorizing additional credits to veterans who "shall have been" in service before July 1, 1920, to additional credits in promotional examination for position of lieutenant in fire department because of status as veteran, he having been in municipal service before July 1, 1920, quoted words applying to past as well as future conditions.

[Ed. Note.—For other definitions, see Words and Phrases, First, Second, and Third Series, Shall Have.]

Appeal from Superior Court, City and County of San Francisco; Louis H. Ward, Judge.

Mandamus by Joseph F. McCarthy against the Civil Service Commission of the City and County of San Francisco and others. Judgment for petitioner, and defendants appeal. Affirmed.

John J. O'Toole, City Atty., and Thomas P. Slevin, Asst. City Atty., both of San Francisco, for appellants.

Charles R. Boden, of San Francisco, for respondent.

NOURSE, J. Petitioner sued in the superior court for a writ of mandate requiring the defendants to award him three additional credits in a promotional examination for the position of lieutenant in the fire department, because of his status as a veteran. Judgment went for petitioner on the pleadings, and the defendants have appealed on a typewritten record.

The petitioner was employed in the municipal service of the city and county of San Francisco from September, 1917, until March, 1921, except for a period of one year, when he was in the service of the United States army. In August, 1926, he returned to the service of the city and county as a hoseman in the fire department, and, in February, 1927, participated in a promotional examination for the position of lieutenant in that department. As a result of this examination, the petitioner received such an average as to cause him to be placed No. 66 on the register of eligibles for promotion. His demand that he be awarded additional credits because of his status as a veteran is based upon that portion of section 22 of article XIII of the San Francisco Charter, which reads: "In the case of promotional examinations a credit of three points shall be allowed to veterans—who shall have been in the city and county service prior to July 1, 1920."

It is the contention of the appellants that the expression "shall have been" should be interpreted to apply only to such veterans who had been in the city service prior to July 1, 1920, and who had remained continuously in such service thereafter until the time of the promotional examination—that, because petitioner had severed his connection with the city service for the period from March, 1921, to August, 1926, he did not come within the class of those entitled to the veterans' preference. In support of the argument, appellants point out that the words "shall have been" are in the future perfect tense, and they argue that, if this continuous service had not been desired, the framers of the charter amendment would have used the past perfect tense with the words "had been."

The amendment was adopted by the electors of the municipality at the general election in November, 1920, and was affirmed by the Legislature in January, 1921. In providing that the preference should go only to those veterans who were in the city service prior to July 1, 1920, no reason has been given for the selection of that date other than that it was about the time when the supervisors of the city were considering submitting the proposal to the electors at the ensuing general election.

To determine the meaning of the amendment we must bear in mind that the words "shall have been" are applied to past as well as to future conditions. It is said in Chenoweth v. Chambers, 33 Cal. App. 104, 110, 164 P. 428, 431, "The expression 'during the term for which he shall have been elected' presents a question of more difficulty. In a strictly grammatical sense the phrase, standing alone, conveys the idea of futurity. Reading the section in its entirety it does not appear to us imperatively to demand a construction contrary to what we have the right to assume the electors, in voting on the amendment, understood to be its purpose and the class of officers to whom it was intended to apply. The phrase or its equivalent is frequently found in statutes and constitutions and the cases show that it is applied to past as well as to future acts or conditions. As was said in Norris v. Sullivan, 47 Conn. 474: 'The words "shall have levied" are susceptible of both past and future application; they furnish a convenient form for legislative use when it is desired to give all-inclusive force to a single expression. Therefore, as they may mean future, or past and future,

---

★Rehearing denied. Hearing denied by Supreme Court.

it becomes a question of legislative intent in each statute.' "

If the framers had used the words "who had been," as suggested by appellants, the phrase would have been open to the interpretation that it applied only to one who had been in the city service prior to July 1, 1920, but who was not in the service on that date or thereafter. If they had used the word "was," it would have expressed a similar meaning. But the words "shall have been" included any person who was in the city service prior to July 1, 1920, and who may or may not have been in such service thereafter. It will be noted that the entire phrase relates to the veteran and not to the municipal employee. If it had been intended to require continuous city service on the part of the employee, some such expression would have been used as "who shall have remained continuously in the city and county service until the date of the promotional examination."

But there is no reason for reading such an expression into the amendment, if we were permitted to do so. The amendment related solely to preferences to be given to veterans. It was not concerned with the length of service to be required for promotion in any department. Other sections of the charter provide for promotional examinations, and provide for the award of credits for meritorious service in the department. But this section had to do with credits for service with the United States military forces. We can see no relation between awards for such service and the period or continuity of service in the city and county.

The petitioner's status as a veteran is conceded, and his service in the city and county employ prior to July 1, 1920, is also admitted. He has established the right to the preference, and the commission has failed to show any reason why the additional points should not be allowed.

The judgment is affirmed.

We concur: KOFORD, P. J.; STURTEVANT, J.

95 Cal. App. 711

PEOPLE v. FERUGIA. (Cr. 1514.)

District Court of Appeal, First District, Division 1, California. Dec. 22, 1928.

1. Criminal law 🔑531(3)—Phonographic reporter's testimony that defendant's extrajudicial statement was made voluntarily, and not induced by promises or threats, held sufficient foundation for admission of statement.

In prosecution for murder, testimony by phonographic reporter, who took defendant's extrajudicial statement, that defendant's statement was voluntarily given and that no promises or threats were given or made, which testimony was confined to what occurred in witness' presence, showed sufficient foundation for admission of defendant's statement in evidence.

2. Criminal law 🔑1168(4)—Refusal to strike portions of defendant's extrajudicial statement, referring to prior use of shotgun used in shooting and time witness came from Italy, held not prejudicial.

In prosecution for murder, refusal to strike portions of defendant's extrajudicial statement, referring to shotgun with which he shot deceased as having been used once before to shoot jack rabbits, and referring to time when defendant came to this country from Italy, *held* not prejudicial to defendant.

3. Criminal law 🔑696(7), 1168(4)—Portion of defendant's extrajudicial statement referring to quarrel with wife should have been stricken, but admission was not prejudicial in murder prosecution.

In prosecution for murder, portion of defendant's extrajudicial statement regarding quarrel between defendant and his wife, which resulted in police being called, but which was result of interference by neighbors, should have been stricken by court, but its admission in evidence was not so prejudicial as to require reversal of conviction.

4. Criminal law 🔑1129(3)—Assignment of error, merely citing court to places in record where requested instructions might be found with statement that they should have been given, held insufficient.

Assignment of error, on refusal to give instruction, merely citing court to places in record where such instructions were to be found together with assertion that they should have been given, *held* insufficient.

5. Criminal law 🔑1129(3)—Assignment of error to be considered should point out rulings complained of and reasons therefor with authorities.

Assignment of error should point out clearly and concisely rulings complained of as erroneous and reasons why they are so with reference to authority, if any, and, in absence thereof, court will deem matter as of not sufficient importance to merit notice in opinion.

6. Homicide 🔑250—Evidence that defendant killed deceased in quarrel when decedent refused to leave defendant's barn held not to show anything reducing homicide to manslaughter (Pen. Code, § 1105).

In prosecution for murder, evidence of quarrel between defendant and deceased concerning payment for horse collar claimed by defendant and shooting of deceased when he refused to get out of defendant's barn, together with statement by defendant that he did not intend to kill decedent but merely to scare him away, did not show anything which could reduce crime from murder to manslaughter under Pen. Code, § 1105, since homicide was not committed on sudden quarrel or heat of passion, nor in commission of unlawful act not amounting to felony, nor in commission of lawful act which might have produced death in unlawful manner.

7. Homicide 🔑309(3)—Refusal to instruct on manslaughter held proper, where evidence has no tendency to show manslaughter rather than murder.

Where evidence in homicide case fails to contain evidence having tendency to show that crime is manslaughter rather than murder, it is proper for court to refuse to give an instruction authorizing jury to find defendant guilty of manslaughter.

8. Criminal law 🔑1144(15)—Jury is presumed to have heeded court's instruction and performed duty in murder prosecution.

In prosecution for murder it is presumed that jury heeded court's instruction and performed its full duty.

9. Homicide 🔑341—Defendant cannot complain of failure to instruct on manslaughter, where jury, under instructions, would have acquitted defendant if homicide was manslaughter.

Where court in prosecution for murder instructed jury on ingredients necessary for first and second degree murder, that manslaughter is unlawful killing of human being without malice, and that defendant is presumed to be innocent, and to acquit in case of reasonable doubt that guilt was shown, jury, if not satisfied beyond reasonable doubt that defendant was guilty of murder, but that killing was without malice, would have acquitted defendant, and hence defendant cannot complain of court's failure to instruct on question of manslaughter.

10. Criminal law 🔑1173(2)—Failure to instruct that conviction requires concurrence of 12 minds, and that juror entertaining reasonable doubt of guilt should not consent to conviction, held not reversible error.

In prosecution for murder, failure to instruct that law requires concurrence of 12 minds in conclusion of defendant's guilt, and that if one juror should entertain reasonable doubt of defendant's guilt such juror should not under oath consent to verdict of guilty, *held* not reversible error.

Appeal from Superior Court, Fresno County; Charles R. Barnard, Judge.

Sam Ferugia was convicted of murder in the second degree, and he appeals. Affirmed.

W. D. Crichton, of Fresno, for appellant.

U. S. Webb, Atty. Gen., and William F. Cleary, Deputy Atty. Gen., for the People.

CAMPBELL, Justice pro tem. Appellant was charged with the crime of murder. He was convicted of murder of the second degree, and from such judgment of conviction and from an order denying his motion for a new trial has appealed.

[1] Appellant urges as his points on appeal: (1) Errors of the court in receiving evidence over the objection of defendant; and (2) errors of the court in the giving and refusing certain instructions. Under the first objection appellant contends that the court erred in admitting in evidence an extrajudicial statement made by him in the county jail following his arrest. The phonographic reporter who took defendant's statement, which was made in response to questions propounded by the district attorney, was called as a witness and was asked in three preliminary questions whether promises or threats had been made to induce such statement, and whether it was voluntarily given, to which he answered that there were no promises or threats given or made, and that the statement was voluntary. The questions asked the reporter were in the usual form and were confined to what occurred in the witness' presence. Objection was made that they called for the opinion and conclusion of the witness. The court overruled the objections, stating that the defense might cross-examine the witness upon that point. Counsel for defendant, however, did not avail himself of such privilege. The question here presented is passed upon directly and the foundation laid for the admission in evidence of the statement held sufficient in People v. Rodundo, 44 Cal. 538, and reiterated in People v. Goldenson, 76 Cal. 350, 19 P. 161, and People v. Bateman, 80 Cal. App. 151, 251 P. 335.

[2, 3] It is contended that the court erred in allowing certain portions of the extrajudicial statement to be read to the jury, and that the court further erred in refusing to strike out such portions when requested to do so. The first portion of the statement objected to consists of a statement by the defendant as to how long he had owned the shotgun with which he had shot the deceased and what use he had made of it, be stating that months before he had used it to shoot jack rabbits which he fed to his chickens and to his dog. The second portion of the statement to which objection was made pertains to when defendant came to this country from Italy. The third portion of the statement objected to concerns a quarrel which defendant at one time had with his wife and which resulted in the police being called, but according to defendant's statement the quarrel was the result of interference by neighbors, which prompted his wife to try to whip him. "I got one slap in the face and I came back with a little blow. That is all the trouble I had and I got so mad the policeman come and I got a little whipping too. I got mad at my wife and I got mad at the neighbor because he told my wife, and blow come to the head and I don't know what happened and I got awful mad." The first two portions objected to could in no way prejudice the defendant, and while the objection to the last portion relative to the quarrel the defendant had with his wife should have been sustained, its admission in evidence is not of such a prejudicial nature as to call for a reversal of the judgment.

[4, 5] Appellant claims that the court erred

in refusing to give eleven instructions requested by him. With the exception of two of the instructions, appellant has done no more than cite the court to the places in the record where such instructions are to be found and made the assertion that they should have been given. Such assignments of error are insufficient. "It is due to this court from the members of the bar to point out clearly and concisely the rulings complained of as erroneous and the reasons why they are so, with reference to authorities, if any. In case counsel will not take the trouble to do so, we shall deem the matter as of not sufficient importance to merit notice in an opinion." People v. Woon Tuck Wo, 120 Cal. 297, 52 P. 853; People v. McLean, 135 Cal. 309, 67 P. 771.

The first of the two instructions singled out by appellant for argument is requested instruction X, and the only material difference between the requested instruction and the one given by the court is that the court's instruction told the jury that they could find the defendant guilty of murder in the first degree, guilty of murder in the second degree, or not guilty; whereas, the requested instruction contained guilty of manslaughter between guilty of murder in the second degree and not guilty.

The omission to instruct the jury that it could find the defendant guilty of manslaughter might have constituted error if there were any evidence in the record which, if believed, would have justified such a verdict. But the record contains no such evidence. Section 1105 of the Penal Code provides: "Upon a trial for murder, the commission of the homicide by the defendant being proved, the burden of proving circumstances of mitigation, or that justify or excuse it, devolves upon him, unless the proof on the part of the prosecution tends to show that the crime committed only amounts to manslaughter, or that the defendant was justifiable or excusable."

The defendant did not take the witness stand, and he produced only one witness whose testimony was confined to the question of decedent's reputation for peace and quiet. It therefore follows that any evidence of record which would have justified the instruction that the jury might find the defendant guilty of manslaughter must be found in the prosecution's case. The case of the prosecution consists of the proof of the corpus delicti and an extrajudicial statement of defendant in which he admits he shot the decedent, together with the testimony of several witnesses which tended to corroborate various matters contained in such statement.

The story told by defendant is as follows: He was operating a small farm on the outskirts of the city of Fresno. On the 8th day of April, 1928, he was desirous of obtaining a horse collar so that he might do some plowing. On that day he asked a certain neighbor of his if he (the neighbor) had a horse collar of a certain size which he could spare for a time. The neighbor said that he had one about a size smaller and that it might do. The defendant and the neighbor and a third party left defendant's farm, got the horse collar and returned, tried the horse collar for size, and found it too small. At this juncture they discovered a second horse collar in defendant's farmyard. They tried that collar for size and found it suitable. About the hour of 8 o'clock p. m. the defendant was in bed, but not sleeping. He heard some one knocking at his front door. He called: "Who is there?" and received the answer: "This is Bill." He got up and went to the door and found the decedent, Bill Pearson, a negro, at the door. He said: "What do you want?" Bill Pearson replied: "I want money." Defendant said: "What do you want money for?" Decedent replied: "I want three dollars—I throw collar on your place." Defendant said: "What business you got throwing a collar on my place, who gave you that privilege to throw the collar on my place?" Decedent answered: "You give me three dollars or give me the collar." Defendant replied: "I don't buy anything. I don't want to buy anything that you steal." Decedent then said: "Give me that collar." Defendant replied: "I can't go to the barn, it is all full of mud. Please go home tonight and come tomorrow morning and talk like a gentleman. You go to bed. You lay down. Don't come here and make trouble. You are drunk. Get out of here and go to bed." Decedent replied: "No, I be damned if I get out of here." The defendant then stated that he and the decedent remained on the porch for about ten minutes; that he (the defendant) then went in the house and put on his trousers and returned to the porch, saying to decedent: "Please go home. Bill, you go home tonight, you come tomorrow." Decedent replying: "No, I want my money, give me my money. Give me the money or the collar." Whereupon defendant replied: "I ain't giving you no money or I ain't giving you no collar." That thereupon the defendant ushered decedent to the front gate, put him on the outside, and closed the gate, saying: "Please you go to sleep, go in the house and go to sleep." The defendant's statement was then to the effect that the decedent remained on the sidewalk in front of the house for a few minutes, and then went around the side of the house on the street and toward defendant's barn; that the defendant then went in the house and got his double-barreled shotgun and went out to the back of the house, where he waited 10 or 15 minutes; that he saw the decedent light a match; that at the end of that time decedent jumped up on the fence with his feet remaining upon the outside; that the defendant then called to the decedent to "get out of there," decedent making no reply; that then defendant shot the decedent. The language of the defendant is as follows: "He didn't say anything, then I shoot him. I never shoot him to kill him. I don't know what was going to happen. I never tried to kill him, I tried to scare him—he no answer me, and I shoot him."

[6] When viewed in the light most favorable to the defendant, there was nothing which could have reduced the crime from murder to manslaughter. The homicide was not committed "upon a sudden quarrel or heat of passion," and therefore it could not have been voluntary manslaughter. Nor was it committed "in the commission of an unlawful act not amounting to a felony or in the commission of a lawful act which might have produced death in an unlawful manner or without due caution and circumspection." The fact that defendant in his extrajudicial statement stated that he did not intend to kill decedent did not tend to reduce the offense from murder to manslaughter. In the case of People v. Freel, 48 Cal. 436, the succinct statement is made: "Whether the homicide amounts to murder or to manslaughter merely, does not depend upon the presence or absence of the intent to kill."

"If the unlawful killing is done without the provocation and sudden passion which reduces the offense to manslaughter, or is done in the commission of an unlawful act, the natural consequences of which are dangerous to life, or is committed in the attempt to perpetrate a felony other than those mentioned in the description of murder in the first degree, or the circumstances of the killing show an abandoned and malignant heart, this is murder in the second degree, unless the facts prove the existence in the mind of the slayer of the specific intent to take life. Malice aforethought is implied from the absence of considerable provocation, the wanton recklessness, or the felonious purpose." People v. Doyell, 48 Cal. 85; People v. Cox, 76 Cal. 286, 18 P. 332. In People v. Jones, 160 Cal. 367, 117 P. 180, the court approved an instruction containing the following, given in People v. Bruggy, 93 Cal. 476, 29 P. 26: "To reduce a felonious homicide from the grade of murder to manslaughter upon the ground of a sudden quarrel or heat of passion, the provocation must be of such a character as would be naturally calculated to excite and arouse the passions and it must appear that the party acted under the smart of this sudden passion and resentment. If, however, the provocation was of slight and trifling character of such a nature as would not be calculated to arouse the passion, or if sufficient time had elapsed between the provocation and the fatal blow for passion to subside and reason to resume its empire, the offense will not be mitigated, but the slayer will be guilty of murder."

[7] In the present case, according to appellant's extrajudicial statement—which is the only evidence on this question—there was no quarrel or heat of passion nor any facts which show or tend to show that the crime was manslaughter. Where the evidence in a homicide case fails to contain evidence having a tendency to show that the crime is manslaughter rather than murder, it is proper for the court to refuse to give an instruction authorizing the jury to find the defendant guilty of manslaughter. People v. Turley, 50 Cal. 469; People v. Fellows, 122 Cal. 240, 54 P. 830.

The jury was instructed as to the ingredients necessary to constitute murder of the first and second degrees; that manslaughter is the unlawful killing of a human being without malice; that the defendant is presumed to be innocent until the contrary is proved; and that in case of a reasonable doubt whether his guilt has been satisfactorily shown he is entitled to an acquittal.

[8, 9] It will be presumed that the jury heeded the court's instructions and performed its full duty. If it had not been satisfied beyond a reasonable doubt that the defendant was guilty of murder, but that the killing was without malice and was therefore manslaughter, under the instructions of the court it would have acquitted appellant, and he therefore cannot be heard to complain. People v. Brown, 3 Cal. App. 178, 84 P. 670; People v. Lopez, 135 Cal. 25, 66 P. 965.

[10] Appellant urges that the court erred in refusing his proposed instruction XI, in substance, that the law requires the concurrence of 12 minds in the conclusion of guilt; that before a verdict of guilty can be rendered each juror must be satisfied beyond a reasonable doubt of defendant's guilt, and if any one juror after having considered the evidence and consulted with the other jurors should entertain a reasonable doubt of defendant's guilt, such juror should not under his oath consent to a verdict of guilty. In support of this contention appellant has cited People v. Loomer, 13 Cal. App. 654, 110 P. 466; People v. Wong Loung, 159 Cal. 520, 114 P. 829; and People v. Singh, 20 Cal. App. 146, 128 P. 420. While each of these cases holds that such instruction is proper and should be given, in the Loomer and Singh Cases it is said that the refusal to give such instruction did not constitute reversible error, and in the Singh Case it is pointed out that the Wong Loung Case was reversed for other reasons. The following language of the court in People v. Singh is applicable here: "While the opinion of the Supreme Court as expressed in those cases (People v. Dole, 122 Cal. 486 [55 P. 581, 68 Am. St. Rep. 50]; People v. Howard, 143 Cal. 316 [76 P. 1116]; People v. Wong Loung, 159 Cal. 520 [114 P. 829]) is binding upon us, and should have controlled the trial court in its application of the law to the facts of the present case, nevertheless we are satisfied that the mere failure to charge the jury as requested was not, in and of itself, an

error of sufficient gravity to warrant a reversal."

The judgment is affirmed.

We concur: KNIGHT, Acting P. J.; CASHIN, J.

95 Cal. App. 490

LENCIONI v. FIDELITY TRUST & SAVINGS BANK OF FRESNO et al.★
(Civ. 6261.)

District Court of Appeal, First District, Division 1, California. Dec. 15, 1928.

Rehearing Denied Jan. 12, 1929. Hearing Denied by Supreme Court Feb. 11, 1929.

1. Chattel mortgages 🔑227—Finding that no agreement was made to reimburse mortgagor's wife claiming benefit of crop mortgage and trust agreement for advances held contrary to evidence.

In action involving right to funds held by trustee under crop mortgage and trust agreement, providing that any one making advances to mortgagor for purpose of harvesting crop should be repaid out of first proceeds of crop not exceeding a specified sum, finding that no agreement was made to reimburse mortgagor's wife for advances made by her, and used by mortgagor to develop crop on mortgaged land, *held* contrary to the evidence.

2. Husband and wife 🔑257—That farm, part owned by wife and part by husband, was farmed as unit, held not to affect wife's right to reimbursement for advances.

Where crop mortgagor owned one part of farm on which crops were raised and his wife owned the other portion, fact that whole farm was cared for as a unit, and that there was no segregation of receipts or expenses, *held* not to affect wife's right to reimbursement for advances to mortgagor for purpose of harvesting crop, under crop mortgage and trust agreement providing that any one making advances for such purpose should be repaid out of first proceeds of crop not to exceed specified sum, since profits of separate property are by law expressly declared to be separate property of owner of land or personalty whence they are derived.

3. Equity 🔑57—Under crop mortgage and trust agreement requiring mortgagor to give trustee notice of loan to mortgagor, maxim that that will be considered done which ought to have been done held applicable to lender's rights.

Where crop mortgage and trust agreement provided that any one making advances to mortgagor for purpose of harvesting crop should be repaid out of first proceeds of crop not to exceed specified sum, and required mortgagor to give trustee written notice of such loan, mortgagor's wife, who made advances to mortgagor for such purpose, *held* entitled to assume that required notice was given, and, neither trustee nor creditors having been injured by her failure to give notice until her relations with her husband became strained, at which time no distribution of funds had been made, maxim that equity will consider done that which ought to have been done applied.

4. Equity 🔑56—Equity looks beyond form of transaction to carry out parties' purposes.

Equity looks beyond the form of a transaction and shapes its judgment in such a way as to carry out the purposes of the parties, dealing with substance of transactions and treating their forms as of secondary importance.

5. Fraud 🔑16—That lender claiming benefit of crop mortgage and trust agreement failed to notify trustee held not fraudulent "concealment."

Where crop mortgage and trust agreement provided that any one making advances to mortgagor for purpose of harvesting crops should be repaid out of first proceeds of crop not exceeding specified sum, and trustee and creditors knew that their claims against proceeds did not come into existence until necessary moneys borrowed to produce crop had been repaid, failure of mortgagor's wife to notify trustee of her advances to mortgagor for such purpose *held* not a concealment of facts amounting to fraud, since "concealment" implies design or purpose, and not mere silence.

[Ed. Note.—For other definitions, see Words and Phrases, First, Second, and Third Series, Conceal; Concealment.]

6. Estoppel 🔑95—To create "estoppel" there must be something culpable in silence which allows another to place himself in unfavorable position.

In estoppel, there must be something willful and culpable in the silence which allows another to place himself in an unfavorable position on the faith or understanding of a fact which the person remaining silent can contradict.

[Ed. Note.—For other definitions, see Words and Phrases, First, Second, and Third Series, Estoppel.]

Appeal from Superior Court, Fresno County; Charles R. Barnard, Judge.

Action by Amelia Lencioni, administratrix of the estate of B. Lencioni, deceased, against the Fidelity Trust & Savings Bank of Fresno and Minnie Helene Setchel, in which defendants filed cross-complaints and in which Amelia Lencioni and others intervened. From an adverse judgment, defendant Minnie Helene Setchel appeals. Reversed.

F. de Journel and Conley, Conley & Conley, all of Fresno, for appellant.

Cosgrave & Barstow, of Fresno, for respondent Fidelity Trust & Savings Bank.

Harris & Hayhurst, of Fresno, for respondents Amelia Lencioni and others.

CAMPBELL, Justice pro tem. This is the second appeal in this action, the first being presented by appellant herein from a judgment of nonsuit entered against her upon her cross-complaint. Lencioni v. Fidelity Trust & Savings Bank, 69 Cal. App. 325, 231 P. 366. On that appeal the judgment was reversed, with directions to the trial court to deny the

---

★Rehearing denied. Hearing denied by Supreme Court.

motion for nonsuit and proceed with the trial of the case. A petition for rehearing in the Supreme Court was denied, and the trial of the case was proceeeded with as directed by the Appellate Court in its order reversing the judgment of nonsuit. Defendant Fidelity Trust & Savings Bank filed a pleading, denominated "supplemental amended complaint," praying that the consignment creditors and the general creditors of the Setchel Fruit Company (the Setchel Fruit Company having gone into the hands of a receiver on October 3, 1921, and was adjudged bankrupt) might be made parties. Thereupon the consignment creditors intervened and filed a cross-complaint, and one of the general creditors, the Barrett-Hicks Company, on behalf of the general creditors, also filed an answer and cross-complaint against Minnie Helene Setchel. Appellant Minnie Helene Setchel, defendant and cross-complainant, duly answered the supplemental amended complaint of the bank, the cross-complaint of the intervening consignment creditors and the Barrett-Hicks Company. Judgment was rendered that Minnie Helene Setchel, cross-defendant and cross-complainant, take nothing by her several cross-complaints; that Fidelity Trust & Savings Bank retain $1,125 for its compensation and the further sum of $2,273.33 for its expenses and attorney's fees; that from the balance in its hands, being $23,045.20, the trustee bank pay to the estate of Monge, deceased, $11,673.14; to the estate of B. Lencioni, deceased, $1,313.40; to B. Lencioni and Company, a copartnership, $985.35; to O. Toccini, $3,567.66; to G. Schlichting, $1,739.33, being consignment creditors of the Setchel Fruit Company; and that the balance in its hands, $3,766.32, be paid to the general creditors to be divided among them in proportion to their claims.

[1] In Lencioni v. Fidelity Trust & Savings Bank, supra, in an opinion by Mr. Justice Langdon, then presiding justice of Division 2 of this court, the evidence supporting appellant's claim is fully reviewed. There the court says: "W. Flanders Setchel, from whom she [appellant] had been divorced at the time of the trial, testified: That the crops belonging to the appellant were handled in the years 1918, 1919, and 1920 by the Setchel Fruit Company 'on consignment' and 'the proceeds were credited on the books'; that the total amount credited to Mrs. Setchel for these years was 'some $200 or $300 short of $38,000,' and that no portion of that amount of money was ever paid in cash or otherwise to Mrs. Setchel; that in the latter part of 1920, he had a conversation with Mrs. Setchel with reference to the disposition of this money; that Mrs. Setchel was 'very insistent upon receiving payment of her moneys'; that 'he wanted the money to stay—so he could use it'; that he 'asked her if some arrangement could be made whereby it was not to be paid to her just at that time'; * * * that Mrs Setchel was induced by him to 'allow the money to remain there'; that at the time he requested Mrs. Setchel to let this money remain with the company, 'it was understood' that the money would be 'repaid out of the proceeds of the crops of the following year and in making the arrangements to secure certain creditors of the Setchel Fruit Company I made reservation in order to protect that money and induced her to agree to that.' 'What was to be done with this money which I retained in my hand was to take care of the property and develop the crops of 1921.' 'The Setchel Fruit Company's books will show the amount of money so belonging to Mrs. Setchel which was used for the purpose of making the crop of 1921.' * * * Mrs. Setchel's testimony appears in the record in the form of a deposition, wherein she says: 'I think it was in the early fall of 1920 that I made inquiries about the proceeds of these 91½ acres of the Carmelita, but I had been asking for money from my place the whole year. I never got any. * * * When I asked him for some money he came back and asked me to advance him—to let him use the money, rather, that he owed me, to crop the Carmelita now; he must have told me about the right amount then because he said it would cost something like $30,000. * * * I agreed that he could have the money to farm the Carmelita and he was to give a mortgage to the bank and there was to be a trust deed in which I was to be paid back first of all.' We are disposed to agree with the appellant that there is enough in the foregoing testimony to support Mrs. Setchel's claim that she had made advances to W. Flanders Setchel, within the meaning and intent of the mortgage and declaration of trust heretofore discussed upon a motion for nonsuit and with no evidence before the court to contradict or destroy the force of the foregoing testimony. It is to be remembered that the Setchel Fruit Company was not the owner of the land comprising the Carmelita Vineyard. Upon the company's books and in legal effect, the corporate funds were not used to develop a crop upon land not owned by said company, but such funds were used in reducing the company's indebtedness to one of its consignment creditors, Mrs. Setchel—a legitimate use of such funds—and then W. Flanders Setchel, individually, took this money, so paid by the company, to Mrs. Setchel, under a private arrangement with her, and used it to develop a crop upon the Carmelita Vineyard which he had mortgaged in advance for the benefit of the creditors of the Setchel Fruit Company. The fact that this was accomplished in one instead of in two steps surely cannot prejudice Mrs. Setchel in a court of equity. She is, obviously, a woman unacquainted with business methods and she had no voice in the selection of the method adopted in carrying out the scheme agreed upon. * * * However, the bank should

have an opportunity to prove, if it can, its allegations regarding estoppel, and to disprove, modify, or explain, by other evidence, the matters heretofore stated which Mrs. Setchel has introduced into the record." The same facts summarized in the quotation from the opinion on the former appeal as given by Mrs. Setchel in her deposition were again testified to by her on the issues raised by reason of the appearance in the action of the interveners.

Although the facts are rather fully set out in the opinion in Lencioni v. Fidelity Trust & Savings Bank, supra, it is proper to restate a few of the salient ones here. W. Flanders Setchel owned all the stock of the Setchel Fruit Company with the exception of the qualifying shares issued to other directors. The Carmelita Vineyard comprised a tract of land of 323½ acres, 91½ of which were owned by Mrs. Setchel, and the remaining 232 acres stood in the name of W. Flanders Setchel. The entire tract was a fruit farm and vineyard and was farmed as a unit. Becoming heavily indebted in the year 1920 to various creditors, including growers who had consigned their fruit, and being threatened, Setchel contrived to pay these consignment creditors about half the amount due them and executed a mortgage to Fidelity Trust & Savings Bank for the balance due all creditors, covering the crops on his 232 acres for the year 1921, and at the same time executed a declaration of trust wherein he specifically set forth the conditions and purposes of the trust. By these instruments the consignment creditors were given a preference for the balance due them over the general creditors. Mr. and Mrs. Setchel, though subsequently divorced, were at that time living together. Foreseeing that he might not have money available with which to produce the 1921 crop, Setchel suggested to his creditors that he might have to borrow money and that he should be given authority to do so. This appeared entirely reasonable to the creditors, and it was accordingly provided in the crop mortgage and trust instrument that any one advancing money for this purpose, not exceeding $30,000, should have a preferred right to its repayment secured by the mortgage in advance of the other creditors.

On the former appeal the case was remanded for trial for the defendant and cross-complainant bank, and since the consignment and general creditors have been made parties, also for them, to establish, if they could, the allegations regarding estoppel and to disprove, modify, or explain by other evidence the above matters testified to by Mr. and Mrs. Setchel. We shall therefore direct our inquiry as to whether the finding that the agreement alleged to have been made to reimburse appellant for advances to produce the 1921 crop was never made is supported by the evidence; for, if the evidence fails to support this finding, but establishes to the contrary that appellant did advance the money to produce the 1921 crop under an agreement with W. Flanders Setchel in accordance with the provisions of the trust, the judgment must be reversed.

We have not only considered the testimony set out in the briefs of appellant, respondent bank, and the interveners and cross-complainants, but have read the entire record, and have found no evidence to rebut the testimony of W. Flanders Setchel, F. De Journel, and appellant, Minnie Helene Setchel, that the money due her as a creditor of the Setchel Fruit Company was, under an agreement between Mr. and Mrs. Setchel, used in the production of the 1921 crop and was to be repaid out of the proceeds of the crop ahead of the other creditors, and that she was to be protected by the crop mortgage and trust agreement, and the testimony of M. J. Hall, an employé of the Setchel Fruit Company, that the moneys due Mrs. Setchel, entered on the books of the company as "Carmelita Account," were expended in the care and cultivation of the Carmelita ranch during 1921.

[2] Respondent urges in support of the finding that the contract between Mr. and Mrs. Setchel was not entered into; that the Carmelita Vineyard was cared for as a unit by Mr. Setchel; that no segregation either of receipts or expenses was made, and was to all intents and purposes a community proposition; that Mrs. Setchel failed to mention her claim for advances in the fall of 1921, when she made a claim to the bank for her prunes taken under the crop mortgage; and that the contemporaneous acts of the parties show an utter absence of any intention to claim that Mrs. Setchel was in any way interested in the advances.

Of the numerous authorities cited in support of the first contention that no segregation of either receipts or expenses was made with respect to the raising of crops and therefore the two tracts of land farmed together were so farmed as a community proposition, wherein the facts are at all analagous, is Dean v. Bailey, 50 Ill. 484, 99 Am. Dec. 533, wherein the court says: "Where the husband and wife live upon a farm, which, together with the stock and implements upon it, * * * have been bought with the money of the wife, the husband may exercise the same care and control over such personal property as he would over his own, and, in the eyes of the public, have the same freedom in its use, without its thereby becoming liable to the payment of his debts, * * * but it does not follow, because the wife merely allows her husband to have a general use and control over her personal property, such use and control being of a character consistent with their common interests, and the proper enjoyment of it by both, that it should thereby become liable to the payment of his debts." In this state by a long line of authorities it is held that the profits of separate property are by law expressly declared to be the separate property of the owner of the land or personalty whence they are derived (5 Cal. Jur. 300, and cases cited).

[3] As to respondents' next contention, that appellant failed to notify the bank of her advances to her husband, it may be said the testimony shows that appellant consented to be charged and there was charged against her share of the credits of the Carmelita Vineyard account the expense of raising the 1921 crop, and the fact that her money was actually so used is in no way rebutted. She had a right to assume that the trustor Setchel, then her husband, did not entertain any intention to defraud her by failing to give sufficient and proper notices to the bank trustee, which was set forth as his duty in the declaration of trust. When her relations with her husband became strained and there arose some misgivings on or before October 18, 1921, she did notify the trustee, and such notice was given before any distribution of the funds were made. At the trial the trust officer of the bank testified that he still held the funds intact and to the amount on hand.

The crop mortgage provides: "Also to secure the repayment of all advances made by any corporation, individual, or party, or their assigns, to the mortgagor not exceeding for such advances the sum of Thirty Thousand ($30,000.00) Dollars." As a part of the mortgage transaction, a declaration of trust was executed by Setchel to the bank in which the crop mortgage is referred to, and which provides: "That any corporation, individual or party, may at any time during the life of this agreement, advance to W. Flanders Setchel for the purpose of producing, harvesting, packing and marketing the crops described in said mortgage a sum or sums not to exceed $30,000.00, as specified in said mortgage, and the said W. Flanders Setchel shall, after receiving said loan, notify in writing the trustee herein of the corporation, individual or party making said loan * * * and thereafter said corporation, individual or party shall be constituted the first beneficiary under this trust for the amount loaned not to exceed $30,000.00, and said sum or sums so advanced or loaned shall be repaid to the said corporation or individual or party out of the first proceeds of said crop."

Neither the trustee nor the creditors were in any way injured by Setchel's failure to notify the trustee of the money advanced by Mrs. Setchel, or that he did not mention Mrs. Setchel because he was trying to get the advance money back for the Setchel Fruit Company, as he testified:

"Q. Why didn't you tell him then Mrs. Setchel was the one who had advanced the money and not the Setchel Fruit Company? A. I told him it was advanced for the Setchel Fruit Company. * * * At that time there were domestic affairs which prompted me to take on the attitude of looking after my own interest rather than Mrs. Setchel's. * * * And from that time on, a little before that, my attitude was rather to look after the Setchel Fruit Company and let the rest be subordinated to it.

"Q. In other words, you were trying to get the money back for the Setchel Fruit Company instead of for Mrs. Setchel? A. That is probably the interpretation of it."

[4] Equity looks beyond the form of a transaction and shapes its judgments in such a way as to carry out the purposes of the parties, dealing with the substance of transactions and treats their forms as of secondary importance. Campbell v. Freeman, 99 Cal. 548, 34 P. 113; Vance v. Anderson, 113 Cal. 538, 45 P. 816. Since under the contract the notices were to be given by Setchel and not by Mrs. Setchel, and since the failure to give them neither prejudiced the trustee nor the creditors, the maxim applies—"equity will consider as done that which ought to have been done." 1 Pomeroy, Equity Juris., §§ 365, 370, 373; Poultry Producers, etc., v. Nilsson, 197 Cal. 245, 239 P. 1086.

[5, 6] As to the charge of concealment, it may be said that there was no concealment that amounts to fraud or deceit for the reason that the trustee, as well as all of the creditors, knew that by the terms of the mortgage and declaration of trust their interest, rights, or claims did not come into existence until the necessary moneys borrowed to produce the crop had been repaid. "The 'concealment' of facts by a party to a contract, which amounts to fraud, implies design or purpose, and mere silence is not itself concealment." Barrett v. Lewiston, B. & B. St. R. Co., 110 Me. 24, 85 A. 306. "We do not" generally "speak of a person concealing a thing, unless he is in some way called upon to produce it." Watertown Sav. Bank v. Mattoon, 78 Conn. 393, 62 A. 624. So, also, in estoppel, there must be something willful and culpable in the silence which allows another to place himself in an unfavorable position on the faith or understanding of a fact which the person remaining silent can contradict. Eltinge v. Santos, 171 Cal. 278, 152 P. 915, Ann. Cas. 1917A, 1143; Stern v. Sunset Road Oil Co., 47 Cal. App. 334, 190 P. 651.

The following language of the court on the former appeal is apropos here: "So far as the record shows, the creditors of the Setchel Fruit Company had no claim upon the proceeds of the crop to be raised on Mrs. Setchel's land in 1921, but her husband's credit was seriously involved, and she not only consented to the mortgage of her future crop, but also to pay the expenses of raising the same out of moneys due her, provided only that this expense should be repaid to her out of the crop before the money was turned over to the creditors. The fairness of this demand is obvious, and it appears in the record that if the crop had not been a failure, it would have paid the expense of its production and furnished ample money to satisfy all creditors. Th. incidental unfortunate circumstance that the crop was a failure does not change the equity of allowing the expense of its production to be paid first out of its proceeds."

We have examined the authorities cited by respondents and question not the principles they enunciate, but merely their application to the situation presented here.

As the evidence without conflict establishes the fact that appellant advanced funds to produce the crop of 1921, as provided for in the crop mortgage and declaration of trust, and is therefore entitled to be repaid such funds in advance of other creditors, the judgment must be reversed, and it is so ordered.

We concur: TYLER, P. J.; KNIGHT, J.

---

95 Cal. App. 741

DE LONG v. MISSION MARBLE WORKS et al. (Civ. 6543.) ★

District Court of Appeal, First District, Division 1, California. Dec. 24, 1928.

Rehearing Denied Jan. 23, 1929.

1. **Novation ⟹12—Evidence held to show new contract supported by consideration was made for installing marble, after plaintiff refused to proceed on discovering plans bid on were admittedly not in accordance with official plan required to be completed.**

In action for labor in installing marble for defendants, evidence that plan furnished by contractor on which plaintiff's bid was based did not correspond to official plan, that contractor admitted plans furnished were wrong, and that, after plaintiff refused to proceed on ground that work bid on was not work called for by official plans, plaintiff was requested to proceed according to latter plans and render account for labor required to complete work, and that plaintiff completed work under new arrangement, showed that new contract supported by sufficient consideration was made.

2. **Novation ⟹1—Whether new agreement amounts to novation is question of intention.**

Whether new agreement amounts to novation is question of intention.

3. **Novation ⟹4—Novation is effected when new contract has been entered into without fraud and as substitute for previous contract.**

When it is clear that new contract has been entered into without fraud and with understanding that it shall be substituted for previous contract, novation is effected and former agreement extinguished.

Appeal from Superior Court, City and County of San Francisco; E. P. Mogan, Judge.

Action by C. A. De Long against the Mission Marble Works, a corporation, and another. Judgment for plaintiff, and defendants appeal. Affirmed.

Geo. Clark Sargent, of San Francisco, for appellant Marble Works.

Louis Ferrari and J. J. Posner, both of San Francisco (Aaron M. Sargent, of San Francisco, of counsel), for appellant Bank of Italy.

Whitehurst & Logan, of Newman, and H. K. Eells, of San Francisco, for respondent.

CASHIN, J. Defendant Mission Marble Works, a corporation, on March 29, 1923, entered into a contract with the Bank of Italy to manufacture and install the marble work in a bank building, which was being erected by the latter at Visalia, Cal. The work was to be done according to certain plans and specifications which were referred to in the contract. The plans were prepared by the architect employed by the bank, and the specifications provided that the contractor should prepare and furnish shop drawings of the marble work, and that these should be checked by the architect and returned to the contractor with his approval or corrections. The contractor prepared a set of shop drawings, but the evidence shows that only one of these, called the typical floor plan, and upon which were shown the marble tiled floor, the border and wainscoting of the second, fourth, and fifth floors of the building, was submitted to the architect. The latter drawing as shown was a blueprint, and on May 3, 1923, before the plaintiff had any connection with the work, the same was returned by the architect to the contractor with a number of corrections made thereon. The evidence further shows that after the latter date and before May 28, 1923, the contractor, in order to enable the plaintiff to submit a bid for setting the marble, delivered to him the shop plans, including a copy of the typical floor plan mentioned, but without the architect's corrections being shown thereon. On May 31, 1923, the plaintiff entered into a contract with the defendant contractor whereby he agreed, for the sum of $4,500, to install the marble in the building as called for by the specifications and shown on the plans, all to the satisfaction of the architect. In this connection it was alleged by the plaintiff, and the court found, "that prior to the execution of said contract of May 31, 1923, defendant, Mission Marble Works, furnished the plaintiff certain plans prepared by said defendant, which said plans purported to show in detail the dimensions, character and location of all marble to be installed in said building, and that said defendant, for the purpose of inducing plaintiff to enter into a contract for installing said marble at as low a price as possible, then and there stated to plaintiff that said plans so furnished him by it were in all respects true and accurate and corresponded exactly with the official plans of said building." It was further alleged and

---

★Rehearing denied.

found that the plaintiff, believing and in reliance upon the representations that the plans furnished him were correct, entered into the contract for the price mentioned, and that the latter was the lowest possible cost of doing the work had the representations been true. It was also found that plaintiff entered upon the performance of the contract, but that the plans furnished by said defendant did not correspond with the official plans of the building, and the marble furnished by the defendant—and which was cut in accordance with the plans furnished to the plaintiff—could not be installed therein; that because of this impossibility the original contract between plaintiff and defendant contractor was abandoned, and a new agreement entered into between them by which the plaintiff was to be paid the value of his work and labor in installing the marble in accordance with the official plans of the building. The court found that the plaintiff was compelled to recut and repolish a large part of the marble furnished by the defendant contractor; that much was furnished only after long delay; that the value of the work done by plaintiff was $6,769.94, of which the sum of $4,100 had been paid; and also that the bank, which was served with a verified notice of the claim, was indebted to defendant contractor under its contract in a sum more than sufficient to pay the balance unpaid to the plaintiff. Judgment was entered accordingly against the contractor and also against the bank, which was joined as a defendant, and both defendants have appealed.

As grounds for reversal it is claimed that the evidence was insufficient to support the conclusion that a new contract was made between the parties, and that any recovery for extra work should be based not upon its reasonable value but upon the original contract price.

[1] The evidence adduced in support of plaintiff's claim that the plan furnished by the contractor, and upon which the bid was based, did not correspond with the so-called official plans, is not contradicted. Furthermore, there was no denial of his testimony that the president and general manager of the contractor admitted that the plans furnished were wrong, and that after the plaintiff had refused to proceed under his contract upon the ground that the work bid upon was not the work which the official plans called for, he was requested by that officer to proceed according to the latter plans and render an account of the labor required to complete the job. The facts justified the plaintiff's refusal to proceed further under his contract, and it was not only to the interest of the defendant contractor, which was at fault, that the work should proceed, but, in view of the circumstances, it was manifestly the intention that the plaintiff should continue under a new arrangement.

[2, 3] Whether a new agreement amounts to a novation is a question of intention (Parkside Realty Co. v. MacDonald, 166 Cal. 426, 137 P. 21; Dyer Bros. Iron Works v. Central Iron Works, 182 Cal. 588, 189 P. 445); and when it is clear that a new contract has been entered into without fraud, and with the understanding that it shall be substituted for a previous one, a novation is effected and the former agreement extinguished (Beckwith v. Sheldon, 165 Cal. 319, 131 P. 1049; Utah Construction Co. v. Western Pacific Ry. Co., 174 Cal. 156, 162 P. 631; Simmons v. Sweeney, 13 Cal. App. 283, 109 P. 265; Thomas v. Wentworth Hotel Co., 16 Cal. App. 407, 117 P. 1041, 1046; Hieatt v. Gassen, 41 Cal. App. 620, 183 P. 227; Harpold v. Slocum, 46 Cal. App. 51, 188 P. 824).

It is our conclusion that a new contract supported by a sufficient consideration (Credit Clearance Bureau v. Geo. A. Hochbann, etc., Co., 25 Cal. App. 546, 144 P. 315) was made in the present case, and the judgment is accordingly affirmed.

We concur: TYLER, P. J.; KNIGHT, J.

95 Cal. App. 754

SEXTON v. DALY et al. (Civ. 3648.)

District Court of Appeal, Third District, California. Dec. 24, 1928.

1. Constitutional law ⚷188—Legislature may change law of succession, and make it applicable to previously acquired property.

The Legislature may at any time change the law of succession, and may make the changed law applicable to previously acquired property.

2. Wills ⚷3—Statute authorizing testamentary disposition by either spouse of half of community property held applicable only to after-acquired property, as respects testamentary disposition by wife (Civ. Code, § 1401, amended in 1923).

Amendment of Civ. Code, § 1401, in 1923, to provide that on death of either spouse one-half of community property belongs to surviving spouse, and that other half is subject to testamentary disposition of decedent, authorizes either spouse to make testamentary disposition of one-half of community property, not merely part thereof remaining undisposed of at death of the other, and court will therefore presume that it was intended to be applicable only to after-acquired property, as respects testamentary disposition of community property by wife, who previous to amendment had a mere expectancy in community property.

3. Wills ⚷6—Will bequeathing all property of which wife died possessed did not dispose of community property wherein testatrix had mere expectancy as heir (Civ. Code, § 1401, amended in 1923).

Wife's will, bequeathing to named children all her property of which she died possessed, executed before 1923 amendment of Civ. Code, § 1401, providing that, on death of either spouse, one half of community property belongs to surviving spouse, and that other half is subject to testamentary disposition of decedent, *held* not intended to dispose of any part of community property in which, prior to amendment, testatrix had a mere expectancy as heir.

Appeal from Superior Court, Los Angeles County; William C. Doran, Judge.

Action by Henry Sexton against Alba Daly and others. From an adverse judgment, certain defendants appeal. Affirmed.

Joseph Scott and A. G. Ritter, both of Los Angeles, for appellants.

Verge, Cooney, Davin & Kearney, Arthur C. Verge, and A. H. De Tremaudan, all of Los Angeles, for respondents.

FINCH, P. J. The plaintiff, who is the surviving husband of Mary Sexton, deceased, was given judgment quieting his title to several parcels of real property which, during the lifetime of his wife, had been a part of their community property. The appellants are the children of Mrs. Sexton by a previous marriage, and they are beneficiaries under her last will, which was upheld in Estate of Sexton, 199 Cal. 759, 251 P. 778. The will was executed July 12, 1921. The dispositive clause thereof reads as follows:

"I give, bequeath and devise to my children (naming them), share and share alike, all property, both real and person(al), of which I may die possessed."

Mrs. Sexton died September 25, 1924. The Legislature of 1923 amended section 1401 of the Civil Code to read as follows:

"Upon the death of either husband or wife, one-half of the community property belongs to the surviving spouse; the other half is subject to the testamentary disposition of the decedent, and in the absence thereof goes to the surviving spouse, subject to the provisions of section one thousand four hundred two of this Code."

The property in controversy was acquired prior to 1923. Appellants concede that at and prior to the death of Mrs. Sexton a wife's interest in community property was a mere expectancy. A mere expectancy "is not to be deemed an interest of any kind." Civ. Code, § 700. In Stewart v. Stewart (Cal.) 269 P. 439, it is held that, as to all community property acquired prior to the enactment of section 161a of the Civil Code in 1927 (Stats. 1927, p. 484), "during the marriage the husband is the sole and exclusive owner of all the community property, and the wife has no title thereto, nor interest or estate therein, other than a mere expectancy as heir, if she survive him." In appellant's reply brief it is said:

"Appellants' contention is * * * that upon the death of Henry Sexton they, as children of Mary Sexton, are entitled by reason of being legatees and devisees of their mother's will, to share in any property of Henry Sexton's estate which was community property of Henry Sexton and Mary Sexton during her lifetime. * * * Appellants do not seek to interfere with or molest the right of Henry Sexton to handle and deal with the community property, but claim that upon his death they have the right to succeed to a portion of what remains by reason of the existence of Mary Sexton's will. They claim that by reason of said will and said sections 1401 and 1402 they have been awarded a right of succession in whatever remains of said community property, and that sections 1401 and 1402 are in effect statutes of succession or inheritance for their benefit rather than statutes to disturb any vested interest of the estate."

[1, 2] Undoubtedly the Legislature may at any time change the law of succession, and may make the changed law applicable to previously acquired property; but to authorize one who has no "interest nor estate therein, other than a mere expectancy as heir," to determine who shall succeed to such property, is an entirely different proposition. The

language of section 1401 shows a clear intent to authorize either spouse to make testamentary disposition of one-half of the community property, not merely such part thereof as may remain undisposed of at the death of the other. It is to be presumed, therefore, that it was the intention to make the provisions of that section applicable only to after-acquired property, in so far as concerns the testamentary disposition of community property by the wife, rather than to interfere with the husband's vested right to the ownership and control of the whole of such property during his lifetime, or to provide a new rule of succession.

[3] The will was executed prior to the amendment on which the appellants rely and, therefore, the testatrix could not have had the provisions of that amendment in mind when she made her will. If she was attempting to dispose of any part of the community property, singularly inappropriate language was employed to accomplish her purpose. "All property * * * of which I may die possessed" could not have been intended to designate property in which the testatrix had "a mere expectancy as heir." Appellants' position appears to be so clearly untenable that further discussion or citation of authorities is deemed unnecessary.

The judgment is affirmed.

We concur: SHIELDS, Justice pro tem.; PLUMMER, J.

---

95 Cal. App. 659

PEOPLE v. LEDDY. (Cr. 1506.)★

District Court of Appeal, First District, Division 2, California. Dec. 21, 1928.

Rehearing Denied Jan. 5, 1929. Hearing Denied by Supreme Court Jan. 17, 1929.

1. Homicide 🔑250—Evidence held to support conviction of murder as against claim of mutual combat.

Evidence *held* to support conviction of murder as against claim that parties were engaged in mutual combat and that crime was manslaughter only.

2. Homicide 🔑145—It is natural inference that vicious attack with club is with intent to inflict great bodily injury.

Where men are suddenly and viciously attacked, one of the assailants having a small club, it is a natural inference that great bodily injury was intended.

3. Criminal law 🔑823(17)—Instruction that killing with specific intent to take life would be first degree murder held not erroneous, in view of other instructions, because omitting deliberation and premeditation.

Where court charged that if killing was done under specified circumstances it was murder in the second degree, unless evidence proved specific intent to take life, further statement that if such specific intent existed the offense would be murder in the first degree, *held* not erroneous as ignoring premeditation and deliberation, where other instructions fully defined murder in both degrees and manslaughter and their elements.

4. Criminal law 🔑810—Instructions on murder in the second degree held not in conflict.

Instruction that if unlawful killing was done under specified circumstances it was murder in the second degree, unless evidence proved specific intent to take life, in which case it was murder in the first degree, *held* not in conflict with instruction that in second degree murder there might be formed design and purpose to kill, but that killing was not deliberated and premeditated.

5. Criminal law 🔑823(9)—Instruction as to burden being on defendant to show mitigating circumstances, justification, or excuse held not erroneous, when jury was instructed on reasonable doubt and burden of proof (Pen. Code, § 1105).

Instruction based on Pen. Code, § 1105, that burden of proving circumstances of mitigation or that justified or excused killing devolved on defendant unless proof by prosecution tended to show crime was manslaughter or that defendant was justifiable or excusable, but that defendant was only bound to create a reasonable doubt, *held* not erroneous, where jury were also instructed on subjects of reasonable doubt and burden of proof.

6. Homicide 🔑286(3)—Where evidence warranted conviction of murder in the first degree, instruction on deliberation and premeditation was not error.

Where evidence justified a verdict of murder in the first degree, it was not error to give instructions as to what would constitute premeditation and deliberation.

7. Criminal law 🔑1172(1)—Instruction that act might be done deliberately and intentionally from moment's reflection, if invading jury's province, held not injurious.

On trial for murder, instruction that a man might do a thing willfully, deliberately, and intentionally from a moment's reflection, as well as after pondering it for a month or a year, stated a mere commonplace which could not prejudice defendant, conceding it to be an attempt to state a psychological fact, which was exclusively for the jury.

8. Criminal law 🔑823(9)—Instruction as to presumption of intent to do that done willfully and voluntarily held not erroneous in connection with other instructions.

On trial for murder, instruction that person was presumed to intend to do that which he voluntarily and willfully did, and that presumption must prevail in absence of evidence to contrary, *held* not erroneous in connection with all the instructions because not adding that presumption was subject to be repudiated by evidence.

★Rehearing denied. Hearing denied by Supreme Court.

9. Criminal law 🔑815(4)—Instruction that intent was manifested by circumstances of homicide held not erroneous as excluding defendant's testimony.

On trial for homicide, instruction that intent is manifested by circumstances connected with the homicide *held* not erroneous as excluding defendant's testimony as to his intent from jury's consideration, particularly when considered with the instructions as a whole.

10. Homicide 🔑309(1)—Instruction on murder in the second degree held not erroneous because not stating that absence of either deliberation or premeditation would be sufficient (Pen. Code, § 189).

Instruction defining murder in the second degree in accordance with Pen. Code, § 189, was not erroneous because not stating that if either premeditation or deliberation was absent, the homicide was murder in the second degree.

11. Homicide 🔑286(2)—Instructions on malice were properly given when evidence made jury question as to murder (Pen. Code, § 188).

Where evidence was sufficient to make jury question as to whether homicide was murder rather than killing in mutual combat, instruction defining malice as defined in Pen. Code, § 188, and instruction amplifying such definition, were properly given.

12. Homicide 🔑309(4)—Instruction as to adequate provocation to reduce homicide to manslaughter held warranted by evidence.

Under the evidence, instruction as to what constituted adequate provocation by which unlawful homicide would be reduced from murder to manslaughter *held* properly given.

13. Homicide 🔑233—In murder prosecution, motive need not be proved when inferable from evidence.

On trial for murder, it is unnecessary that prosecution prove motive where it may be inferred from the evidence.

14. Homicide 🔑230—Jury held entitled to infer intent to commit felony by persons making attack.

Where on trial for murder there was evidence that witness and another were suddenly attacked by defendant and another, and that during ensuing struggle deceased was killed, jury were entitled to make any reasonable inference which facts warranted, one of which was intent to commit a felony.

15. Criminal law 🔑824(2)—Instruction defining "absolutely necessary" as used in instruction on self-defense should be offered if definition is desired.

Where court charged that to justify or excuse killing it must have appeared to defendant as reasonable man that killing was absolutely necessary, if defendant desired meaning of phrase "absolutely necessary" to be explained to the jury, he should have offered an instruction to that effect.

16. Criminal law 🔑811(2)—Repetition of statement as to necessity for killing to support claim of self-defense held not erroneous.

Where court several times charged that defendant was not entitled to claim self-defense unless killing was actually or apparently necessary, repetition was not erroneous as impressing jury with idea that court did not believe such necessity existed, where instruction stated law of self-defense in various forms which necessitated such repetition.

17. Criminal law 🔑763, 764(8)—Instruction stating testimony and then stating law, if jury found certain facts from such testimony and all the evidence, was not a charge respecting matters of fact (Const. art. 6, § 19).

Instruction that named witness had testified to certain facts and that if jury found from that evidence and all the evidence in the case that fatal blow was struck by defendant, when he was not in real or apparent danger of being killed or seriously injured, then blow was not excusable or justifiable, did not violate Const. art. 6, § 19, prohibiting charge with respect to matters of fact.

18. Criminal law 🔑761(12)—Instruction as to self-defense held not erroneous as telling jury defendant had intentionally taken deceased's life.

On trial for murder, instruction that law would not allow man to constitute himself a judge to declare that another's life was forfeited and execute such judgment, unless there was real or apparent necessity for such action, *held* not erroneous as in effect telling jury that defendant intentionally took deceased's life.

19. Criminal law 🔑829(9)—Instruction as to presumption that defendant spoke the truth as a witness held sufficiently covered by one given.

Instruction that defendant was entitled to presumption of law that he spoke the truth and that jury had no right to disregard his testimony, but that his testimony was entitled to same consideration as that of any other witness, was sufficiently covered by instruction that witness called by people or by defendant, and defendant himself, was presumed to speak the truth.

20. Homicide 🔑300(3)—Instruction on self-defense held not erroneous because not repeating right to use force appearing necessary to defendant as a reasonable man.

Where court charged as requested by defendant that if one attacked on his own premises as a reasonable man believed and had cause to believe that his assailant intended to kill him or to do him great bodily harm, he was not obliged to retreat, etc., it was not error to add that the person assailed must not use more force or violence than was necessary, without also adding that defendant had right to use such force or violence as appeared to him as a reasonable man to be reasonably necessary.

21. Criminal law 🔑785(3), 789(2)—No instruction other than giving of statute is necessary on subject of reasonable doubt and presumption of innocence (Pen. Code, § 1096, as amended, and § 1096a, as added by St. 1927, p. 1039).

Under the express provisions of Pen. Code, § 1096a, as added by St. 1927, p. 1039, where the court gave to the jury section 1096, as amended by St. 1927, p. 1039, no other instruction on subject of reasonable doubt and presumption of innocence was required.

22. Criminal law 🔑829(18)—Instruction that juror having reasonable doubt should not vote for verdict because majority were in its favor held sufficiently covered by instruction given.

Instruction that juror entertaining a reasonable doubt should not vote for verdict of guilty because majority were in favor of such verdict was sufficiently covered by instruction that it was jurors' duty to maintain their individual opinions so long as they thought they were right, and to act in accordance with their honest belief and according to the law and the evidence.

23. Criminal law 🔑763, 764(5)—Instruction stating there was evidence tending to show certain facts was properly refused as invading jury's province (Const. art. 6, § 19).

Instruction which contained a statement that there was evidence tending to show certain facts was properly refused as trenching on the province of the jury and violating Const. art. 6, § 19, prohibiting charges with respect to matters of fact.

24. Criminal law 🔑781(4)—Instruction as to consideration with caution of statements of defendant while in custody held properly refused.

Instruction that there was evidence tending to show admissions of defendant while in custody and that statements made under such circumstances were to be received with caution *held* properly refused.

25. Criminal law 🔑761(1)—Instruction to consider intoxication or degree of intoxication of witnesses held properly refused as assuming disputed fact.

Where there was evidence that some witnesses had been drinking, but their condition as to sobriety or being drunk was a question of fact, instruction that jury should consider intoxication or degree of intoxication of witnesses or any of them at time of homicide, in determining weight to be given their testimony, was properly refused, as assuming that some witnesses were intoxicated.

26. Criminal law 🔑1173(1)—Instruction as to effect of intoxication held to state mere commonplace, and its refusal was harmless.

Where there was evidence that some witnesses had been drinking at time of homicide, instruction that intoxication involved numbness of faculties so as to affect capacity to observe, recollect, or communicate stated a commonplace that needed no exposition, and its refusal was not injurious.

Appeal from Superior Court, Santa Clara County; J. R. Welch, Judge.

Clarence A. Leddy was convicted of murder in the first degree and sentenced to life imprisonment, and, from the judgment and an order denying a new trial, he appeals. Affirmed.

John O'Gara, of San Francisco, E. M. Rea, of San Jose, and George T. Kerr, of San Francisco, for appellant.

U. S. Webb, Atty. Gen., and Lionel Browne, Deputy Atty. Gen., for the People.

BURROUGHS, Justice pro tem. The defendant was accused by an information filed in the superior court of Santa Clara county with the crime of murder. He entered a plea of not guilty, and upon a trial of the issue thus raised the jury returned a verdict of guilty of murder of the first degree and fixed his punishment at life imprisonment. He made a motion for a new trial, which was denied. The court thereupon sentenced him to life imprisonment in the state prison at San Quentin. From said order and judgment he appeals. He contends that the evidence is insufficient to sustain the verdict, and, further, that the trial court committed prejudicial error in giving certain instructions to the jury, and also in refusing to give certain instructions proposed by him. We will first consider the question of the alleged insufficiency of the evidence to support the verdict.

[1] The transcript of the evidence reveals that two distinct versions of the affray which led to the killing are given by the witnesses, one version being given by the witnesses for the prosecution, and which it is claimed by respondent amply sustains the verdict, and the other by the witnesses for the defendant, and from which it is claimed by appellant it was a case of justifiable homicide. Further, even though this theory is untenable, it is claimed that, giving to the testimony of the prosecution its full weight, the offense amounted to no more than voluntary manslaughter. It is uncontradicted that this appellant kept a "bootleg joint" on the Almaden road, just outside the city limits of San Jose. About 4:30 a. m. on Saturday, May 26, 1928, an automobile arrived at appellant's resort. Robert F. Hill, Jr., Fred Jenny, and Alfred H. Webb were the occupants of the car. An altercation ensued. Webb, Hill, Jenny, appellant, and Fred True, appellant's barkeeper, were participants. Hill was hit on the head with a hoe. Appellant was the man who hit him. Hill is dead, and it is with his death appellant is charged. Bearing in mind the well-settled rule of law that appellate tribunals will not pass upon the credibility of witnesses, or weigh their evidence, the question to determine is this, Is there substantial evidence in the record to sustain the verdict of the jury? If so, the verdict may not be disturbed on appeal.

The story of the tragedy, as told by the witnesses for the prosecution, is concisely stated in respondent's brief as follows: "The testimony shows: Alfred H. Webb testifying:

"That Webb, Jenny and Hill arrived at the place of appellant at about 4:30 a. m. on the twenty-sixth day of May, 1928; that Hill and Webb left the car together and started toward the new building; that when they reached the corner of the garage walking side by side, someone *rushed* them. That Webb was thrown to the ground, and Hill was thrown on top of him.

"That Jenny, who had remained in the car, was called while both Webb and Hill were on the ground. That Jenny arrived before Webb and Hill got up; that Hill and Webb got on their feet.

"That thereupon Fred True, the bartender 'came' at Webb with an indoor baseball bat, and appellant was following Hill 'over toward the steps.'

"That Jenny said to appellant 'Put that down or you will kill somebody;' that this was followed by mumbling, and then Jenny said 'Will you promise to throw that away if I let you up.'

"That 'Leddy got up.' While Webb and Hill were brushing off their clothes, Jenny walked back toward the car.

"Webb heard: 'Let's finish the sons of bitches,' and then True came at Webb with the baseball bat again. While Webb was protecting his head by raising his arm, he looked under it and saw Leddy hit Mr. Hill.

"That Leddy hit Hill with a 'long blunt instrument' resembling People's Exhibit A. That appellant struck Hill on the head. That at the time Webb saw Hill struck on the head by appellant, Hill was lying on the ground.

"The witness Fred Jenny testified:

"That Webb, Jenny and Hill arrived at the place of appellant at about 4:30 a. m. on the morning of May 26, 1928. That he was asleep in the car when it arrived. That Webb spoke to him upon arrival, asking him to come in the resort, but that he declined to do so and that about three minutes passed when he heard Hill and Webb shout, 'Help, Fred,' and awakening he got out of the car and saw there was a fight, that one man was standing and three were on the ground.

"Leddy was 'on top of the two boys' and True was holding an indoor baseball bat above them, trying to hit someone.

"Jenny said : 'I don't know what this fight is all about or who started this fight. At any rate, you (speaking to True) put the bat away or you will kill somebody.' That he 'got underneath the baseball bat and held True.'

"True said 'they are trying to rob you, and we are helping you,' to which Jenny replied 'If these boys are trying to rob me, I will take care of myself.'

"Leddy got up, with that statement and started toward the garage. Just a moment or two passed, and Leddy came back to the place where they had struggled. Hill was sitting and Webb was on his knees.

"Leddy 'had a grub hoe,' and Jenny 'met him about half way to where the boys were on the ground.' The struggle for possession of the hoe ended by Jenny and Leddy falling to or hitting the ground. After hitting the ground, it appears Jenny was on top of appellant like 'riding a horse.'

"Jenny remonstrated with Leddy to 'put the hoe down or you will kill somebody.' Leddy stated 'I know when I am licked. * * * I will promise to be good,' whereupon Jenny let appellant up, and Jenny started for his car.

"Reaching his car, Jenny called to Hill and Webb 'Let's get out of here, let's go home.' Hill was brushing off his clothes and Webb was leaning on the tree.

"About this time appellant hollered 'Let's finish the sons of bitches, now. With that he made a run for Mr. Hill; and Mr. True made a run for Webb.' On cross-examination Jenny testified he saw appellant run fifteen or twenty feet with the hoe before striking Hill.

"Jenny called to Hill to look out, whereupon Hill raised his hand. Appellant hit Hill three times, the third time after he had fallen to the ground.

"Jenny, by that time, reached and grabbed appellant, saying 'You have killed him.' With that Leddy threw the hoe away.

"Jenny positively identified the hoe (People's Exhibit A.)

"Hill never recovered and died the next day.

"J. T. Maguire, a witness for the prosecution, was not a member of the Hill, Webb and Jenny party. He occupied a good position with a public service corporation in California. He was in the place conducted by appellant on the evening of the tragedy. He had had three drinks. He testified he did not see either Webb or Jenny in the place, and that he did not witness any trouble inside the place. That appellant and True left the place together, and that he remained talking with a girl in the place for five or ten minutes thereafter. Seeing no one, he imagined there must be some trouble, and walked toward the door. The first thing he saw was some skirmishing and fist fighting over near the steps. Then, as he said: 'My attention was centered on Mr. Leddy, who had a hoe in his hand and walking toward another gentleman, and he struck this man, I could not say where, but it appeared to me that he struck him on the head. *Twice.*'

"At the time he was struck Hill was backing up and the witness did not see anything in his hands. The witness later stated Hill might have had something in his hands, that he was not testifying *positively* that he did not. Still later, that Hill did not have his hands up.

"After Hill was struck Mr. Maguire left immediately.

"The witness, William Condon, a deputy sheriff, testified to an admission of the appellant that 'Those fellows were never in the joint.'

"To the same effect is the testimony of L. T. Torres, another deputy sheriff.

"Doctor Sullivan, the physician that attended Hill prior to his death and who performed the autopsy, stated that death resulted from a considerable hemorrhage secondary to extensive fracture of the skull. That the cause of the fracture was the application of considerable force."

Contradicting the foregoing, we have the following statement of the substance of the evidence given by the defendant and his witnesses as set forth in the appellant's opening brief, which is as favorable to appellant as the evidence will warrant:

"According to the testimony of defendant and his witnesses, Webb knocked at the door of the saloon and was admitted by Machado. Webb asked True for three drinks of whisky. True inquired why he wanted three, and was told that he had two friends outside. True refused to give Webb any liquor, saying that he appeared to have sufficient already. Then, Webb appealed to Leddy, who replied that he was not the bartender. Again denied a drink by True, Webb walked out.

"Leddy looked through a small window in the saloon door and saw Hill reaching into the pocket of Jenny, apparently asleep in the parked machine, and a moment later saw Hill with a pocket-book in his hand, evidently taken from Jenny's pocket. Leaving the machine, Hill came toward the door of the saloon, but turned and walked down by the side of the building. Leddy came out of the saloon and catching up with Hill told him not to hide that there. Hill said: 'Who are you?' Leddy replied that he was the boss of the place. At once Hill struck Leddy a blow with his fist. An exchange of blows followed. Hill backed over to the machine, and Leddy spoke to Jenny and asked if the purse was his and Jenny clapped his hand on his breast and said: 'It is mine.'

"Thereupon, Hill struck Leddy again, and they clinched. Webb went to the aid of Hill, and the two of them threw Leddy on the ground and piled on top of him.

"At this point Machado heard the uproar and came out from the saloon, bearing in his hand a toy bat which had been hanging above the bar. Machado approached the three fighting men, but took no part except to stand near them with the bat in his hand. While Machado stood there, True, the bartender, also came from the saloon into the yard and went at once to Leddy's aid, seizing Webb and taking him off. Leddy and Hill continued to scuffle.

"Then, Jenny joined in the contest by trying to take the bat away from Machado. Failing to get the bat, Jenny seized a hoe which was lying near, having been left there by a workman the day before. When Jenny came up with the hoe in his hands Leddy turned away from Hill and sought to take the hoe from Jenny. A struggle for possession of the hoe ensued. Finally, Jenny loosened his hold on the hoe in trying to jump and butt Leddy, and Leddy wrenched the hoe from him. Leddy warned Jenny, and Jenny ran out of the yard.

"Thereupon Leddy saw that Hill had joined Webb in an attack on True. Leddy threw the hoe aside, and walking over engaged with Hill, leaving Webb to fight with True. Hill and Leddy fought with each other, and finally Hill, backing up, seized an ax which was standing in its usual place, near the cellar door of the old residence across the yard from the saloon. Leddy tried to take the ax from Hill, and a struggle for the possession of the ax followed. While they were struggling, Otto, the piano player, ran over and got the hoe and came up with it by the side of Leddy and Hill. Leddy seized the hoe from Otto's hand, and raising it, warned Hill to stand back, but Hill, who now had the ax in his hand, crouched as if he would strike Leddy with it. When Hill disregarded the warning and started toward him Leddy struck Hill twice with the hoe, the first blow upon the shoulder and the second blow on the side of the head. Hill fell, and his head struck the curve. Immediately Leddy put down the hoe and went to Hill's aid, placing him in an easier position, bathing his head and trying to bring him back to consciousness. The fight between True and Webb, which was still going on, came to a sudden stop when Webb said to True: 'Fred, somebody is hurt.' Their efforts to restore Hill failing, Leddy, True and Webb placed Hill in Jenny's car and he was taken to the hospital, where he died the next day."

There is also evidence that Hill, Webb, and Jenny had visited other resorts that night and had been drinking.

Under this state of the record there can be no question but that the jury believed the account of the affray given by the prosecution witnesses and disbelieved that given for the defense. But it is contended by the defendant that, disregarding the theory of self-defense, there is no evidence of any more serious crime than voluntary manslaughter. In support of this view it is said that the parties were engaged in a mutual combat, and that under that doctrine the crime could amount to manslaughter only. He cites Clark and Marshall's Law of Crimes (2d Ed.) pp. 358, 359, § 260, where it is said: "If two persons meet, not intending to quarrel, and angry words suddenly arise, and a conflict springs up, in which blows are given on both sides, without much regard to who is the assailant, it is a mutual combat; and if no unfair advantage is taken at the outset, and the occasion was not sought for the purpose of gratifying malice, and one of them seizes a weapon and strikes a fatal blow, it is regarded as homicide in the heat of blood, and manslaughter." Other authorities are cited dealing with the law of mutual combat, but as we view the evidence in this case such doctrine is inapplicable. The witness Webb testified that after he and Hill got out of the car, and approached the appellant's saloon, they were suddenly rushed by appellant and True. Webb thereupon called upon Jenny for help and when Jenny arrived the fight was in progress. If the jury believed the story of Webb and Jenny then it was not a case of "mutual combat" as defined by the law writers and decisions, but was clearly a case of assault by the appellant and his barkeeper, in which Hill, Webb, and Jenny were exercising the right of self-defense, and we are at a loss to find any place in the evidence where it appears that it ever became a "mutual combat," which would relieve the appellant from the charge of murder.

[2] What motive may have actuated the appellant and True in attacking Webb and Hill does not appear in the record except by inference, but where men are suddenly viciously attacked, one of the assailants having a small club, it is a natural inference great bodily injury was intended.

[3] The appellant claims that the court should not have given any instructions upon the subject of murder; that the evidence in the case established that the defendant in any event had committed no offense higher than voluntary manslaughter. We have already held that under the evidence adduced at the trial the crime of murder was involved, and therefore such conclusion disposes of this objection made by the appellant. The court instructed the jury: "If the unlawful killing is done without the provocation and sudden passion which reduces the offense to manslaughter, or is done in the commission of an unlawful act, the natural consequences of which are dangerous to life, or is committed in the attempt to perpetrate a felony other than those mentioned in the description of murder in the first degree, or the circumstances of the killing show an abandoned heart, this is murder of the second degree, unless the evidence proves the existence in the mind of the slayer of the specific intent to take life. If such specific intent exists at the time of such unlawful killing, the offense committed would, of course, be murder of the first degree." It is claimed that this instruction is erroneous because it tells the jury that if there existed in the mind of appellant a specific intent to take life it constituted murder of the first degree, and that the instruction ignores the necessary elements of premeditation and deliberation, which are necessary elements of murder of the first degree. It will be noted that the instruction states that if the unlawful killing is done without the provocation and sudden passion, which reduces the offense to manslaughter, or is done in the commission of an unlawful act, the natural consequences of which are dangerous to life, or is committed in the attempt to perpetrate a felony other than those mentioned in murder of the first degree, or the circumstances of the killing show an abandoned heart, that is murder of the second degree. The court in its other instructions fully defines murder of the first and second degree, and manslaughter, and the elements constituting those offenses. Therefore, read in connection with the other instructions, the instruction complained of constituted a correct statement of the law.

[4] Appellant further contends that the instruction is in conflict with the following one given by the court: "In murder of the second degree there may be a formed design and purpose to kill, but it is followed immediately by the act, and is not deliberated and premeditated." Counsel does not point out wherein this instruction conflicts, but the latter instruction states elements of murder of the second degree and read in conjunction with the other instructions it could not be interpreted as contradictory of the first instruction of which complaint is made.

[5] The court further instructed the jury: "The court also instructs you that upon this trial for murder, the commission of the homicide, that is the killing of Robert F. Hill, Jr., by the defendant, being proved or admitted, the burden of proving circumstances of mitigation or that justify or excuse such killing devolves upon him, the defendant, unless the proof on the part of the prosecution tends to show that the crime committed only amounts to manslaughter, or that the defendant was justifiable or excusable." It is contended by appellant that the giving of the foregoing instruction was erroneous, first, because the proof on the part of the prosecution did tend to show that the crime committed only amounted to manslaughter; second, because section 1105 of the Penal Code which this instruction attempts to have the jury apply was intended as a direction or guide to the court to enable the court to determine when the prosecution had made out a prima facie case in a murder trial and was never intended to be applied by the jury. In addition to the portion of the instruction above set forth the court annexed to said instruction the following: "But the defendant is only bound under this rule to produce such evidence as will create in the minds of the jury a reasonable doubt of his guilt of the offense charged; it can make no difference whether such reasonable doubt is the result of evidence on the part of the defendant tending to show circumstances of mitigation or that justify or excuse the killing, or from other evidence coming from him or the prosecution."

In support of his contention counsel cites the case of the People v. Durand, 307 Ill. 611, 139 N. E. 78. In that case the instruction complained of was a copy of section 155 of the Criminal Code of Illinois and which was similar to section 1105 of the Penal Code of this state. The court said: "This is purely an abstract proposition of law, which gives the jury no correct idea of the law of the case or as to how much proof on the question of self-defense is necessary to entitle the defendant to a verdict of not guilty. The law clearly is that the burden of proof never shifts to the defendant no matter what his defense may be, and where the defense is self-defense, it is sufficient if his evidence on self-defense, together with all the other evidence in the case, creates in the minds of the jury a reasonable doubt of his guilt, and there was no instruction given for the people that recognizes this as the law."

In the case at bar the jury were fully instructed upon the subject of reasonable doubt and the burden of proof being upon the people. The giving of section 1105, Penal Code, has been approved by the Supreme Court of this state in the cases of People v. McClure, 148 Cal. 418, 83 P. 437; People v. Grill, 151 Cal. 592, 91 P. 515, and in People v. Richards, 1 Cal. App. 566, 82 P. 691. The objection is therefore not well taken.

[6, 7] The court further instructed the jury that there need be no appreciable length of time between the intention to kill and the act of killing; that they may be as instantaneous as successive thoughts of the mind; it was only necessary that the act of killing be preceded by concurrence of the will, premeditation, and deliberation. The court gave an additional instruction that a man may do a thing willfully, deliberately, and intentionally from a moment's reflection as well as after pondering over the subject for a month or for a year. Both of these instructions are couched in appropriate language and are what the trial courts usually term "stock instructions." It is claimed in support of the objection to these particular instructions that the evidence does not justify a reasonable inference that the defendant acted with premeditation, but we have already held that the jury were justified in a verdict of murder of the first degree, therefore this objection is not well taken. It is also claimed that the second instruction is an attempt to state a psychological fact which is exclusively for the jury. Conceding this to be the fact, it was the statement of a mere commonplace which could not have in any manner prejudiced the rights of the defendant.

[8] Further objection is made to two instructions dealing with the question of intent. The court in said instructions stated that a person is presumed to intend to do that which he voluntarily and willfully does in fact do, and that in the absence of evidence to the contrary said presumption must prevail. These instructions are also stock instructions and couched in appropriate language. It is claimed that their vice lies in the fact that the court told the jury that the presumption specified must prevail in the absence of evidence to the contrary without adding that the presumption was subject to being repudiated by evidence. We do not consider said instructions subject to the criticism made. It is expressly stated in the instructions that said presumption must prevail in the absence of evidence to the contrary, and in connection with all of the other instructions of the court the jury could not have misunderstood their meaning.

[9] Another instruction given by the court tells the jury that the intent is manifested by the circumstances connected with the homicide. This instruction is attacked upon the ground that the phrase, "the circumstances connected with the homicide," implied that the jury should consider the circumstances and nothing else, thereby excluding from their consideration the defendant's testimony as to his intent or intention. But we cannot conceive that the jury as reasonable men could take such an extreme view of this instruction and particularly when considered with the instructions as a whole.

[10] Criticism is also directed to the instruction which defines murder of the second degree, it being the claim of appellant that the instruction told the jury that in murder of the second degree both premeditation and deliberation are absent. and does not state that if either of these elements is absent the homicide is still murder of the second degree. The instruction as given by the court is in accordance with section 189 of the Penal Code and is correct.

[11] It is further claimed that the trial court erred in improperly defining the word "malice" as the term is used in the law of homicide. The instruction complained of is an amplification of section 188 of the Penal Code defining "malice." The court also in its instructions gave the Code definition of "malice" as contained in section 188 of said Code. As we understand, counsel contends that in this particular case the killing was the result of violent passion engendered in a mutual combat, but, as we have already held that the evidence was sufficient to leave the consideration of murder to the jury, the instruction was properly given.

[12] It is next claimed that the trial court erred in giving an instruction as to what constituted adequate provocation by which an unlawful homicide will be reduced from murder to manslaughter, but we are of the opinion that under the evidence adduced the instruction was properly given.

[13, 14] It is claimed that the trial court committed prejudicial error in instructing the jury as to the law of self-defense. It is admitted by appellant that the instructions are a correct statement of law, but he claims that they are not applicable to the facts of this case. His argument in support of his objection is practically to the effect that no motive was shown for the killing of Hill by Leddy; but it is unnecessary that the prosecution prove motive where it may be inferred from the evidence. In this case we have the evidence of Webb that he and Jenny were suddenly attacked by the defendant and True, and that during the struggle that ensued Hill was killed. From this evidence the jury were entitled to any reasonable inference which the facts might warrant, one of which as heretofore pointed out, on an examination of the evidence in this case, might have been the commission of a felony.

[15] It is next contended that in two of the instructions relating to the law of self-defense the court told the jury that in order to justify or excuse the slaying it must have appeared to the defendant as a reasonable man that the killing of the deceased was absolutely necessary. It is claimed that the jury should have been told the legal meaning of the phrase "absolutely necessary," and that, failing to explain the phrase, the jury were misled. We are of the opinion that the jury as reasonable men would understand that whenever an innocent person is placed in sudden jeopardy of life or limb the absolute necessity referred to in the instructions complained of exists. However, had the appellant desired the matter to be further explained he should have offered such an instruction to the trial court.

[16] It is claimed that during the course of its instructions the court told the jury ten times that the defendant was not entitled to claim self-defense unless the slaying was actually or apparently necessary to save him from loss of life or great bodily injury. It is contended that this repetition had the effect of impressing the minds of the jury with the idea that the court did not believe that the defendant slew deceased under such necessity. A careful reading of the instructions does not impress us as having such an effect. The instructions given stated the law of self-defense in various forms, all of which in our opinion were correct statements of the law and necessitated a repetition of the language complained of. Furthermore, the jury were sworn to determine the facts of the case upon their own judgment and not that of the court's, and the presumption is that they so acted.

[17] It is next claimed that the trial court erred in charging the jury as to matters of fact. The court instructed the jury as follows: "Witness Maguire testified that Hill was backing up and Leddy was following; that he saw no ax in Hill's hands; that he saw Leddy strike Hill twice with the grubbing hoe here in evidence; that Hill fell to the ground. If you find from this evidence, and from all the evidence in the case, that the fatal blow was struck by the defendant when he was not in any real or apparent danger of being killed by Hill or seriously injured in body by him, the blow was not excusable or justifiable." It is claimed that by this instruction the court pointed out to the jury that the testimony of witness Maguire was entitled to full credit and should be accepted by them as correctly presenting the facts upon which the prosecution and defense were in conflict. Section 19 of article 6 of the Constitution reads as follows: "Judges shall not charge juries with respect to matters of fact, but may state the testimony and declare the law." An analysis of the instruction given by the court will show that it is not within the prohibition of the section of the Constitution just cited. The court states that Maguire testified to certain things, and the jury are then told: "If you find from this evidence and from all the evidence in the case certain facts then the blow was not excusable or justifiable." The court does not say that the evidence of Maguire is true, nor does he confine the consideration of the jury to that evidence alone. But he says: "If you find from this evidence and all the evidence in the case, then the defendant is not excusable or justifiable." In the case of People v. Casey, 65 Cal. 260, 3 P. 874, the court said: "Testimony in this case shows." In the case of People v. Matthai, 135 Cal. 446, 67 P. 694, the court said: "The deceased was unarmed." In People v. Gordon, 88 Cal. 422, 26 P. 502, the court told the jury: "The testimony is corroborated." In these cases it is clear that the court invaded the province of the jury and did not state the testimony and declare the law, but told the jury that certain facts had been proven. In People v. Richards, 81 Cal. App. 30, 253 P. 162, the court stated the testimony of the defendant on the one hand and that of the prosecuting witness and other witnesses, followed by this statement to the jury: "Now it is for the jury to determine from all the facts whether the defendant committed the act by force or not or by threats of great bodily harm." The appellate court held that this was not error, stating that "it nowhere appears that the court indicated a belief as to the truth or falsity of any witness' testimony, or that the jury should believe the facts to be true as had been testified, or find for or against the defendant if they believed them." In the instruction complained of the court does not indicate its own belief as to the testimony of Maguire or any of the other testimony. It follows that the point is not well taken.

[18] In concluding his instructions, the court said: "The court submits the case to you expecting you to apply and administer the law given you." The instruction given preceding these words reads as follows: "The law is careful and jealous of the life of a citizen. The law, in effect, says: You must

not take from your fellowman the life which God has given him; you shall not constitute yourself the judge to declare that a life is forfeited, and execute such judgment, unless there is a necessity, real or apparent, for such action on your part." It is claimed that this instruction told the jury in effect that the defendant constituted himself a judge, declared the life of the deceased forfeited, that is, intentionally took the other man's life. We do not so read this statement. As we understand its meaning, and the only meaning which the jury as reasonable men could have legitimately placed on this instruction as applied to the facts of this case, was that there must be a necessity, real or apparent, to justify the taking of human life, which is a correct statement of the law.

[19] The defendant offered and the court refused an instruction that the defendant is entitled to the presumption of law that he speaks the truth, which instruction also cautioned the jury that they have no right to disregard his testimony merely because he is the defendant, but that his testimony is entitled to the same consideration as that of any other witness. The court gave the jury an instruction that: "A witness, whether called by the People, or by the defendant, and the defendant himself, is presumed to speak the truth." We are of the opinion that this instruction covers all that the defendant was entitled to in this behalf.

[20] The appellant also proposed the following instruction: "A person who is upon his own premises where he has a right to be, is not obliged to leave said premises or to flee therefrom in order to avoid an adversary, and in this regard I charge you that a man who is where he has a right to be, is not bound to retreat from any aggressor who there seeks a quarrel with him, but may stand his ground and repel any attack that may be made upon him there, and may meet force with force; and if, as a reasonable able man he believes and has cause to believe that his assailant intends to kill him or do him great bodily harm, he is not obliged to retreat but may kill his adversary and may even pursue his adversary and kill him if such standing his ground or such pursuit appears to be reasonably necessary in order to protect his life or to protect his body from great bodily injury." The court gave the instruction with the following modification: "But under such circumstances the person assailed, if you should find in this case that Leddy was assailed, must not use more force or violence than is necessary to avoid being killed himself or seriously injured." It is claimed that this modification is incorrect because it omits the element that the defendant had a right to use such force or violence as appeared to him as a reasonable man to be reasonably necessary under the circumstances, a consideration which it is claimed is omitted by the modification. We are of the opinion that the claim is without merit. The court told the jury that if as a reasonable man the defendant believed and had cause to believe that his assailant intended to kill him or do him great bodily harm, he need not retreat but may pursue his assailant if pursuit appears to be reasonably necessary in order to protect his life or limb. The modification is that under such circumstances no more force than necessary may be used to avoid being killed himself or seriously injured. The modification concerns the amount of force which may be used and could not have been otherwise understood by the jury.

[21] The defendant offered and the court refused to give several instructions bearing upon the question of the presumption of innocence and the term "reasonable doubt." The court did give to the jury section 1096 of the Penal Code enacted by the Legislature in 1927. St. 1927, p. 1039. It is stated in section 1096a of said Code that the instruction given in said section 1096 on the subject of reasonable doubt and presumption of innocence is all that it is necessary that the court should give and, we believe, is a sufficient answer to defendant's objection.

[22] It is further claimed by appellant that the trial court erred in refusing an instruction offered by him on the duty of individual jurors, to the effect that any juror entertaining a reasonable doubt as to the guilt of the defendant should not vote for a verdict of guilty for the single reason that a majority of the jury are in favor of a verdict of guilty. Among the instructions given by the court appears an instruction upon this subject in which it is said: "It is your duty as jurors to maintain your individual opinion so long as you think you are right. It is your duty to act in accordance with your honest belief and according to the law and the evidence in the case." We are of the opinion that the foregoing admonition to the jury as given by the court is sufficient and in substance covers the ground of the instruction offered by the defendant.

[23, 24] Complaint is also made that the court erred in refusing to give the following instruction as to defendant's alleged admissions: "There is evidence before you tending to show that the defendant after the homicide and while in the custody of the officers of the law made certain statements with respect to the affray. I instruct you that such statements when made by a defendant under such circumstances are to be received with caution and I further instruct you that you are entitled to take into account the mental attitude of the defendant at the time such statements were made and his condition of responsibility or irresponsibility as you may find his condition from the evidence." This is not a correct statement of the law. The expression, "tending to show," trenches on the prov-

ince of the jury and would be violative of section 19 of article 6 of the Constitution. In People v. Casey, supra, the court condemned the expression of the trial court that the "testimony in the case shows" as being an instruction upon a question of fact. The further expression used in the instruction, "under such circumstances" can only refer to statements made by the defendant "while in the custody of the officers of the law," should be received with caution. The instruction not being a proper exposition of the law, the court was justified in refusing to give it to the jury.

[25, 26] Appellant also offered an instruction that the jury were entitled to consider and should consider the intoxication or the degree of intoxication of the witnesses or any of the witnesses in the case at the time of the homicide; that intoxication involves a numbness of the faculties so as to affect the capacity to observe, or to recollect, or to communicate, and should be taken into consideration by the jury in determining the weight to be given to the testimony of the witnesses so affected. The vice of the foregoing instruction is that it assumes that the witnesses or some of them were in fact intoxicated. While there is evidence that some of the witnesses had been drinking, their condition as to sobriety or being drunk was one of the questions of fact involved in the case. The latter part of the instruction undertaking to define the effect of intoxication is a commonplace that needs no exposition and there could have been no injury resulting to the appellant by the court's failure to so instruct the jury. The jury were fully and fairly instructed.

We have gone over the entire record in the case, and have considered each one of the points raised by appellant, and we find no prejudicial error.

The judgment and the order denying appellant's motion for a new trial should be affirmed; and it is so ordered.

We concur: NOURSE, Acting P. J.; STURTEVANT, J.

---

95 Cal. App. 633

ISAACSON v. UNION TRUST CO. OF SAN DIEGO et al. (Civ. 3646.)★

District Court of Appeal, Third District, California. Dec. 20, 1928.

Rehearing Granted.

1. Pleading 🔑237(3)—In trustee's action to establish trust in stock for bankrupt, trial amendment, conforming to proof alleging fraudulent pledge and sale to pledgee, was properly allowed.

In action by trustee of bankrupt to establish secret trust for benefit of bankrupt and to have title to stock vested in trustee, amendment to complaint to conform to proof, alleging execution of promissory note by bankrupt to defendant, fraudulent pledge of stock, and pretended sale to pledgee, was properly allowed as not altering essential characteristics of action, where pledgee stated he did not wish continuance when matter was suggested.

2. Pleading 🔑236(3)—Allowance of trial amendment to pleadings is within court's discretion, not to be disturbed without showing of prejudice.

Allowance of trial amendments to pleadings rests in sound discretion of court, and ruling should not be disturbed on appeal in absence of showing that prejudice resulted therefrom to extent that party aggrieved was deprived of substantial right or deprived of fair trial.

3. Bankruptcy 🔑279—Trustee in bankruptcy may pursue bankrupt's property held by third persons in fraud of creditors.

Trustee in bankruptcy has right to pursue property of bankrupt claimed to be held by third persons in fraud of creditors.

4. Limitation of actions 🔑103(2)—Limitation of action to recover stock held in trust did not commence until repudiation of trust.

Action by trustee in bankruptcy to establish title to stock held by third person under agreement to hold stock in trust for bankrupt *held* based on express trust, and against which statute of limitations did not commence to run until trust was repudiated.

5. Limitation of actions 🔑103(3)—Trust in stock held by pledgee in trust for bankrupt held not repudiated until pledgee's answer to action by trustee in bankruptcy to recover stock.

In action by trustee in bankruptcy to establish title to stock pledged to defendant and sold to pledgee under agreement that pledgee was to hold stock in trust for bankrupt, repudiation of trust first took place when pledgee filed answer denying allegations of complaint and alleging limitations, and hence action was not barred by statute of limitations commencing on repudiation of trust.

6. Judgment 🔑256(2)—Judgment restoring stock to trustee in bankruptcy held too broad, under findings that pledge by bankrupt was bona fide and should be modified to prohibit recovery until debt was paid.

In action by trustee in bankruptcy to establish express trust in stock for bankrupt and recover stock, judgment restoring stock to trustee absolutely *held* too far-reaching under findings that transaction for pledge and sale of stock up to time of sale was bona fide, but that sale was made with secret agreement that pledgee was to hold stock in trust for bankrupt, and hence judgment must be modified to deny recovery of possession of stock until debt was paid.

7. Limitation of actions 🔑167(1)—Pledgee can retain property until debt is paid, though debt is barred by limitations.

Pledgee has right to retain possession of pledged property until debt for which it was given as security is paid, and pledgee cannot be required to surrender property, though debt is barred by statute of limitations and no affirmative action can be taken to enforce it.

★Superseded by opinion of Supreme Court 292 P. 448.

Appeal from Superior Court, San Diego County; Frank C. Collier, Judge.

Action by J. A. Isaacson, as trustee in bankruptcy of the estate of J. C. Rice, a bankrupt debtor, against the Union Trust Company of San Diego and others. Judgment for plaintiff, and defendants appeal. Affirmed as modified.

L. E. Dadmun, of Los Angeles, for appellants.

Curtis Hillyer and Rolland C. Springer, both of San Diego, for respondent.

TUTTLE, Justice pro tem. This is an action brought by plaintiff, as trustee in bankruptcy of the estate of J. C. Rice, a bankrupt, to secure an adjudication of the ownership and title to certain property, and to establish the interest of plaintiff, as trustee, in the same, and for an accounting and recovery of money. Judgment went for plaintiff, and defendants J. C. Rice Company and M. Y. Wolf now appeal from the same, and also from the order denying motion for new trial and the order denying the motion to vacate and set aside the judgment and render judgment in favor of defendants.

The complaint alleges that plaintiff is the trustee in bankruptcy of the estate of J. C. Rice, a bankrupt debtor; that at the time of the filing of the petition in bankruptcy said J. C. Rice was the owner of an undivided one-half interest in certain lands situate in the county of San Diego, known as the "Lincoln Acres"; that heretofore the said J. C. Rice, acting in the name of the defendant J. C. Rice Company, entered into an agreement with defendant Rae Investment Company whereby said defendant and said Rice became owners in common of the tract of land hereinbefore described, taking the title thereto in the name of defendant Rae Investment Company; that subsequent thereto said Rice and said defendant Rae Investment Company entered into an agreement with said defendant R. E. Harrison Company under and by virtue of the terms of which said R. E. Harrison Company became the selling agents for the defendants Rae Investment Company and the said J. C. Rice in the sale of said tracts of land hereinbefore described; that a large number of parcels of land have been sold and the contracts for the purchase of the same have been placed with the defendant Union Trust Company for the purpose of collection; that the defendant Union Trust Company has collected a large amount of money upon said contracts, as plaintiff is informed and believes, one-half of which is the property of the said bankrupt; that the said R. E. Harrison Company has entered into said contracts under its own name, but in fact as and for the defendants Rae Investment Company and the said J. C. Rice; that the plaintiff is informed and believes, and on such information and belief alleges, that said J. C. Rice Company, a corporation, was organized by the said J. C. Rice as a vehicle through which to transact business and conceal his assets from his creditors, and that ever since its organization said J. C. Rice has used said corporation for that purpose, and that ever since its organization said J. C. Rice has been and now is the sole owner of the said J. C. Rice Company and all of its assets, and that the said J. C. Rice Company is in fact and always has been J. C. Rice, the bankrupt debtor; that prior to the commencement of this action the said court of bankruptcy duly made and filed its order in said bankruptcy proceedings, authorizing and directing plaintiff to commence and prosecute this action. On information and belief plaintiff alleges that said defendant M. Y. Wolf claims to own 247 shares of the capital stock of said J. C. Rice Company, being all of the capital stock of said company except 3 shares, and that the claim of the said M. Y. Wolf to said stock is without any right whatever, and that in truth and in fact the said J. C. Rice, the bankrupt debtor, was the owner of all of the capital stock of the said J. C. Rice Company at the time of the filing of his petition in bankruptcy.

At the trial of the action an amended complaint, to conform to the proof, was filed under order of court. The allegations of this amended complaint are similar to those in the original, except that certain other lands are added. The following additional allegations appear: That certain other parcels of real property stand on the records in the name of defendant J. C. Rice Company, but that they were, at the time the bankruptcy petition was filed, owned by said J. C. Rice; that on November 21, 1918, and at a time when J. C Rice was insolvent, he was the owner of all the stock of defendant J. C. Rice Company, to wit, 250 shares; that for the purpose of hindering, defrauding, and delaying his creditors, he (J. C. Rice) executed and delivered to defendant Wolf a promissory note for $21,458.79, and as security therefor pretended to pledge to said Wolf 247 shares of said stock; that on September 9, 1919, said Wolf made a pretended sale of said stock to himself, and credited a payment of $15,000 on said note; that prior to said sale a creditor of said Rice levied an execution on said stock, and that said pretended sale was made to assist said Rice in concealing his assets from his creditors, and that said sale was made with the secret understanding that it was to be held in trust by said Wolf, and that said Wolf now holds the same in trust for plaintiff as trustee in bankruptcy.

Appellants each filed separate answers, which are practically the same. They deny the essential allegations of the complaint. In addition, the statute of limitations is pleaded.

As the entire appeal revolves around the sale of said stock, we quote, in part, the finding of the court upon this issue: "That on the 21st day of November, 1918, the said J. C. Rice was indebted to defendant M. Y. Wolf in the sum of $21,458.79, and that on said 21st day of November, 1918, the said J. C. Rice did in consideration of said indebtedness sign, execute, and deliver to said defendant M. Y. Wolf his certain promissory note for the sum of $21,458.79, payable to the order of defendant M. Y. Wolf, five years after its date, with interest thereon at the rate of seven per cent. (7%) per annum, payable at maturity, and said J. C. Rice did at said time pledge and deliver to said M. Y. Wolf 247 shares of the capital stock of said J. C. Rice Company, and also stock in other companies; among the stock so pledged being stock of the Central Mortgage & Investment Company, as collateral security for the payment of said note; *that said note so signed, executed and delivered by said J. C. Rice to M. Y. Wolf, and delivery of the said 247 shares of the capital stock of said J. C. Rice Company and stock of the other corporations to said M. Y. Wolf, as security for the payment of said $21,458.79 note, was a bona fide transaction and made in good faith on the part of said J. C. Rice and M. Y. Wolf, and for valuable consideration.* That the value of said stock so pledged was fixed in said note by said J. C. Rice and said Wolf in said note at the sum of $75,000.00. That said alleged pledgee's sale of said 247 shares of the stock of said J. C. Rice Company by the said M. Y. Wolf to himself on said 9th day of September, 1919, was made with the secret understanding and agreement between said J. C. Rice and said M. Y. Wolf that said M. Y. Wolf would hold said stock in trust for said J. C. Rice, and that said M. Y. Wolf does now hold said stock in trust for said plaintiff as trustee in bankruptcy of said J. C. Rice and that the claim of said M. Y. Wolf to said stock of said J. C. Rice Company is without any right whatever as against this plaintiff." The judgment does not mention the stock, but it is decreed that "plaintiff, as such trustee in bankruptcy, is the owner of said J. C. Rice Company, a corporation, and all its assets and property of every kind and nature." This is treated and construed by all the parties as an adjudication that plaintiff, as trustee, is the owner of said shares of stock, and we will follow that construction.

[1-3] It is contended by appellants that the court erred in allowing said trial amendment to the complaint, for the reason that said amendment changes the cause of action. When the case was called for trial, respondent admitted that no cause of action was stated against defendant M. Y. Wolf, and that he was only referred to in the caption and prayer of the complaint. Thereafter, and during the trial, permission was granted to file the amended complaint to conform to proof, referred to, supra. It is the position of appellant, with reference to said stock, that the amended complaint states a cause of action to set aside the sale of said stock. If this were true, it would no doubt be the addition of a new cause of action. As we view the pleading, the action was commenced by the trustee to establish a secret trust for the benefit of the bankrupt, and to have the title to said stock vested in said trustee. If, in fact, Rice and Wolf had a secret understanding that the latter was to hold the stock as his own, the effect of this was to work a deception upon the creditors, and this would be true whether a deception was intended or not. The pleading of fraud, therefore, does not alter the essential characteristics of the action, which was, in effect, for the purpose of impressing a trust upon the stock in the hands of Wolf. This precise point was before the court in the case of Ury v. Van Every, 181 Cal. 604, 188 P. 985, and it was there so held. The matter of the allowance of trial amendment to the pleadings rests in the sound discretion of the court, and such ruling should not be disturbed upon appeal in the absence of a showing that prejudice resulted therefrom to the extent that the party aggrieved was deprived of a substantial right or placed in a position where it may be said that he was deprived of a fair trial. No such showing is here made. If defendants were faced with a new issue upon which they were unprepared, they had the right to move for a continuance upon that ground. Having made no such motion, they are in no position to complain. The record shows that the attorney for defendant stated in open court he did not wish a continuance when the matter was suggested. For these reasons we hold that the point is without merit. It is claimed that the trustee in bankruptcy had no authority to bring such an action. There is no merit in this contention. Ury v. Van Every, supra. The right of a trustee, under such circumstances, to pursue the property of the bankrupt is unquestioned. 7 Cal. Juris. 118.

[4, 5] The next question raised by appellants is that of the statute of limitations. It is claimed that the action is one to set aside the sale upon the ground of fraud; that the three-year limitation applies. We have pointed out that the cause of action is one to establish a trust, so far as the stock is concerned. The court found that the stock was sold under an agreement that defendant was to hold the same in trust for the bankrupt, Rice. This was an express trust, and the statute of limitations did not commence to run until the same was repudiated by the trustee. Lezinsky v. Mason Malt Co., 185 Cal. 240, 196 P. 884. The repudiation first took place in the instant case when defendant Wolf filed his answer. The action,

therefore, was commenced within the time provided by law.

It is contended that the findings upon the issues relating to the execution of the note, the pledging of the stock, and the sale of said stock are in favor of appellants, and that they should have judgment upon such findings. This question presents some unique features. It will be observed that the court found that the whole transaction up to the time of the sale under the pledge was bona fide, but that the sale was made with the secret understanding that Wolf was to hold the stock in trust for the bankrupt, Rice. The argument of appellants is that the court having found that the steps leading up to the sale were valid, it must necessarily follow that the sale was in good faith, and that the finding that the sale was made with a secret understanding, creating a trust, must be disregarded. As authority, they refer to the case of Pierce v. Pierce, 16 Cal. App. 375, 117 P. 580. In that case the trial court upheld a mortgage as executed in good faith, but set aside a foreclosure sale upon the ground of fraud. The judgment was reversed upon the ground that there was no evidence to show any attempt to conceal property, and no agreement between the parties to that effect, and no evidence that any creditor of the mortgagor was making any demands upon him at the time of said sale. The case turned upon the sufficiency of evidence, and not upon the doctrine that a sale under such circumstances cannot be annulled upon sufficient evidence.

[6, 7] A more serious question arises in this case as to the extent that a judgment can go under these findings. The judgment, in effect, restores the stock to the trustee, absolutely, and yet it is found that the execution of the note and the pledge were proceedings in good faith; hence, the pledge was valid. The effect of the findings is to leave the stock in the hands of the pledgee, while the trustee in bankruptcy is the legal owner thereof. It is at once apparent that the judgment is too far-reaching in its terms, and should be modified to conform to the findings. No recovery of possession of the said shares of stock could be had until the debt was paid. "Unless otherwise agreed, a pledgee has a right to retain possession of pledged property until the debt or obligation for which it was given as security is paid. He is precisely in the position occupied by a mortgagee in possession, and cannot be required to surrender the property until the debt is satisfied, even though it is barred by the statute of limitations, and no affirmative action can be taken to enforce it." 21 Cal. Juris. 330.

The sufficiency of the findings is attacked in many particulars. The "business" ventures of the bankrupt are spread over hundreds of pages of the transcript. His schedule of indebtedness was about $360,000. His assets were listed at $125, but claimed as exempt. At the time of the execution of said note to Wolf, his creditors were legion. Many of these were judgment creditors. Numerous corporations were organized by him, and the stock was traded back and forth. His gyrations in a corporate way are almost impossible to follow. Always, however, he was the whole corporation; the matter of control by a directorate being but a fiction. After the "sale" of said stock under the pledge, he continued just as he always did in the conduct of the corporation. The purported owner of the stock, for a period of some five years, shows by his testimony that he did not know what was going on, so far as the affairs of the corporation in which he held all the stock were concerned. We are satisfied that there is ample evidence in the record to support the findings.

The judgment is modified so that paragraph 4 thereof will read as follows: "4. That plaintiff as such trustee in bankruptcy is the owner of said J. C. Rice Company, a corporation, and of all of its assets and property of every kind and nature whatsoever, provided, however, that it is hereby adjudged that the said 247 shares of stock are subject to a pledge as security for the payment of the promissory note for $21,458.79, executed by J. C. Rice to defendant M. Y. Wolf."

As so modified, the judgment is affirmed; appellants to recover their costs herein.

We concur: FINCH, P. J.; HART, J.

---

95 Cal. App. 647

FRANKEL v. ROSENFIELD. (Civ. 6278.)

District Court of Appeal, First District, Division 1, California. Dec. 21, 1928.

1. Guaranty 🔑64, 65—Where plaintiff as seller, by terminating conditional sales contract on buyer's default, released buyer, guarantor was released.

Where plaintiff as seller, by terminating contract and taking constructive possession of property and entering into new conditional sales contract with buyer, released buyer from further obligation on original contract, plaintiff's acts operated as release of defendant as guarantor of buyer's contract, since guarantor's liability cannot extend beyond that of buyer whose contract is guaranteed.

2. Sales 🔑479(1)—Plaintiff as seller could not terminate conditional sales contract on buyer's default and also treat transaction as sale and sue buyer's guarantor.

Where plaintiff as seller under conditional sales contract terminated contract on buyer's default and took constructive possession of property, but caused purported sale to be made at public auction he could not treat transaction as sale and sue guarantor of buyer's contract.

3. Judicial sales ⚷1—Purported sale, on default of buyer under conditional sales contract, was not "judicial sale," where no action was instituted, but plaintiff merely posted notices and held sale.

Purported sale by plaintiff as seller, under conditional sales contract on buyer's default, was not a "judicial sale," where no action of any kind was instituted by plaintiff against buyer or guarantor or the property and such sale was not authorized by any agreement of the parties, but plaintiff merely had notices posted in three public places stating that he as seller had elected to terminate contract and stand upon default and held sale at which no bidders were present and bid in property himself.

Appeal from Superior Court, Los Angeles County; Carlos S. Hardy, Judge.

Action for money by Julius Frankel against Louis Rosenfield. From a judgment for defendant, plaintiff appeals. Affirmed.

Herbert R. Macmillan, of Los Angeles, for appellant.

Bailie, Turner & Lake and Norman A. Bailie, all of Los Angeles, for respondent.

KNIGHT, J. Plaintiff, Julius Frankel, brought this action to recover a money judgment against defendant, as the alleged guarantor of a conditional sales contract, and to obtain an order directing a bank to deliver to the sheriff certain corporate stock belonging to defendant and claimed by plaintiff to have been deposited with said bank as collateral security, so that the same could be sold in liquidation of the judgment which plaintiff sought to obtain. Judgment was given in favor of defendant, and plaintiff appeals.

Assuming that the agreements of the parties hereinafter set forth legally established a contract of guaranty, the determinative issue in the case was and is whether, as defendant claims and as the trial court found, plaintiff released the original debtor, for if he did his act in so doing released the guarantor also, and it would follow that the judgment was properly entered in defendant's favor. The material facts surrounding the transaction, which are without substantial dispute, may be stated as follows: Plaintiff and his son, George Frankel, and a party named Miller, whose rights are not here involved, were stockholders and directors in a corporation named the M. C. Hat & Cap Manufacturing Company, against which plaintiff held a promissory note for $5,000. Defendant Louis Rosenfield and one Fisher desired to purchase the interests of the Frankels in said company and to succeed them on the board of directors, and to that end all parties entered into a written agreement dated October 20, 1923, which provided in part for the sale to defendant and Fisher of 50 shares of said stock of the par value of $100 each, standing in the name of George Frankel; and, continuing, said agreement read as follows: "Said Julius Frankel does hereby agree to cancel and surrender a certain note for the principal sum of Five Thousand Dollars ($5,000.00) of the M. C. Hat and Cap Manufacturing Company held by him, and, in lieu thereof, said Louis Rosenfield does hereby assign, transfer and set over to said Julius Frankel a certain contract made the 15th day of September, 1923, between said Louis Rosenfield and Luella Payne of Long Beach, California, for the sale of a certain apartment lease and furnishings on the west side of Rose Avenue of Long Beach, California, on which there is unpaid the sum of Forty-eight Hundred Seventy-five Dollars ($4875.00) and said Louis Rosenfield and said Stern Fisher do hereby agree to deposit with the California Bank (Hibernian Branch), at Fourth and Spring Streets, Los Angeles, California, stock of the M. C. Hat and Cap Manufacturing Company of the par value of Five Thousand Dollars ($5,000.00), transferred to them under this agreement, to be held by said bank in escrow until such time as said contract shall have been paid in full, at which time said fifty (50) shares of stock shall be returned to said Louis Rosenfield and said Stern Fisher." To make up the balance of the $5,000 defendant paid plaintiff $125 in cash.

Thereafter, in conformity with the foregoing clause of the agreement, and on October 29, 1923, two certificates of stock, indorsed in blank by defendant and Fisher, representing a total of 50 shares which then stood in their names, were deposited in said bank by defendant, accompanied by written instructions, signed by defendant, to "hold (said stock) in escrow an indefinite period or until there is handed you due notice that a certain contract in the amount of $4875.00 on a chattel between Luella Payne and Louis Rosenfield has been paid in full. Said notice will be handed you [by] Julius Frankel or his nominee, at some later date and you will be governed accordingly."

The Payne contract, assigned by defendant to plaintiff, was in its nature, as indicated, a conditional sales contract, wherein it was provided that title to the property agreed to be sold should remain in the vendor until all monthly payments required to be made thereunder were completed. And all of the documents relating to this transaction were also placed in escrow, including the contract itself, the lease of the premises duly assigned to Mrs. Payne, and a bill of sale to her of the personal property; and with respect thereto it was in said contract provided that "upon the final payment of the last installment price to become due hereunder the escrow holder shall deliver each of the instruments deposited herewith unto the said Luella Payne, but should she make default in any of the said terms or conditions and continue in such default for the period of ten days then the instruments deposited herewith shall be returned to the first party and all right of the second party shall thereupon terminate and end, and the first party shall retain all amounts that have theretofore been paid under this contract; first, for the use and occupation of said premises by the second party, and second, as liquidated damages for the breach of this contract, which said damages are hereby expressly agreed upon and liquidated in the amount that shall have been paid at the time that such breach occurred."

[1] Mrs. Payne defaulted in making the July, 1924, monthly payment, and thereupon plaintiff, as vendor, exercised the remedy afforded by the terms of said contract by terminating the contract and withdrawing from escrow all papers and documents relating to the transaction, and within a few days thereafter took constructive possession of the property and entered into a new conditional sales contract with Mrs. Payne for the sale of the same property. It is evident, therefore, that the foregoing acts of the plaintiff operated to release Mrs. Payne as vendee from further obligation; and, since the guarantor's liability cannot in any contingency extend beyond that of the purchaser whose contract is guaranteed, plaintiff's acts operated also as a release of defendant as guarantor. Glassell v. Coleman, 94 Cal. 260, 29 P. 508; Merrill v. Merrill, 103 Cal. 287, 35 P. 768, 37 P. 392.

The evidence further shows, however, that notwithstanding the cancellation of said contract in the manner hereinabove set forth, plaintiff, two days prior to the date of the execution of the new agreement with Mrs. Payne, caused a purported sale of the property to be made at public auction, but with respect thereto the trial court held that said purported sale was of no legal consequence, its finding thereon being as follows: That "plaintiff went through the form of selling the said property covered by said Luella Payne agreement and buying the same in himself for the sum of $1,000.00, and the court finds that said plaintiff under said contract at all times was and remained the owner of the furniture, fixtures, and lease mentioned in said contract, as well prior to, as after, said purported sale."

[2] Appellant contends that said finding is not only unsupported by the evidence, but that the trial court's conclusion as to the legal effect of said sale was erroneous, and in support of such contention calls attention to the law that where a vendee defaults in making payment under a conditional sales contract and the property is in the possession of the vendee, but title thereto remains in the vendor until he is fully paid therefor, the vendor is given an election of remedies. He may terminate the contract, retake the property, and retain the money theretofore paid, or he may treat the transaction as a sale and sue for the balance of the purchase price. There is no disputing the foregoing rule, but, as said in Holt Mfg. Co. v. Ewing, 109 Cal. 353, 42 P. 435, "These remedies being inconsistent, the plaintiff could elect which he would pursue, but he could not have both." Here, as pointed out, plaintiff elected to and did pursue the remedy provided for in the contract by terminating the contract and releasing the vendee, and, obviously, thereafter he was not permitted to pursue the alternative remedy afforded by the law.

[3] Furthermore, said purported sale was in no sense a judicial sale, no action of any kind having been instituted by plaintiff against Mrs. Payne or the defendant or the property; nor was such sale directly or indirectly authorized by any agreements of the parties. There is some suggestion made in the record about a chattel mortgage or a "chattel mortgage contract"; but the evidence clearly shows, and the court found, that no such document was ever executed by Mrs. Payne or involved in that transaction. Said sale was conducted by plaintiff's attorney, after plaintiff had caused notices thereof, signed by plaintiff, to be posted in three public places in Long Beach, in which notices it was stated, among other things, that Mrs. Payne having defaulted in making the July, 1924, payment, plaintiff as vendor had "elected to terminate the contract, and stand upon said default," etc. No bidders were present at said sale, however, and plaintiff bid in the property for $1,000, which amount he claimed to have credited on the Payne contract. It is evident from the foregoing facts and circumstances that said purported sale was fictitious in character and, therefore, as the trial court concluded, was of no legal value in determining the rights of the parties herein.

The judgment is affirmed.

We concur: TYLER, P. J.; CASHIN, J.

95 Cal. App. 598

HODGES v. KAUFFMAN, City Treasurer. ★

(Civ. 6348.)

District Court of Appeal, First District, Division 1, California. Dec. 20, 1928.

Rehearing Denied Jan. 20, 1929. Hearing Denied by Supreme Court Feb. 18, 1929.

1. Mandamus 🔑109—Mandamus will not lie to compel treasurer to pay warrants issued for claim which was not legal charge against municipality.

Though generally city treasurer is vested with no discretion with respect to the payment of warrants drawn by the proper officers, nevertheless, if a claim is not a legal charge against a municipality, mandamus will not lie to compel its payment even though it has been ordered and allowed by the board charged with that duty.

2. Municipal corporations 🔑159(1)—City trustees had no discretion as to question of calling election pursuant to petition conforming substantially to law.

Where petition for election to determine whether certain members of city board of trustees should be recalled, conforming substantially to the provisions of statute, was filed and properly certified by the clerk as to the number of signatures, trustees had no discretion as to question of calling the election.

3. Municipal corporations 🔑258—Expense incurred in trustees' unsuccessful attempt to show that petition for recall election was insufficient was not proper municipal charge (St. 1911, Ex. Sess., p. 128).

Where members of city board of trustees, required under St. 1911, Ex. Sess., p. 128, to call election pursuant to petition to determine whether certain members of the board should be recalled, refused to call election and unsuccessfully attempted to show that petition though sufficient in form was insufficient in fact, the expense incurred for witnesses and mileage fees did not constitute a proper municipal charge.

Appeal from Superior Court, San Mateo County.

Proceeding in mandamus by D. Hodges against E. P. Kauffman, as Treasurer of the City of South San Francisco. Judgment for defendant, and petitioner appeals. Affirmed.

Leo R. Friedman, of San Francisco, for appellant.

J. W. Coleberd, of South San Francisco, for respondent.

PER CURIAM. A proceeding in mandamus was commenced by appellant in the superior court of San Mateo county to compel respondent, as treasurer of the city of South San Francisco, to pay to him, as assignee thereof, three warrants which had been allowed and issued to him by a vote of the majority of the board of trustees of the city. Two of the warrants, aggregating $233, were issued in payment of claims for fees in serving subpœnas upon certain witnesses and for sums paid to them as their fees and mileage; the third, amounting to $153.22, was for the claim of an expert witness. Judgment was rendered for respondent, from which this appeal was taken.

Some time before the warrants were issued a proceeding in mandamus was commenced in the District Court of Appeal, First District, to compel the board of trustees to set a date for an election to determine whether three of the members of the board, and who constituted the majority thereof, namely, Carl Blank, Hugh McCaffrey, and Hugh Felix McNellis, should be recalled. Ratto v. Board of Trustees, 75 Cal. App. 724, 243 P. 466. In the latter proceeding it was alleged that the city clerk had attached to a recall petition, which had been duly filed, his certificate that the same was signed by the requisite number of qualified voters, but, notwithstanding, the board refused to fix a date for the election. The board of trustees, as such, was made a party respondent, and with it were joined the five individual members thereof. The three members whose recall was sought joined in an answer, which also purported to be that of the board, but the other members made no appearance. The answer alleged that the recall petition was not signed in the manner provided by law or by the requisite number of qualified electors, and that a section thereof, purporting to have been circulated by the person whose affidavit to that effect was attached, was in fact circulated by another. By order of the District Court of Appeal these questions were referred for determination to the superior court of San Mateo county, which, following a hearing, found against the contentions of the above-named trustees, and subsequently a peremptory writ of mandate as prayed was issued by the District Court of Appeal. Ratto v. Board of Trustees, 76 Cal. App. 276, 245 P. 1112. In the present proceeding the appellant alleged, and the court found, that at the above hearing it became necessary for respondents therein to present testimony, and to that end to subpœna and pay the fees and mileage of the witnesses whose names appeared as electors of the city on the petition for the recall election; that there were issued out of the superior court subpœnas directed to about 80 persons, requiring their attendance. In that connection it was further found that the allegation that Charles E. Storeck, as chief of police of the city, one of appellant's assignors, served 42 or any number of witnesses on behalf of the board of trustees, or incurred or expended in or about such service and the paying of witness and mileage fees the sum of $233, or any sum, was untrue. With respect to the claims represented by the third warrant, the court found that while it was necessary for said respondents to present testi-

---

★Rehearing denied. Hearing denied by Supreme Court.

mony as to the genuineness of the signatures attached to the recall petition, it was not necessary to employ a handwriting expert, and it was not true, as alleged, that the board of trustees employed for that purpose, or in any capacity, the handwriting expert named in the petition and whose claim was assigned to the appellant. It was further found with respect to the claims that each was audited, allowed, and ordered paid by the board, but that two of the board, namely, Cunningham and Eschlebach, protested against the payment of the same. In this connection it appears from the minutes of the board that the claims were audited by the three members sought to be recalled, who constituted the finance committee of the board, and that it was by their votes alone that the same were allowed and ordered paid. It was the court's conclusion that the action of the board in ordering payment of the claims was void, and that the refusal of the treasurer to pay the same was lawful, judgment being entered accordingly.

[1-3] As claimed by appellant, no evidence was adduced which supported the findings that no subpœnas were served by Storeck, or sums expended or advanced by him, or that the employment of a handwriting expert was unnecessary; and it has been held that a determination by the board of the facts involved in a claim against the municipality is conclusive in the absence of fraud. McFarland v. McCowen, 98 Cal. 329, 33 P. 113; McConoughey v. Jackson, 101 Cal. 265, 35 P. 863, 40 Am. St. Rep. 53. While as a general rule no discretion is vested in its treasurer with respect to the payment of a warrant therefor drawn by the proper officers (McFarland v. McCowen, supra; Victors v. Kelsey, 31 Cal. App. 796, 161 P. 1006; McGowan v. Ford, 107 Cal. 186, 40 P. 231), nevertheless, if the claim is not a legal charge against the municipality, mandamus will not lie to compel its payment, even though it has been audited and allowed by the board charged with that duty (Keller v. Hyde, 20 Cal. 593; Linden v. Case, 46 Cal. 171; Walton v. McPhetridge, 120 Cal. 440, 52 P. 731; Cal. Highway Commission v. Riley, 192 Cal. 97, 218 P. 579). No discretion was vested in the trustees as to the question of calling the election when a petition conforming substantially with the provisions of the statute was filed and the same had been properly certified by the clerk as to the number of signatures. Ratto v. Board of Trustees, 75 Cal. App. 724, 243 P. 466. The municipality as such owed no duty in the premises, but this duty was imposed by statute on the trustees. Stats. 1911, Ex. Sess., p. 128. The three members thereof whose recall was sought undertook, however, to justify their refusal to call the election by attempting to show that the petition, although sufficient in form, was insufficient in fact, and in this effort failed. Under the circumstances there could be no reasonable ground for the contention that the expense incurred was a municipal charge.

The conclusion of the trial court was right, and its judgment is accordingly affirmed.

---

95 Cal. App. 555

CURRAN v. PECHO RANCH & STOCK CO. et al. (Civ. 5982.)★

District Court of Appeal, First District, Division 2, California. Dec. 18, 1928.

Rehearing Denied Jan. 17, 1929. Hearing Denied by Supreme Court Feb. 14, 1929.

Courts ⚿93(1)—Court decision that devisee and grantee took fee established property rule, on which subsequent grantees could rely, in absence of extrinsic fraud.

District court decision, affirmed by Supreme Court, that devisee and grantee took estate in fee simple absolute, not mere life estate, under will and deed, established a rule of property, on which her subsequent grantees had right to rely in partition suit many years later, in absence of extrinsic fraud in procuring judgment, where all parties interested, including parties not in being when former action was instituted, were properly represented.

Appeal from Superior Court, San Luis Obispo County; T. A. Norton, Judge.

Action by Ramona Frances Curran, formerly Ramona Frances Hillard, against the Pecho Ranch & Stock Company, a corporation, Maria Ygnacia Roberson, and others, in which defendants Roberson and others filed cross-complaints against defendants stock company and another. From a judgment for the latter defendants, plaintiff and cross-complainants appeal. Affirmed.

Stoney, Rouleau, Stoney & Palmer, of San Francisco, for appellant Ramona Frances Curran.

Orville C. Pratt, Jr., of San Francisco, for appellants Maria Ygnacia Roberson and Frederick Wilson Hillard.

Dockweiler & Dockweiler & Finch, of Los Angeles, for respondent Luigi Marre Land & Cattle Company.

Albert Nelson, of San Luis Obispo, for respondent Pecho Ranch & Stock Company.

NOURSE, J. This is an action for partition of a ranch of about 9,000 acres in San Luis Obispo county. Plaintiff, Ramona Frances Curran, claiming to own an equitable estate in fee simple in one-quarter of said ranch, filed her complaint against the present owners of the legal title thereof, Pecho Ranch & Stock Company and Luigi Marre Land & Cattle Company, and also against certain mortgagees and trustees under a deed of trust; but as to said mortgagees and trustees

---

★Rehearing denied. Hearing denied by Supreme Court.

the action was dismissed on stipulation. Plaintiff alleged that the defendants Maria Ygnacia Roberson, Frederick Wilson Hillard, and Adelaida Hillard were equitable co-owners with her of said ranch. The latter three equitable co-owners came in by cross-complaint, asserting their equitable title in fee simple to three-quarters of the land involved, admitting that one-quarter of the same belonged to the plaintiff and denying that the other defendants, respondents herein, had any right, title, or interest except a present possession and a bare legal title subject to the beneficial interests of plaintiff and of themselves.

The action was tried upon the complaint and cross-complaint and upon the respective answers of respondents thereto, and thereafter judgment was ordered for the respondents. An appeal was taken by plaintiff, Maria Ygnacia Roberson, Frederick Wilson Hillard, and Maria Ygnacia Roberson, as administratrix of the estate of Adelaida Hillard, deceased; Adelaida Hillard having died while the cause was pending and Maria Ygnacia Roberson, as her administratrix, having been substituted in her place.

It has been stipulated that the two separate appeals may be heard and determined together. They are presented upon the judgment roll alone, and the sole questions for the court are questions of law. It is argued by the appellants that the findings do not support the judgment and under this head four points are argued. The facts are most complicated and the events narrated in the findings extend over a long period of time. Substantially, they are as follows:

That prior to and up to the time of his death John Wilson was the owner, seized in fee, and in the actual and peaceable possession of the land involved in this action; that said John Wilson died in the county of San Luis Obispo on October 13, 1861; that subsequently, to wit, on the 18th day of December, 1861, the last will and testament of said John Wilson, deceased, was duly admitted to probate and Mariano Pacheco and Romualdo Pacheco were appointed executors thereof; that in and by said last will and testament of said John Wilson, deceased, the land hereinabove described was devised and bequeathed as follows, to wit: "Sixth: I do give, devise and bequeath all that certain rancho or tract of land situate, lying and being in the county of San Luis Obispo and State of California known and called 'Pecho y Islay' together with the appurtenances thereunto belonging, * * * to my executors hereinafter named, and to the survivor of them and the heirs of such survivor in trust for the sole and separate use, benefit and behoof of my daughter, Ramona (wife of Frederick Hillard) for and during her natural life, only, and on her decease to the sole use, benefit and behoof of the heirs of her own body living at the time of her said decease to whom the said executors and survivors or survivor of them, or the heirs of such survivor shall convey in fee simple absolute on the said decease of said Ramona and failing such heirs of her body, then, on her decease to the sole use, benefit and behoof of my son John Wilson, my stepsons Mariano Pacheco and Romualdo Pacheco, and to my daughters Maria Ygnacia and Juana Castor, and to their heirs forever, share and share alike, to whom, except the said Juana, on the decease of said Ramona, without heirs of her body living at the time of her decease, the said executors and the survivors and survivor of them, and the heirs of such survivor shall convey in fee simple absolute, and on the happening of the death of the said Juana leaving heirs of her body the said executors shall convey their mother's share in fee simple absolute to her said heirs."

On April 28, 1912, Ramona Hillard died leaving her surviving as the only heirs of her body her children, Maria Ygnacia Roberson, Frederick Wilson Hillard, and Adelaida Hillard, and her granddaughter, Ramona Frances Hillard, now Ramona Frances Curran, plaintiff herein (the daughter of John Hillard, deceased, son of Ramona Hillard).

The trial court also found that the plaintiff and cross-complainants did not become vested with the equitable title to said property upon the death of Ramona Hillard, in accordance with the said devise in the said will of John Wilson, deceased, or otherwise or at all, and that no right, title, interest, or estate whatsoever in said property vested in said plaintiff and cross-complainants or either of them under the terms of said will or at all; that Mariano Pacheco, one of the executors of the said will of John Wilson, died on or about the 15th day of January, 1865; and that Romualdo Pacheco, the other executor of said will, continued to act as such executor until the 18th day of February, 1891, when he resigned as such executor and was discharged by order of court.

The trial court also made elaborate findings against the allegations in the complaint and cross-complaint to the effect that there had existed a conspiracy between Ramona Hillard, her attorneys, and the executors of the will of John Wilson, deceased, to have the property distributed to said Ramona Hillard in fee. These allegations and the findings upon them take up considerable space in the record, and it is unnecessary to set them forth herein, for the court found against them all, and this is an appeal upon the judgment roll alone. As appellants have admitted in their briefs, that matter is concluded upon appeal.

It also appears that in 1870 Ramona Hillard commenced an action in the district court of the first judicial district of the state of California, in and for the county of San Luis Obispo, to quiet her title in fee simple to the property involved here; that at the time of the commencement of said action, and at the time of obtaining a decree therein, the cross-complainant Maria Ygnacia Hillard (now Maria Ygnacia Roberson) and Adelaida Hillard were minors, and were of the ages of three and four years, respectively; that one Walter Murray was appointed by said court as guardian ad litem for said minors; that the said district court entered the defaults of said Romualdo Pacheco, surviving executor, and of Walter Murray as such guardian ad litem, and on the 20th day of January, 1871, filed its written decision in said action, finding the facts alleged in the complaint as true and ordering judgment for the plaintiff as prayed; that the said Maria Ygnacia Roberson, Frederick Wilson Hillard, Adelaida Hillard, and Ramona Frances Curran never had, nor did any or either of them ever have, any interest in said real property, or any part thereof; that everything required by law or necessary to represent and protect any interest or rights that the said plaintiff Ramona Frances Curran or the said defendants and cross-complainants, Maria Ygnacia Roberson, Frederick Wilson Hillard, and Adelaida Hillard, or either or any of them, might have had in or to said real property and in and to said proceedings was duly had, taken, done, and performed; that said action and the said proceeding just mentioned were brought and prosecuted by the said Ramona Hillard for the purpose of obtaining from the district court and from the Supreme Court of the state of California, which afterwards affirmed the judgment of said district court, a true and correct construction of the will of said John Wilson and of correctly and properly ascertaining the rights of the said Ramona Hillard and the rights of the said plaintiff herein, Ramona Frances Curran, and of the said cross-complainants. Though the said defendant and cross-complainant Frederick Wilson Hillard was not born until October 16, 1875, or four years after the obtaining of the decree in said action, and could not be a party to said action, his rights and interests, if any, in said action, were duly and regularly represented and protected. John Hillard, a brother of the cross-complainants, and the father of the plaintiff herein, was born on the 25th day of January, 1874, and was not a party defendant to the said action, but his interests were duly and regularly represented and protected.

It also appears that on April 18, 1891, a decree of final distribution in the matter of the estate of John Wilson, deceased, was entered, whereby and wherein the real property involved here was distributed to Ramona Hillard in fee simple absolute; that said distribution of said real property was not in contravention of the terms of said will of said John Wilson; and that said distribution was in accordance with the construction placed upon said will by the Supreme Court of the State of California in the action of Hillard v. Pacheco et al. The facts with reference to this decree of distribution were found to be as follows:

That A. M. Graves did petition for letters of administration with the will annexed of the estate of John Wilson on the 9th day of February, 1891, and that letters of administration with the will annexed, etc., were issued to said petitioner on March 2, 1891; that on April 6, 1891, an order of court was made appointing Louis Lamy to represent all the minors and absent heirs interested in the said estate, all of whom, excepting one Charles Hillard, now deceased, whose rights are not involved in this proceeding, were present in the state of California; and that no actual notice of said appointment or of the pending proceeding for distribution in said estate was ever communicated to any of said minors, or absent heirs. That at the time of the filing of the petition for distribution, notice of the hearing of said petition was duly and regularly given in the manner and for the time directed by the court and in the manner and for the time provided by law.

There are other matters set forth in the findings regarding mortgages and sales of the property, all tracing originally from the title of Ramona Hillard; but we need not discuss these matters in detail, for the one question which is decisive of these rights is whether or not Ramona Hillard took a fee simple under the will of John Wilson, deceased, and under the proceedings to quiet her title and the probate proceedings, ending in the decree of distribution decreeing that she was the fee simple owner.

The judgment herein proceeds upon the theory that the devise in question in the will of John Wilson, deceased, was within the rule in Shelley's Case, which, though now abolished in this state, was in effect at the time said will took effect, 1861. Ramona Hillard also took a portion of the land involved here by deed from her mother, Ramona Wilson, and that grant had the same language as contained in the will, so we shall refer to but one instrument, as both are governed by the same rule.

In brief, appellants contend that the judgment in Hillard v. Pacheco, heretofore referred to, was erroneous; their position being that although the rule in Shelley's Case was the law of this state at the time the instruments involved here became effective, the devise in the will of John Wilson and the grant in the same words in the deed from Ramona Wilson to her daughter, Ramona Hillard, come within the ruling in Gordon v. Cadwalader, 164 Cal. 509, 130 P. 18, in which it was said: "The grant as a whole must be understood as if it read: 'to John, for and during his natural life, and after his death to the children or other lawful heirs of his body who may survive him.' * * * The use of the expression 'who may survive him' or similar terms, shows that the mind of the grantor was directed to the particular persons surviving at the death of John and not to his posterity generally." It is urged that the language of the instruments involved in the instant case, "to the sole use, benefit and behoof of the heirs of her own body living at the time of her [Ramona Hillard's] decease," makes the last-cited case applicable. The difficulty is that the case of Gordon v. Cadwalader was decided years after the case of Hillard v. Pacheco, and the latter case settled the law with reference to this property and built up a rule of property upon which subsequent purchasers had a right to rely. That decision was affirmed by the Supreme Court in September, 1878, upon the authority of Norris v. Hensley, 27 Cal. 439. The opinion of the district court contained the following language: "It is now ordered, adjudged and decreed that by the devise to plaintiff (Ramona Hillard) in the will of her father John Wilson, deceased, * * * she took an estate in fee simple absolute and not a mere life estate, in and to the undivided one-half of the Rancho Pecho y Islay and in and to the undivided one-half of the tract called 'Santa Fe' and that by the deed from her mother, Ramona de Wilson, * * * she took an estate in fee simple absolute and not a mere life estate in and to the other undivided one-half of said tracts of land."

A fee simple absolute estate being the largest estate known to the law is all-inclusive, and all-exclusive and if Ramona Hillard took such an estate from her mother and father, there is no one who could hold any part or parcel of this property except through and by deraignment of title through her. Appellants have presented very interesting briefs and have argued learnedly as to the nature of grants and devises which would be subject to the operation of the artificial rule in Shelley's Case. That problem may demand our attention on some other occasion, but in the instant case we are disposed to hold that the judgment in the case of Hillard v. Pacheco defining the estate taken by Ramona Hillard under the will of John Wilson, and designating that estate as one which must necessarily exclude any and all other interests, has become a rule of property under which the subsequent grantees of Ramona Hillard have acquired their rights and upon which they had a right to rely.

The trial court has found that all parties interested were duly and properly represented. It is true that some of the parties hereto were not in being at the time the other action was instituted, but they were represented by others in the same class and with the same interests. In the case of County of Los Angeles v. Winans, 13 Cal. App. 234, 109 P. 640, it was said: "The rule and its reason are declared in Sweet v. Parker, 22 N. J. Eq. 455, as follows: 'Many exceptions exist to the general rule that in equity all must be parties who have an interest in the object of the suit.' The reason or principle of such exceptions is stated as follows in Calvert on Parties, section 2, page 20: 'If they are required to be parties merely as the owners and protectors of a certain interest, then the proceedings may take place with an equal prospect of justice if that interest receives an effective protection from others. It is the interest which the court is considering, and the owner merely as the guardian of that interest; if, then, some other persons are present, who, with reference to that interest, are equally certain to bring forward the entire merits of the question, the object is satisfied for which the presence of the actual owner would be so required, and the court may, without putting any right in jeopardy, take its usual course and make a complete decree.' The rule is made applicable to representation of persons living, as well as those unborn. * * * The protection of a person whose property is brought into court by such representation is to be found in his right to attack the decree on the ground of fraud or collusion in its procurement. In the absence of such attack, the decree is final and conclusive as to the status of the property"—citing numerous cases.

No showing was made by the appellants here of extrinsic fraud in procuring the judgment in Hillard v. Pacheco et al. The trial court has found that no fraud existed, and no extrinsic fraud was pleaded. The judgment in Hillard v. Pacheco et al. is unimpeachable unless obtained by extrinsic fraud. People v. Mooney, 178 Cal. 525, 174 P. 325; Huffaker v. Gray, 38 Cal. App. 605, 177 P. 183; Del Campo v. Camarillo, 154 Cal. 647, 98 P. 1049. Extrinsic fraud is clearly defined in the case of Pico v. Cohn, 91 Cal. 129, 25 P. 970, 27 P. 537, 13 L. R. A. 336, 25 Am. St. Rep. 159, and nothing in the pleadings or findings brings the instant case within the rule of that decision.

The judgment is affirmed.

We concur: KOFORD, P. J.; STURTEVANT, J.

95 Cal. App. 652

In re MORSE'S ESTATE.★

WELLS FARGO BANK & UNION TRUST CO. et al. v. MILLS COLLEGE.

(Civ. 6508.)

District Court of Appeal, First District, Division 1, California. Dec. 21, 1928.

Rehearing Denied Jan. 19, 1929.

Wills ⟹840—Debt secured by mortgage on property specifically devised held payable from residuary estate (Civ. Code, § 1359; Code Civ. Proc. § 1563).

Where debt secured by mortgage on property specifically devised to trustees of college was one for which testator was personally liable, *held* that it was payable from residuary estate under Civ. Code, § 1359 and Code Civ. Proc. § 1563, though devise was not specifically made free from incumbrances as was another devise.

Appeal from Superior Court, City and County of San Francisco; Thomas F. Graham, Judge.

Proceedings for distribution of the estate of Isaac H. Morse, etc., deceased. From a portion of final decree directing final distribution favorable to Mills College, the Wells Fargo Bank & Union Trust Company and another, as executors and individually, appeal. Affirmed.

Edgar C. Chapman, of San Francisco, for appellants.

Harrison S. Robinson, Harry L. Price, and R. W. Macdonald, all of Oakland, for respondent.

CASHIN, J. An appeal from a portion of a final decree of distribution entered in the matter of the estate of Isaac H. Morse, deceased. The appeal was taken by Wells Fargo Bank & Union Trust Company and Fremont Morse, executors of the last will and testament of the deceased; Wells Fargo Bank & Union Trust Company, trustee under the will, and Fremont Morse, individually, as heir, legatee, and devisee of the deceased.

The last will of the deceased, which was executed on October 15, 1923, contained the following devise to respondent college: "If at the time of my death I am the owner of the real property situate at the northeast corner of Lombard and Montgomery streets, San Francisco, my said wife having predeceased me, I give, devise, and bequeath the same unto the trustees of Mills College, now located in Oakland, California, and I request that said trustees shall hold such real property until the amount which can be realized from the sale thereof, plus the net income therefrom, shall equal the sum of one hundred and fifty thousand ($150,000.00) dollars, to be then used by said trustees for the erection of a Residence Hall at Mills College which shall accommodate one hundred women, to be known as 'The Mary E. Morse Memorial', or for some other hall or building at Mills College in the discretion of said trustees, to be known as 'The Mary E. Morse Memorial.'" At the time of the death of the deceased the property devised was subject to a mortgage in the sum of $20,000, held by the Hibernia Savings and Loan Society. The decree distributed the property to the college, and also provided that the latter should be paid out of the residue of the estate the sum of $20,000, together with interest thereon from and after April 14, 1927, with which to satisfy and discharge the mortgage. The decree further provided (this being the portion appealed from): "That the residue of said estate be and is hereby distributed to the said Wells Fargo Bank & Union Trust Company, trustee as aforesaid, subject to a lien in favor of Mills College in the sum of $20,000 with interest thereon at the rate of six per cent. per annum from and after the 14th day of April, 1927."

It appears that the testator acquired the property on December 8, 1919, from Albers Bros. Milling Company, a corporation, for $100,000, the sum of $60,000 being paid in cash and the balance secured by a mortgage thereon to the grantor in the sum of $40,000. Thereafter payments were made on the mortgage, $20,000 being paid in December, 1919, and $5,000 in August 1920. On October 7, 1920, the present mortgage was executed by the testator and Mary E. Morse, his wife, who predeceased him and from this sum the balance of the indebtedness to the milling company was paid and its mortgage satisfied. The appraised value of this property was $75,000, the total appraised value of the estate being $454,795.50. In addition to the devise to the college the will devised two lots in Monterey county to Annie H. Morgan if she should survive the testator, the will providing that she should take the same "free of incumbrances excepting only the equity of Mary L. Morgan in said property over and above the amount charged against the property on my books at the time of my death." The will also contained several specific bequests aggregating the sum of $92,000. The residue of the estate, consisting of real and personal property, was devised and bequeathed to appellant Wells Fargo Bank & Union Trust Company, in trust for the purpose of paying the net income therefrom during his lifetime to appellant Fremont Morse, a brother of the testator, it being also provided that upon his death the corpus of the trust shall vest in and be paid to his three children, named in the will, or their heirs.

As stated by appellants, the only question presented by the appeal is whether it was the intention of the testator to devise the property to the college free and clear of the existing incumbrance.

★Rehearing denied.

Section 1359 of the Civil Code provides that the property of a testator, except as otherwise specially provided in that code and the Code of Civil Procedure, shall be resorted to for the payment of debts in the following order, viz., after property appropriated for that purpose by the will and property not disposed of, first, "property which is devised or bequeathed to a residuary legatee"; second, "property which is not specifically devised or bequeathed," and third, "all other property ratably." It is provided by section 1563 of the Code of Civil Procedure that "the estate, real and personal, given by will to legatees or devisees, is liable for the debts, expenses of administration, and family expenses, in proportion to the value or amount of the several devises or legacies, but specific devises or legacies are exempt from such liability if it appears to the court necessary to carry into effect the intention of the testator, and there is other sufficient estate."

Both the original mortgage and that now a lien on the property devised to respondent were executed by the testator previous to the execution of his will. The amount secured thereby was a debt within the meaning of the probate statutes for which the testator was personally liable. As the court said, in Estate of De Bernal, 165 Cal. 223, 234, 131 P. 375, 380 (Ann. Cas. 1914D, 26), with respect to the payment of such debts: "We find no dissent in the authorities on the proposition that where the mortgage lien was created by the testator himself to secure his own debt, and at the time of his death the mortgage is simply collateral security for the personal obligation, it is to be paid, as between executors, devisees, legatees, and heirs, in the same manner as the general unsecured debts of the deceased, in so far as the question from what property of deceased it is to be paid is concerned, unless the will discloses a different intent on the part of the testator."

Appellants argue that the devise to Annie H. Morgan having specifically stated that that property was to be taken free of incumbrances, while that to the college contained no such provision, an intention was thereby indicated that the latter should take subject to the mortgage, citing Estate of Porter, 138 Cal. 618, 72 P. 173. Whatever conclusion might be drawn from that circumstance, had the devise been solely for the benefit of the college, we need not consider, as it is clear that the principal, if not the only, object of the testator in making the devise was to perpetuate the memory of his wife, and for this purpose the property was to be held until the sum of $150,000 could be realized therefrom. The value of the property at the time the will was executed had not increased, but rather had decreased, and this fact was doubtless known to the testator. It was thus apparent that several years would probably elapse before the sum necessary for the erection of the memorial would be available. When the value of the property is considered, together with the fact that the testator made ample provision for his brother and the latter's children, an intention to burden the property in an amount which of necessity would long delay, if not wholly defeat, the primary purpose of the devise, is in the highest degree improbable. We are satisfied that the conclusion of the trial court to the contrary was fully supported, and the portion of the decree appealed from is accordingly affirmed.

We concur: TYLER, P. J.; KNIGHT, J.

95 Cal. App. 602

LOS ANGELES COUNTY v. MARBLEHEAD LAND CO. et al. (Civ. 5774.)

District Court of Appeal, Second District, Division 1, California. Dec. 20, 1928.

1. Eminent domain 🔑9—Statute held to authorize counties to acquire rights of way for state highways subsequently authorized, as by constitutional amendment (St. 1913, p. 445; State Highways Act; Const. art. 16, § 2).

St. 1913, p. 445, being general in its terms, authorizes counties to acquire rights of way for state highways subsequently authorized, as by Const. art. 16, § 2, adopted July 1, 1919, as well as those provided for by State Highways Act 1909 (St. 1909, p. 647).

2. Eminent domain 🔑8—Act authorizing counties to acquire rights of way for state highways held not impliedly repealed by constitutional amendment (Const. art. 16, § 2; St. 1915, p. 650; St. 1913, p. 445).

Const. art. 16, § 2, relieving counties from further co-operation in acquisition and construction of state highways under State Highways Act 1915 (St. 1915, p. 650), but providing that "nothing herein shall prevent any county from contributing towards the cost of said extensions or of any other state highways * * * under the provisions of any existing laws," did not impliedly repeal, but directly recognized, existence of St. 1913, p. 445, authorizing counties to acquire rights of way for state highways within their limits.

3. Eminent domain 🔑8—Constitutional amendment held not to render it unnecessary for county to condemn land for state highway (Const. art. 16, § 2; St. 1915, p. 650; St. 1913, p. 445).

Adoption of Const. art. 16, § 2, relieving counties from further co-operation in acquisition and construction of state highways described in St. 1915, p. 650, did not render it unnecessary for county to condemn land for state highway under St. 1913, p. 445, authorizing board of supervisors to "proceed if necessary to condemn" any right of way recommended, state having right to make county its agent for such purpose.

4. Eminent domain 🔑195—County seeking to condemn right of way for state highway need not allege or prove failure of other methods of acquisition (St. 1913, p. 445).

In county's action to condemn right of way for state highway under St. 1913, p. 445, authorizing supervisors to "proceed if necessary to condemn" any right of way recommended, it was not necessary for plaintiff to allege or prove that other methods of acquisition had been attempted and failed, in view of provision that board of supervisors' order shall be only preliminary procedure required.

5. Eminent domain 🔑59—County held not estopped to condemn right of way for state highway, including and parallel with county road (St. 1913, p. 445; Const. art. 16, § 2; Code Civ. Proc. § 1241).

County establishing and condemning right of way for county highway *held* not estopped to condemn right of way, under St. 1913, p. 445, for much wider state highway, including all or parts of county road in some places and paralleling it at varying distances in other places, though entering and leaving certain ranch at same points; such statute not being impliedly repealed by Const. art. 16, § 2, and supervisor's resolution being conclusive evidence under Code Civ. Proc. § 1241, that property was necessary for improvement and that latter was planned or located in manner most compatible with greatest public good and least private injury.

6. Eminent domain 🔑205—Evidence held to support valuation of railroad embankment and structures on land condemned at $1,000 (St. 1913, p. 445).

In county's action to condemn right of way for part of state highway under St. 1913, p. 445, evidence *held* sufficient to support court's valuation of railroad embankment and structures on land taken at $1,000, not $49,660, testified to by one witness.

7. Eminent domain 🔑205—Evidence held to sustain findings of $8,666 damages and benefits to portion of ranch not condemned for state highway (St. 1913, p. 445).

In county's action to condemn right of way for state highway under St. 1913, p. 445, testimony of several apparently competent and well-informed witnesses that damage to portion of ranch not condemned by severance from portion condemned was less and benefits thereto by construction of improvement much more than $8,666, which court found to be amount of both damage and benefits, *held* sufficient to sustain such findings.

8. Eminent domain 🔑146—"General benefits" to land not condemned consist in increased value common to community generally, while "special benefits" are those peculiar to land reasonably certain to result from improvement.

General benefits from public improvement to portion of land not condemned consist in resulting increase in value thereof common to community generally, while special benefits are such as are reasonably certain to result from mere construction of improvement and are peculiar to land in question.

[Ed. Note.—For other definitions, see Words and Phrases, First, Second, and Third Series, General Benefits; Special Benefits.]

9. Eminent domain 🔑205—Evidence held to show special benefits to portion of ranch not condemned for state highway (St. 1913, p. 445; Const. art. 1, § 14).

In county's action to condemn right of way for state highway under St. 1913, p. 445, evidence *held* to establish benefits, special and peculiar to portion of ranch not taken, as result of access to highway, transportation facilities, and increased market value of land fronting thereon, to be set off against damages to such portion, under Const. art. 1, § 14.

10. Eminent domain 🔑262(5)—Condemnation judgment on findings as to compensation and damages, sustained by evidence and made after fair and complete presentation of case, will not be reversed for occasional comparatively unimportant erroneous rulings on evidence.

Judgment of condemnation on findings as to compensation and damages, sustained by evidence and made after fair and complete presentation of case and personal examination of property by judge, will not be reversed because of few comparatively unimportant erroneous rulings admitting and excluding evidence of market value of property taken and damages to that not taken, where court was liberal as whole in admitting evidence and did not lose sight of correct rules governing standards of value.

Appeal from Superior Court, Los Angeles County; F. C. Valentine, Judge.

Action by the County of Los Angeles against the Marblehead Land Company and others to condemn a right of way for part of a state highway. From a judgment of condemnation, defendants appeal. Affirmed.

See, also, 273 P. 138.

Richard Hartley and William J. Clark, both of Los Angeles, for appellants.

Mortimer A. Kline and Hill, Morgan & Bledsoe, all of Los Angeles, for respondent.

CONREY, P. J. This is an action brought by the county of Los Angeles to condemn a right of way for a portion of the state highway running between Oxnard in Ventura county and San Juan Capistrano in Orange county. After an extended trial the court made findings of fact, upon which an interlocutory decree was entered, directing payment to the defendants of specified sums in accordance with their several interests in the land as determined by the court, and providing that upon payment of said sums the lands sought to be taken be condemned and taken by the plaintiff for the purposes of said highway. The defendants appeal from the judgment.

In the year 1913 the Legislature enacted a law entitled "An act to permit counties to acquire rights of way for state highways and to pay part of the expense of constructing state highways and bridges within their limits and authorizing the state to accept the same." Stats. of 1913, p. 445; Henning's Gen. Laws, p. 994.

Section 1 of that act reads as follows:

"Whenever it is determined by a four-fifths vote of the board of supervisors of any county that the interests of the county would be promoted thereby, the board of supervisors, upon the recommendation of the advisory board of the department of engineering of the state of California, may, by resolution passed by a four-fifths vote of said county board, determine to acquire by purchase, donation or dedication, or lease any right of way, rock quarry or land needed for state highway purposes and described in such recommendation, and shall proceed, if necessary, to condemn under the provisions of the Code of Civil Procedure relating to such proceedings any right of way, rock quarry or land recommended to be acquired as aforesaid. The title to such property may be taken in the name of the state or the county. The order of the board of supervisors shall be the only preliminary procedure required prior to the acquisition of such property or the commencement of such condemnation action or actions."

Section 2 provides a similar procedure under which a county whose interests would be promoted thereby is authorized to contribute money toward the expenses of construction of state highways within their limits.

The present action was brought under and in accordance with the above-mentioned statute of 1913. It was preceded by the recommendation of the California highway commission, which is the successor of the advisory board of the department of engineering. It is not claimed that there has been any failure to conform with the procedure required by the terms of said statute. While there has been no direct repeal of the statute of 1913, it is contended by appellants that there is an implied repeal of said statute by reason of an amendment to the Constitution of the state, which amendment was accomplished by the adoption of section 2 of article 16 of the Constitution, on the 1st day of July, 1919. At this point it will be useful to have in mind some of the legal history connected with the development of the present system of state highways:

"The provisions of law relating to the powers and duties of the Highway Commission are to be found in various places. The first 'State Highways Act' was adopted in 1909 (Stats. 1909, p. 647) and amended in 1915 (Stats. 1915, p. 686). The second 'State Highways Act' was adopted in 1915 (Stats. 1915, p. 650), and it, among other things, adopted by reference various provisions of the first State Highways Act. The third state highways measure was adopted in 1919 and 1920 in the form of amendments to the Constitution (Const., art. XVI, secs. 2, 3), and it, in turn, adopted by specific reference certain provisions of the State Highways Act of 1915, and by general reference various other provisions thereof. * * * Section 363f of the Political Code, adopted in 1921, created the present California Highway Commission, as the successor to the duties, powers, purposes, responsibilities, and jurisdiction theretofore vested in the appointed members of the advisory board to the department of engineering, who formerly composed a subdivision of the department of engineering designated as the California State Highway Commission. The statutory provisions prescribing the powers, duties and responsibilities of the department of engineering are to be found in the Statutes of 1907, page 215; Statutes of 1909, page 558; Statutes of 1911, page 823; Statutes of 1915, pages 630 and 898, and Statutes of 1917, pages 541 and 690. By section 8 thereof it is provided that 'all public work done by the state, except as otherwise provided by law, shall be under the full control of said department.' By section 9 thereof it is provided that 'the department of engineering shall take and have full possession and control of all roads and highways which have been declared and adopted state roads and state highways, and all state roads and state highways which may hereafter be acquired and constructed.'" Cal. Highway Com. v. Riley, 192 Cal. 97, 103, 218 P. 579, 582.

The State Highways Act of 1915 was a statute approved May 20, 1915, and was designed to authorize the acquisition, construction, improvement, maintenance and control of the uncompleted portions of the system of state highways prescribed and contemplated by the State Highways Act of 1909. The State Highways Act of 1915 provided for payments to be made by counties to the state treasury as compensation for interest paid upon moneys expended within such counties from the proceeds of the state bonds; and provided for additional state bonds to be issued and sold to create a fund for completing the acquisition of such highway system. Stats. 1915, p. 650.

Another aspect of the series of legislative acts now under consideration is indicated in the reply brief of appellants, where they say: "In 1909 the state approved an issue of bonds in the sum of eighteen million dollars for the construction of a system of highways. In 1915 an additional fifteen million dollars was authorized and expended. In 1919 a further bond issue of forty million dollars was authorized by the constitutional amendment under consideration."

Section 2 of article 16 of the Constitution, adopted as hereinbefore stated, provided for the preparation and issuance of the bonds thereby authorized, and created certain funds corresponding to those provided for in the state highways act of 1915. Said funds were described respectively as "third state highway fund," "third state highway interest and sinking fund," "third state highway revolving fund," and "third state highway sinking fund." It was directed that the moneys in said "third state highway fund" shall be used by the state department of engineering for the acquisition of rights of ways for and the acquisition, construction, and improvement of uncompleted portions of the system of state highways prescribed by the "state highways act" of 1909, and the "state highways act of 1915," and certain extensions thereof described in said last-named act, "and also for the acquisition of the rights of way for and the acquisition, construction, and improvement of the following additional highways as state highways. * * * Oxnard to San Juan Capistrano. * * * Said additional highways to be located on the most direct and practical route."

After providing for certain expenditures of money for the previously planned but not completed highways, said section 2 provides: "The cost of acquisition and construction of the several extensions described in said 'state highways act of 1915' shall hereafter be entirely borne by the state of California, it being the intention hereof to relieve the several counties from any further co-operation as contemplated by said 'state highways act of 1915,' but nothing herein shall prevent any county from contributing towards the cost of said extensions *or of any other state highways* at its option to such extent as it may desire *under the provisions of any existing laws*."

Section 3 of article 16 of the Constitution, adopted at the general election of November 2, 1920, creates a state highway finance board, and contains sundry regulations relating to the various described bond issues.

Appellants contend, first, that the demurrer to the complaint should have been sustained, upon the ground that the county was without authority to maintain the action, and that for the same reason the objections of defendants to the introduction of evidence should have been sustained. Counsel for appellants take the position that, under the act of 1913 to which we have referred, the power thereby conferred upon the board of supervisors was limited to those state highways which had been designated in previous acts of legislation, and therefore did not include the highway between Oxnard and San Juan Capistrano, which was only authorized by the constitutional amendment of July 1, 1919. They say that it cannot be assumed that the Legislature intended to bestow upon the board of supervisors authority to condemn land "for the purpose of a state highway which the state itself had not, at that time, power to construct." They further contend that, because the constitutional amendment empowers and directs the state itself to use funds provided thereby for the acquisition of the rights of way for this highway, and because the intention of the amendment was to relieve the counties from any further co-operation in respect to the described highways, it follows that any law which might prevent the state itself from acquiring such highways would be unconstitutional. They further say that since the statute of 1913, in its provisions relating to the condemnation of rights of way, only authorized the board of supervisors to "proceed, if necessary, to condemn" any right of way recommended, it follows that this action is unauthorized. Counsel say: "All necessity for the county to condemn land for this highway was entirely at an end upon the adoption of section 2 of article 16 of the Constitution. It was not necessary for the county to do so, because the state was obliged to do so and had made provision for the necessary funds and all of the means of carrying out the determination of the state of acquiring the land into execution."

[1, 2] Our own reading of these statutes and constitutional enactments leads us to a different conclusion. Said statute of 1913 is general in its terms. It does not require any special rules of interpretation to make its provisions applicable to a highway originating at a later date, as well as to such highways as had been provided for by the "State Highways Act" of 1909. It is not true that in 1913 "the state itself had not at that time power to construct" any highway for which the Legislature had not yet provided. The power existed, although it had not yet been exercised. It was in recognition of such existing power and of its possibility of future exercise that said statute of 1913 was enacted in the terms there used. Moreover, the provisions of section 2 of article 16 of the Constitution, which we have quoted, directly recognized the existence of the statute of 1913 when, after relieving the counties from the obligation to co-operate in the acquisition and construction of these state highways, it was further provided that: "Nothing herein shall prevent any county from contributing towards the cost of said extensions or of any other state highways at its option to such extent as it may desire *under the provisions of any existing laws*." Since the statute of 1913 contains the authorization under which such contributions were permitted to be made by the counties, it seems clear that the clause, "under the provisions of any existing laws," was intended to include said statute of 1913.

[3, 4] The claim of counsel for appellant that upon adoption of said section 2 of article 16 of the state Constitution it was unnecessary for the county to condemn land for this highway, because the state was obliged to do so, is unsound. The state had a right to choose its agents for the accomplishment of its purpose to construct a system of highways. The statute of 1913 made the county, through its board of supervisors, under the conditions

therein described, the agent of the state for the purpose of acquiring any right of way or land recommended to be acquired. It was particularly provided that the title to the property might be taken in the name of the state or of the county. The clause, "shall proceed if necessary to condemn," when read in the light of its context, seems to refer only to that necessity which would arise when, after determining to acquire the land, the board of supervisors found, in any given case, that the land could not be obtained by purchase, donation or dedication. But it was not necessary for the plaintiff to allege or prove that these methods of acquisition other than condemnation had been attempted and had failed. For the statute says: "The order of the board of supervisors shall be the only preliminary procedure required prior to the acquisition of such property or the commencement of such condemnation action or actions." This provision was in accordance with the rule that, in the absence of contrary evidence, official duty is presumed to have been regularly performed.

[5] This action was commenced by complaint filed on the 15th of January, 1924. The right of way sought to be taken is 80 feet in width, with an extra width at certain described places where such additional width is required in order to provide for cuts or fills. Prior to the commencement of this action, and prior to any proceedings by the state looking to the construction of the state highway on account of which the present action was brought, the county of Los Angeles, by proceedings conducted under the general highway laws of the state, had condemned and taken, for public highway purposes, a strip of land 40 feet in width with sufficient land along the sides thereof to provide for fills and other work. County of Los Angeles v. Rindge Co., 53 Cal. App. 166, 200 P. 27; Rindge Co. v. Los Angeles Co., 262 U. S. 700, 43 S. Ct. 689, 67 L. Ed. 1186; Co. of Los Angeles v. Rindge Co., 69 Cal. App. 72, 230 P. 468. Said county highway commenced at the easterly boundary of the Malibu ranch (the property now owned by defendant Marblehead Land Company) at the point where that portion of the proposed state highway herein sought to be acquired and condemned begins and followed a general westerly course through said ranch, ending at the Ventura county line at the westerly end of said ranch, at the point where the proposed state highway crosses said county line. Said county road in some places lies wholly, and in other places partly, within the right of way now sought to be condemned. At some places the county road parallels the right of way herein sought to be condemned, being but a short distance removed therefrom; while at other places the two rights of way are separated from each other by distances of "from one-half to three-quarters of a mile or more."

It is contended by appellants, and was pleaded by them as a defense to this action, that by reason of the prior establishment of said county highway, and the condemnation of a right of way therefor at the suit of the county of Los Angeles, said county is now estopped from seeking to take by condemnation the right of way described in the complaint. The argument presented in support of this contention rests principally upon the prior contention that said statute of 1913 was by necessary implication repealed by the adoption of section 2 of article 16 of the Constitution. As we have concluded that there was no such repeal, this part of the argument need not be followed any further.

In the establishment of the county road, the purposes in view were comparatively limited in respect to territory to be served. The width of the road, and the particulars of the route thereof, were determined with reference to those local conditions. The present proposed highway, on the contrary, is to be part of a state highway system, through many counties and extending to great distances. The proceedings for obtaining the right of way through appellants' land were initiated by the state highway commission, and the board of supervisors of Los Angeles county is merely the agency through which the state has chosen to proceed in obtaining the right of way. It cannot be said that the county highway, and a state highway thus proposed to be established for more general purposes of the state than the county highway, and of much greater width than the county highway, should necessarily pass through this ranch along an identical route, even though the two roads do enter the ranch at the same point and leave it at the same point. Under these circumstances there is no conflict between the resolution of the board of supervisors, which, prior to the former action, declared that the route chosen for that highway was the route most compatible with the greatest public good and the least private injury, and the resolution of the same board, adopted at the request of the state highway commission, in which resolution the supervisors declared that in this case also the route proposed is the route most compatible with the greatest public good and the least private injury. Under the conditions which attended the former action, and having in view the purpose of the county highway, it might be that the route which would provide for the greatest public good and the least private injury in relation to that highway would be different from the route required by the greatest public good and least private injury in establishing the state highway. The statute of 1913 provided that, under the stated conditions described in that act, the county may proceed to condemn, under the provisions of the Code of Civil Procedure relating to such proceedings. Section 1241 of the Code of Civil Procedure declares that in such a proceeding for condemnation of property within the county, the adoption of the resolution or ordinance declaring that the property sought to be condemned is necessary for the proposed public improvement, and that the proposed improvement is planned or located in the manner which will be most compatible with the greatest public good and the least private injury, shall be conclusive evidence of those facts. Since, in our opinion, the estoppel which has been invoked by appellants is not applicable to the facts of the case, there remains no objection sufficient to prevent the county of Los Angeles from condemning the property sought to be taken in this action.

[6] Finding X reads as follows: "The court further finds that the market value of the property owned by the defendant Marblehead Land Company, herein sought to be condemned by the plaintiff for the purposes herein mentioned, was, on the 15th day of January, 1924, the sum of eighty-two thousand dollars ($82,000.00), and that the market value of all of the improvements thereon pertaining to said realty so owned by the said defendant, Marblehead Land Company, was, on the said 15th day of January, 1924, the sum of eight hundred dollars ($800.00)."

Appellants claim that this finding is without support in the evidence, either in relation to the market value of the land taken, or the market value of the improvements thereon owned by the Marblehead Land Company. The principal point urged in the attack upon this finding is that the valuation made by the court of the improvements "was reached by disregarding entirely the evidence which showed without contradiction or confliction that there was a valuable improvement on said land consisting of a railroad embankment of 93,000 cubic yards of dirt worth $49,660; that the court erred in refusing to award compensation to any of the appellants for said improvement and by its judgment confiscated the same without allowing the owner thereof any compensation for it whatever."

In the year 1903 the ranch owner conveyed to the Hueneme, Malibu & Port Los Angeles Railway Company an easement of 200 feet in width throughout the ranch immediately adjacent to the line of mean high tide. This company proceeded to construct over portions of the ranch a railroad, but in so doing did not follow the easement theretofore granted. Later on another railroad corporation was formed under the name of the Hueneme, Malibu & Southern Railway Company, and the then owners of the ranch conveyed to this corporation a 60-foot right of way, which followed a different course than the 200-foot easement and was so laid out as to cover the previous actual railroad construction.

In finding XIV the court found that "the market value of the improvements of all character owned by defendant Hueneme, Malibu & Port Los Angeles Railway, and herein sought to be condemned, was, on the 15th day of January, 1924, the sum of $1,000.00." The court awarded this $1,000 to the last-named company, and included in its award to the Marblehead Land Company the $800 fixed as the value of improvements on the realty owned by it, in accordance with finding X. The error claimed by appellant on this part of the case is that the court did not adopt the valuation of $49,660 which, according to the testimony of the witness Hawgood, was the amount which a person desiring to obtain a railroad grade on the stated premises and at the above stated date would have been willing to pay for the railroad grade or roadbed which was on those premises, "or a similar graded roadbed." Appellants claim that Hawgood's testimony on this point stands uncontradicted. We find, however, that there is in the record abundant evidence that the railroad, including the grades and fills, as well as the rails and ties, had been washed out in some places and had fallen into a neglected condition, and had so remained for a number of years prior to the year 1924. There is testimony which conflicts definitely with that of Mr. Hawgood. An example of this occurs in the testimony of J. A. Bell, who, like Mr. Hawgood, qualified as an engineer of experience in railroad construction. After an extended statement of facts in support of his opinion that the right of way itself was very unsuitable for a railroad, Mr. Bell said: "Basing my answer upon that which I have heretofore testified to, and my knowledge of conditions both on the ranch and elsewhere, not only the physical conditions but also the conditions I have mentioned, I can't see any conceivable use for it as a railroad right of way." Other witnesses declared that the railroad had washed away in some places, and that some of the trestles and bridges had all dropped to pieces; that there was practically no railroad that could be used for any purpose whatsoever. The witness Benedict, who was one of those who gave the railroad right of way a nominal valuation of $1, said: "I think I saw all of the mileage on the entire route that was graded but the bulk of it throughout the entire ranch was in a condition where it was of no value even though it had been useful to the grade of the highway and I gave it no value." After an extended examination of the testimony we think that, notwithstanding Mr. Hawgood's valuation of the grade and materials of the railroad structure, the testimony of these other witnesses is inconsistent with that valuation, and that the finding of the court which established the value of the railroad embankment and structures at the sum of $1,000 is adequately supported by the evidence.

[7] Appellants next contend that there is no evidence to sustain that portion of finding XI which limits to the sum of $8,666 the damage caused to that portion of the ranch not

sought to be condemned, by reason of the severance thereof from the portion sought to be condemned, and that there is no evidence to sustain that portion of the same finding whereby it was determined that the benefits to that portion of the ranch not included in the condemnation amounted to the sum of $8,666. Appellants further contend that the benefits so set off against severance damages were only of a general nature, and were not of that class of special benefits which may lawfully be set off against severance damages.

[8] Examination of the testimony shows that several witnesses, who were apparently competent and well informed, were of the opinion that the severance damage amounted to sums which were less than the amount subsequently established by the findings of the court. These witnesses were quite uniform in their opinion that the benefits to the portion of the ranch not taken, by reason of the construction of improvements, were many times as much as the amount stated in the findings of the court. We think that the evidence is sufficient to sustain these findings. It follows that on this branch of the case appellants have no ground of complaint, unless it be made to appear that said benefits were only a part of the general benefits and advantages accruing to the community, and were not benefits special and peculiar to the property of defendants not included in the condemnation. Numerous authorities on the subject were cited in the briefs and in the oral argument. The law in this state covering the question here presented is definitely stated in Beveridge v. Lewis, 137 Cal. 619, 67 P. 1040, 70 P. 1083, 59 L. R. A. 581, 92 Am. St. Rep. 188. It was there pointed out that general benefits consist in an increase in the value of land, common to the community generally, and resulting from advantages which will accrue to the community from the improvement. Special benefits, on the other hand, are such as result from the mere construction of the improvement, and are peculiar to the land in question. These special benefits must be such as are reasonably certain to result from the construction of the work. So far as we are advised, the rule or principle thus announced in Beveridge v. Lewis has not been modified by later decisions.

[9] The witnesses who testified in favor of the plaintiff on this question were of the opinion that, in addition to the general benefits, there were special benefits which would result from the construction of this highway, and that these benefits were peculiar to the property of defendants. The witness Butterworth, after stating that the market value of the land taken would be greatly increased by the laying out and construction of the highway, stated that he had in mind both the benefit that would result from access and transportation facilities, and also the benefit to the frontage upon the highway and added value that would accrue to land fronting thereon if the highway was put through. He further stated that these benefits to the ranch, and this increase in market value as a result of the construction of the highway, were in his mind separate and apart from the general benefit which the entire district would receive. The testimony of the witness Benedict, and of others, is of like effect. It is not denied by appellants that under the provisions of article 1, § 14, of the Constitution of the state of California, benefits which are special and peculiar to the property affected may be set off against damages to the portion not taken, whenever the plaintiff is a municipal corporation or a county.

[10] Finally, appellants have submitted for consideration numerous assignments of error in rulings upon evidence. It is claimed that the court erred in permitting the plaintiff to introduce evidence which was incompetent, irrelevant and immaterial, and which was hearsay, and in refusing to permit defendants to introduce competent, relevant and material evidence, and in permitting improper cross-examination of appellants' witnesses. Practically all of these rulings were concerned with testimony of witnesses who were giving their opinions upon questions directed to the subject of market value of the property sought to be taken, or the question of damages to the property not taken. We have made a schedule of the pages of the transcript, referred to in the brief of counsel for appellants in their argument upon these assignments of error, and have read not only the particular folios indicated, but very much of the connecting portions of the record. Let it be assumed, without deciding the questions point by point, that there were occasional errors in these rulings. As a whole, the court was liberal in the admission of evidence offered by the defendants for the purpose of establishing their claims as to the market value of the property. The few rulings made against defendants in this respect were comparatively unimportant, and did not interfere with a full and complete presentation of the facts relied upon by appellants to establish the values claimed by them. A like liberty was allowed to the plaintiff in its reply, not only in the presentation of its own evidence, but in its cross-examination of the witnesses introduced by the defendants. It does not appear that the court lost sight of the correct rules governing the standards of value which enter into a determination of the issues upon which the court was called upon to make its findings. We have reached the conclusion that such errors as may have occurred did not perceptibly interfere with the judgment of the court, or affect the result shown by the findings and judgment. In this connection, although it may be of minor importance, we take note of the fact that the judge had not only the benefit of the testimony of the witnesses, but that he made a personal examina-

tion of the property. If this examination was made under any definite stipulation contained in the record, such stipulation has not been brought to our attention. We do find, however, a statement by one of counsel for appellants, in the course of an argument to the court, and in which he said: "I have in mind that your honor has been out there and has been over the property and that your honor's view of the property is evidence in the case."

We have formed the opinion that the findings of the court upon the questions relating to compensation and damages are sustained by the evidence. They were made after a very fair and complete presentation of the case at a trial which evidently occupied the attention of the court for many days. We have endeavored to state the contentions of appellants upon the principal questions of law in the case, with our conclusions thereon, and we find no reason which would justify a reversal of the judgment.

The judgment is affirmed.

I concur: YORK, J.

Mr. Justice HOUSER, deeming himself disqualified, takes no part in this decision.

---

95 Cal. App. 799

COUNTY OF LOS ANGELES, Plaintiff and Respondent, v. MARBLEHEAD LAND COMPANY (a Corporation) et al., Defendants and Appellants. (Civ. 5380.) †

District Court of Appeal, Second District, Division 1, California. Dec. 21, 1928.

Rehearing Denied Jan. 16, 1929. Hearing Denied by Supreme Court Feb. 18, 1929.

Appeal by defendants from an order of the Superior Court of Los Angeles County, K. S. Mahon, Judge, taxing costs in an action to condemn land for road purposes. Affirmed.

See, also, 273 P. 131.

Richard Hartley and William J. Clark, both of Los Angeles, for appellants.

Everett W. Mattoon, County Counsel, and Hill & Morgan, all of Los Angeles, for respondent.

PER CURIAM. The defendants having filed their bill of costs and disbursements, the court, on motion duly made, struck from the bill sundry large items, and allowed costs in a greatly reduced sum. From the order so made, the defendants appeal.

The questions of law presented on this appeal are substantially the same as those discussed in City of Los Angeles v. Vickers, 81 Cal. App. 737, 254 P. 687, where the principles which apply here are very clearly stated.

In accordance with the decision in that case, it is ordered that the order from which defendants appeal be, and the same hereby is, affirmed.

---

95 Cal. App. 733

PEOPLE by WEBB, Atty. Gen. v. CITY OF SAN RAFAEL et al. (Civ. 6510.)★

District Court of Appeal, First District, Division 1, California. Dec. 24, 1928.

Rehearing Denied Jan. 16, 1929.

1. Municipal corporations 🔑657(2)—Municipality cannot vacate portion of street for sole benefit of private individuals or corporations, but may do so in interest of safety, convenience, and public welfare.

Municipal authorities may not vacate any portion of public street for sole benefit and use of private individuals or corporations, but in proper case may close and vacate street or part thereof in interest of safety, convenience, and good of general public.

2. Municipal corporations 🔑657(2)—Municipality's power to close street held unaffected by fact that beneficial use or title to land abandoned may incidentally revert to private parties.

Power of municipal authorities to vacate street in interest of safety, convenience, and public welfare is not affected by fact that, as one of incidents to its exercise, beneficial use or title to land abandoned may revert to private parties.

3. Municipal corporations 🔑657(2)—Closing of streets is legislative function within council's discretion when delegated to city council by Legislature.

Closing of streets is legislative function and, when delegated to city council by Legislature, is within discretion of council.

4. Municipal corporations 🔑657(1)—Council of city of San Rafael, delegated authority to close streets, must decide in first instance whether closing is in public interest (Const. art. 11, § 8; San Rafael, City Charter, § 18).

Under San Rafael City Charter, § 18, delegating authority to close streets of city to city council, of which charter court must take judicial notice, under Const. art. 11, § 8, council in first instance must decide whether or not closing of particular street is in public interest.

5. Municipal corporations 🔑657(6)—Courts cannot interfere with discretion of city council in closing part of street when soundly exercised and securing real benefits to public.

Where discretion by city council in closing portion of street has been soundly exercised, based on sufficient facts, with proper consideration of needs of public with minimum damage to all concerned and with end of securing real benefits for public, court should not and cannot interfere.

6. Municipal corporations 🔑657(2)—City cannot barter away its streets.

City cannot barter away its streets.

7. Municipal corporations 🔑657(5)—Finding that council did not abuse discretion in closing portion of street held justified by evidence showing dangerous grade crossing was eliminated, resulting in public advantage.

Where evidence showed that closing of portion of street resulted in elimination of dangerous grade crossing where two grade crossings were in close proximity and did away with public inconvenience by having both crossings blocked by stopping of trains, sufficient advantage accrued from street closing to support finding of court that council was not induced to close street solely by desire to turn land over to railroad company and did not abuse its discretion.

---

†Rehearing denied. Hearing denied by Supreme Court.
★Rehearing denied.

8. **Municipal corporations ⚿657(6)—Action of city council in closing portion of street is reviewable, but should not be set aside except on showing of abuse of discretion or fraud.**

Action of city council in closing portion of street is reviewable by courts, but should not be set aside except on substantial showing of abuse of discretion or of fraud.

Appeal from Superior Court, Marin County; Edward I. Butler, Judge.

Action by the People of the State of California, by U. S. Webb, Attorney General, against the City of San Rafael and others. Judgment for defendants, and plaintiff appeals. Affirmed.

U. S. Webb, Atty. Gen., and Leon French, Deputy Atty. Gen. (Daniel A. Ryan, of San Francisco, of counsel), for appellant.

Jordan L. Martinelli, City Atty., of San Rafael, and R. W. Palmer and Orrick, Palmer & Dahlquist, all of San Francisco, for respondents.

BARNARD, Justice pro tem. This is an action brought in the name of the people of the state of California against the city of San Rafael, a municipal corporation, the members of its city council, and the Northwestern Pacific Railroad, a corporation, seeking to set aside the action of the said city council in closing and vacating a portion of a public street within said city, as a gross abuse of discretion, and as having been taken for the purpose of transferring such portion of a public street to a private corporation. After trial, judgment was entered for the defendants, and the plaintiff has appealed. As grounds for reversal, the appellant claims that the evidence shows the sole purpose of the city council in closing said portion of a street to have been to facilitate the construction by the defendant railroad company of a new depot; that the law does not permit the granting of a street by a city to a railroad company; and that the findings of the trial court that such action was in the interest of the public safety and convenience are not sustained by the evidence, and that the facts do not warrant the conclusions drawn therefrom.

The following pertinent facts are disclosed by the evidence: The city council of the city of San Rafael on the 25th day of November, 1924, passed an ordinance vacating that portion of Ida street in said city which is crossed by the double tracks of the Northwestern Pacific Railroad. The main line tracks of this railroad, in the vicinity of the West End Station in San Rafael, run approximately east and west, being parallel to and about 400 feet to the south of Fourth street, one of the Main streets of the city. Between Fourth street and the railroad are located two streets running north and south which are only 129 feet apart. One of these known as G street, is one of the main cross streets in that part of town, extending beyond Fourth street to the northern limits of the town. The other street, known as Ida street, is but 129 feet west of G street, and runs only from Fourth street to the south line of the railroad right of way, its entire length being approximately 400 feet. To the south of, immediately adjoining, and parallel to the railroad right of way, is a street running east and west and known as West End avenue. Prior to the closing complained of in this case, both G street and Ida street extended across the railroad right of way and connected with West End avenue, which was their southern terminus. On the railroad right of way between Ida and G streets is located the West End Station, where trains stop. Ida street and G street are also connected by a paved street, 33 feet in width, immediately north of the depot and paralleling West End avenue. The part of Ida street ordered closed by the city council consists only of that portion within the railroad right of way. In other words, by the closing complained of, Ida street is made to end at the north line of the railroad right of way, whereas formerly it crossed the right of way and connected with West End avenue.

The testimony shows: That, by closing this part of Ida street, the grade crossing theretofore existing at that point was eliminated, and persons desiring to cross from this street to West End avenue must now traverse the 129-foot street north of the tracks to G street, and cross there. That this action of the city council was a part of a general plan of improving street conditions in the vicinity of West End Station. That until the year preceding this action there was no connection, fairly passable for traffic, to the south of the railroad and between the ends of G street and Ida street. But at that time, and pursuant to the general plan referred to, the city acquired certain private property and opened and paved West End avenue. That in paving West End avenue, in adhering to and meeting existing street grades, there had necessarily been created some obstruction to the entrance of Ida street into West End avenue, Ida street being on a different grade at the point of intersection. That at about the same time, the 129-foot street to the north of the depot, between Ida street and G street was paved, thus permitting traffic on Ida street to cross the railroad either on that street or

---

⚿For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

by way of this 129-foot street and the G street crossing.

It further appears from the evidence: That because of these two grade crossings (G street and Ida street) only 129 feet apart, trains, when stopped at the West End Station, frequently blocked both crossings. That at conferences between members of the city council and railroad officials, looking toward a needed new depot, it was suggested that if the depot was moved west about 50 feet it would permit trains to stop without blocking the G street crossing, and in addition, through sheds and approaches thus made room for, passengers would be enabled to board and leave the trains more comfortably. Before taking the action complained of herein, the city council made the other street improvements above referred to. Petitions signed by residents in the vicinity, some favoring and some opposing the closing of the Ida street crossing, were also considered. There was evidence that in view of the improvement of West End avenue and the 129-foot street between Ida street and G. street, the Ida street crossing was no longer necessary to serve the public in that vicinity; that this closing eliminated one of two dangerous grade crossings existing within 129 feet of each other; that there was no considerable travel over Ida street; that G street was the wider and more traveled roadway, being a through street, while Ida street is only one block in length; that a crossing at G street is safer, more practicable, and more necessary than one at Ida street; and that this closing will prevent the blocking of both streets by stopped trains, and will permit one street, the main traveled one, to remain open to traffic during such times.

Among other things, the trial court found as follows:

"That the action of the City Council of said City of San Rafael in adopting said Ordinance vacating said portion of said Ida Street was required by public interest, necessity and convenience and was not directly, or at all, opposed to the public necessity, interest or convenience; that the adoption of said ordinance vacating said Ida Street was not for the purpose of surrendering or conveying to a private party, the defendant Northwestern Pacific Railroad Company, a corporation, public property; that public interest and convenience required that said portion of Ida Street be closed up and abandoned. * * *

"That the action of the City Council in adopting said ordinance vacating said portion of Ida Street was not a gross or any abuse of official discretion and said action was required by public interest, necessity and convenience, and that the said public necessity, interest and convenience were considered by the members of the City Council voting in favor of said proposed vacation and the adoption of the said ordinance vacating said portion of said Ida Street was not for the purpose of surrendering or vacating to a private party, to wit: the said Northwestern Pacific Railroad Company public property, to wit: a portion of a public street, which is much, or at all, needed in said community. * * *

"That the portion of said Ida Street so ordered to be closed constituted and does constitute a railroad grade crossing the continuance of which constituted and does constitute a public menace and danger, and that the interest of public convenience and safety required and do require that said railroad grade crossing be closed;

"That there now exists at a point one hundred and twenty-nine feet easterly from said Ida Street railroad crossing another open, public street, crossing the said railroad tracks of said defendant Northwestern Pacific Railroad Company, known as the 'G' Street crossing, and that said 'G' Street crossing, is a wider, safer and better traveled crossing, than said Ida Street crossing, and that the closing of said Ida street crossing and the diverting of the traffic thereover to the 'G' street crossing will result in no inconvenience to any members of the traveling public and will, on the other hand, promote public safety and the public welfare; * * *"

"* * * That owing to said Ida street crossing and the grade of said Ida street at said crossing it is extremely difficult, unsafe and inconvenient for the traveling public to board and/or leave said trains at said Ida street crossing on either the northerly or southerly sides thereof;"

"* * * That by the closing of said portion of Ida street and the construction of said new depot and platform, the trains of said defendant railroad may be stopped at said West End Depot without blocking the traffic over said 'G' street crossing and without causing inconvenience to the traveling public and to the residents of said City of San Rafael and said vicinity, traveling over said 'G' street crossing; that owing to said Ida street crossing said defendant railroad is unable to maintain suitable platforms thereon of sufficient length to serve and accommodate the public in general with safe, adequate, and boarding facilities."

[1, 2] The principles of law relating to the power of cities in vacating and closing streets within their limits are clear and well established. It is, of course, the law, supported by every consideration of public policy, that municipal authorities may not vacate any portion of a public street for the sole benefit and use of private individuals or corporations. People v. City of Los Angeles, 62 Cal. App. 781, 218 P. 63. But, on the other hand, it cannot be questioned that in a proper case a city, through its duly constituted authorities, may close and vacate a street, or a part thereof, in the interest of the safety, convenience, and good of the general public. Nor is this power affected by the fact that, as one of the incidents to its exercise, the beneficial use or title

to the land abandoned may, and usually does, revert to private parties.

[3, 4] The opening, closing, and improvement of a city's streets are of much greater concern to its inhabitants than to the people of the state at large. City of Los Angeles v. Central Trust Co., 173 Cal. 323, 159 P. 1169. The closing of streets is a legislative function, and, when delegated to the city council by the Legislature, is within the discretion of the council. Polack v. Trustees of San Francisco Orphan Asylum, 48 Cal. 490. We must take judicial notice of the charter of the city of San Rafael. Const. of Cal. art. 11, § 8. Section 18 of this Charter delegates the authority to close the streets of said city to the city council thereof. This power being left by the Legislature with the city, it is then, in the first instance, a matter for the city council of the city to decide whether or not the closing of a particular street, or part of a street, is in the public interest.

[5] It has also been held that "it is essentially a judicial question whether the vacation of a street be for a public or for a private benefit," that a gross abuse of discretion may amount to legal fraud, that the decision of this question, which lies first with the city council, in cases where such legal fraud is claimed, may be reviewed by the courts, and that where such an abuse of discretion on the part of a city council has been shown in this regard, its action may be set aside. People v. City of Los Angeles, supra. But where this discretion has been soundly exercised, based upon sufficient facts, with a proper consideration of the needs of the public, with a minimum of damage to all concerned, and with the end of securing certain real benefits for the public, the courts should not and cannot interfere.

[6, 7] In the instant case the trial court found on these main issues that the city council of San Rafael had not abused its discretion in closing the portion of Ida street involved herein, but that said closing was required by the public interest, convenience, necessity, and safety. The question, then, is as to the sufficiency of the evidence to support such findings. It is, of course, true that a city cannot "barter" away its streets. And it has been held that the advantage coming to the public from vacating a street must arise from the vacation itself, and not from the future use to which the vacated property is put. Horton v. Williams, 99 Mich. 423, 58 N. W. 369. Conceding that this is the rule, and assuming, also, what is not necessary for us to decide, that a contemplated use of property for depot purposes, as suggested herein, is not such a public advantage arising from the vacation itself as would be required by the above rule, still the record here shows other advantages directly accruing to the public from the street closing in question. The evidence showing the elimination of a dangerous grade crossing, where two grade crossings are in such close proximity, and the doing away of the public inconvenience of having both crossings blocked by stopping trains are advantages directly accruing from the street closing. And that these facts were considered by the city council is of itself, irrespective of any other consideration, sufficient to support the finding of the court that the city council was not induced to this closing solely by the desire to turn the land over to the railroad company, but was actuated by considerations of the public good. This is especially true in view of the testimony showing the general plan of street improvement in that vicinity, the relation of Ida street to the other streets, the traffic conditions, and the comparison of the resulting inconvenience with the benefits to the public at large.

[8] While the action of a city council in such a case as is here considered is properly reviewable by the courts, both public interest and the law require that it be not set aside, except on a substantial showing of an abuse of discretion or of fraud. No fraud here has been claimed, and the trial court, having heard all the witnesses and being familiar with the entire situation, has found that there was no abuse of discretion. After a careful study of the record we are of the same opinion. The most that can be said of any facts called to our attention by appellant, as pointing to a contrary conclusion, is that they create some conflict in the evidence. In our opinion the evidence amply supports the findings of the trial court. The views herein expressed make it unnecessary to consider any other points urged.

The judgment is affirmed.

We concur: TYLER, P. J.; KNIGHT, J.

95 Cal. App. 745

COCKING v. FULWIDER et al. (Civ. 6407.)★

District Court of Appeal, First District, Division 2, California. Dec. 24, 1928.

Rehearing Denied Jan. 23, 1929. Hearing Denied by Supreme Court Feb. 21, 1929.

1. Boundaries ⚷37(5)—Evidence in boundary dispute held to warrant finding for defendants on defenses of agreed boundary line and laches.

In suit to quiet title to disputed boundary strip of land, evidence *held* to warrant finding for defendants under their defenses of agreed boundary and laches.

2. Appeal and error ⚷1011(1)—Finding on conflicting and sufficient evidence was sufficient to support judgment based thereon.

Finding on conflicting evidence sufficient to support the finding was sufficient to support judgment based on finding.

3. Quieting title ⚷12(1)—Action to quiet title to boundary strip of land not in plaintiff's possession for over 30 years held not maintainable (Code Civ. Proc. § 318).

Where plaintiff suing to quiet title to boundary line strip was not in possession of disputed strip for more than 30 years, the action was not maintainable under Code Civ. Proc. § 318, providing that no such action shall be maintained unless plaintiff or his predecessors have been seized or possessed of property within five years before commencement of action, purpose of statute being to prevent prosecution of stale demands even though all elements necessary to establish adverse possession on defendant's part are not present.

Appeal from Superior Court, Mendocino County; H. L. Preston, Judge.

Action by N. Cocking against Margaret Fulwider, also known as M. A. Fulwider, and another. From an adverse judgment, plaintiff appeals. Affirmed.

Charles M. Mannon, of Ukiah, for appellant.

Keith C. Eversole, of Ukiah, for respondents.

NOURSE, J. Plaintiff sued to quiet title to a parcel of land containing approximately 0.83 of an acre situated in Mendocino county. For a second cause of action he sought an injunction to restrain defendants from removing a fence which he proposed to construct enclosing the parcel of land in dispute. He was denied relief upon both causes of action and has appealed upon a typewritten record.

The controversy arose over the obliteration of the original section corner of sections 7, 8, 17 and 18, which was marked by a wooden stake erected at the time of the survey in 1873. The evidence is that this corner post had rotted away many years ago, but that the corner had been recognized by the location of certain witness trees mentioned in the surveyor's field notes; that, in the year 1888, the adjoining property owners agreed upon the common boundary line with reference to these witness trees; that, for more than 30 years prior to the commencement of this action, the parties hereto and their predecessors in interest had acquiesced in this boundary line; that, for the greater portion of this period, a fence had been maintained on this boundary line and the land had been claimed and cultivated by the adjoining owners on each side of this fence; that, in the year 1906, when one of the witnesses came into possession of the land now owned by defendants herein, this boundary line was marked by "an old rail fence"; that this witness was in possession of the property in dispute for six years, during which time he maintained the fence along this line; that, some time thereafter, a new and substantial fence was erected on the same line which remained at the time of the trial; that, for more than eight years prior to the commencement of the action, the defendants' predecessors planted 85 fruit trees on the parcel in dispute which the defendants maintained and cultivated during their entire possession.

The reason for the controversy between the parties is that, in the year 1917, a new survey was made of the section lines, and, the surveyor in charge being unable to find the government corner of sections 7 and 18, reestablished this corner at a point where he estimated it should have been in relation to other known corners. This point was about 46 feet north of the fenced boundary line theretofore recognized by the adjoining owners, but, because of the survey, the plaintiff claimed that he was entitled to the strip of land lying north of this boundary line as indicated by a line drawn from the newly established corner.

[1, 2] The defendants pleaded adverse possession, statute of limitations, laches, and an agreed boundary line, and the trial court found for the defendants on all their separate pleas. It expressly found that plaintiff had not been seized or possessed of the land in dispute since 1890, and that for more than 30 years had failed to assert any claim to it. As stated by appellant, the trial court also impliedly found that the true southern boundary of section 7, is the northern boundary of the land in dispute inasmuch as it was stipulated that the plaintiff was the owner of all the SE¼ of the SE¼ of section 7, and that defendants were the owners of all the E½ of NE¼ of section 18, between which the disputed boundary line ran.

This is sufficient in itself to support the judgment, because the evidence offered to prove this disputed fact is conflicting, and sufficient evidence was offered by the respondents to support a direct finding in their favor. The appellant called a surveyor as his witness, who testified that he did not find the government monument and that he there-

---

★Rehearing denied. Hearing denied by Supreme Court.

fore "re-established" this corner by the proportional method of subdivision—by an arbitrary mathematical division of known lines and distances. He, however, testified that, when he followed the government field notes of this particular survey, he came to a point approximately where the boundary fence stood. The surveyor called by the respondents testified that he followed the government field notes strictly, found the witness trees designated, and, in projecting his line along the boundary fence, came to the original monument at the westerly corner of sections 7 and 18 exactly 80 chains distant, as called for in the original survey. Some of the sections in this township are of irregular size, and it is conceded that errors occurred in the original survey. The difference between the witnesses called by the respective parties is that the one sought to re-establish the corner at the point where he believed it should have been, while the other endeavored to place it at the point where it was actually established in the original survey. Upon the evidence we are satisfied that the trial court properly denied appellant the relief sought.

[3] In addition to this, the finding that appellant was not in possession for more than 30 years is a bar to this action under the provisions of section 318, Code of Civil Procedure, which provides that no such action shall be maintained unless the plaintiff, or his predecessors, have been seized or possessed of the property within five years before the commencement of the action. The evidence was that the respondents and their predecessors were in undisputed actual possession of the land for more than 30 years and that appellant had not made any claim of right or possession during that period except the ineffectual attempt to fence the property immediately prior to the commencement of the suit. The purpose of the Code section is to prevent the prosecution of stale demands such as we have here, and for this purpose it limits the remedy of the plaintiff, even though all the elements necessary to establish adverse possession on defendant's part are not present. This distinction is emphasized in Akley v. Bassett, 189 Cal. 625, 647, 209 P. 576, and the rule of that case supports the conclusion of the trial court that appellant may not maintain his action.

Upon the second cause of action it, of course, follows that, as appellant is not entitled to possession of the premises, he may not have an injunction to enable him to inclose it. The other points raised on the appeal have all been considered, but we do not dwell upon them here, as the judgment must be affirmed for the reasons given.

Judgment affirmed.

We concur: KOFORD, P. J.; STURTEVANT, J.

---

95 Cal. App. 571

Ex parte DOWNS. (Cr. 1504.)

District Court of Appeal, First District, Division 2, California. Dec. 18, 1928.

1. Habeas corpus 🔑85(1)—Presumption is that robbery prosecution before superior court was regular and within court's jurisdiction.

The superior court being a court of general jurisdiction, presumption is, record being silent upon the question, that proceedings had before that court in robbery prosecution were regular, and that court acted within its jurisdiction.

2. Habeas corpus 🔑53—Petitioner for release from prison on habeas corpus because he was not transferred to juvenile court, not showing that court was informed of age, did not show excess or lack of jurisdiction.

Petition to procure release of prisoner on habeas corpus because he was not transferred by the superior court to juvenile court, as was requested, having failed to show that it was suggested to the court that prisoner was under 18 years of age, excess or lack of court's jurisdiction is not shown.

3. Habeas corpus 🔑85(1)—Presumption is that superior court examined witnesses regarding age of prisoner seeking release on habeas corpus because not transferred to juvenile court; testimony not being shown.

Presumption is that superior court did its duty and examined witnesses regarding the age of prisoner sentenced to prison seeking release on habeas corpus because he was not transferred by superior court to juvenile court, as requested; testimony of the witnesses not being shown.

4. Habeas corpus 🔑30(1)—Court's determination that it had jurisdiction of robbery prosecution, though erroneous, is binding against collateral attack.

Superior court's determination that it had jurisdiction of prosecution for robbery, though erroneous, is binding against collateral attack on application for writ of habeas corpus to secure prisoner's release from prison.

Habeas corpus by Eddie J. Downs to secure release of petitioner from San Quentin prison on the ground of illegal detention. Writ discharged.

Nathan Merenbach, of San Francisco, for petitioner.

U. S. Webb, Atty. Gen., and Wm. F. Cleary, Deputy Atty. Gen., for respondent.

PRESTON, Justice pro tem. This is a petition made in behalf of Eddie J. Downs to procure his release from San Quentin prison on habeas corpus.

On January 19, 1928, Eddie J. Downs pleaded guilty to the crime of robbery in the superior court of Riverside county. Judgment was thereupon pronounced, and Eddie J. Downs was sentenced to imprisonment at San Quentin for the term prescribed by law, and he is now confined in said prison pursuant to said judgment.

Petitioner contends that Eddie J. Downs should be released from state prison on habeas corpus for the following reason: "Said Eddie J. Downs at the time of his arrest and at the time of the hearing held in the Superior Court of the State of California in and for the County of Riverside informs your petitioner and your petitioner therefore alleges that he made a request in open court to be transferred to the juvenile court on the ground that he was then a minor under the age of eighteen years. That said request was then and there denied without any just cause therefor, and contrary to the laws of the State of California in such cases made and provided."

The difficulty with petitioner's contention is that there is absolutely no competent evidence of any kind presented to us from which we can find that Eddie J. Downs was under the age of 18 years at the time of his arrest, or that he or any one on his behalf ever requested the superior court of Riverside county to transfer his case to the juvenile court. Certain papers were offered in support of the petition, which will be hereafter discussed.

Upon this hearing, the court is only concerned with the question as to whether or not Eddie J. Downs is illegally detained in San Quentin. It appears that he is held there under a judgment of the superior court. The question is, therefore, did the superior court exceed its jurisdiction in rendering that judgment?

[1, 2] The superior court being a court of general jurisdiction, the presumption is, where the record is silent upon the question, as it is here, that the proceedings had before that court were regular, and that the court acted within its jurisdiction. In re Eichhoff, 101 Cal. 600, 36 P. 11; In re Tassey, 81 Cal. App. 287, 253 P. 948. It was incumbent upon petitioner, acting in behalf of Eddie J. Downs, to make it affirmatively appear to this court that Eddie J. Downs, or some one on his behalf, stated or suggested to the superior court of Riverside county during the proceedings in that court, that the prisoner was under the age of 18 years, and that his case should be transferred to the juvenile court. This the petitioner has failed to do. In the absence of such an affirmative showing, excess or lack of jurisdiction on the part of the superior court is not established.

In Re Tassey, supra, this court said: "We conclude that while it is true that the superior court has full jurisdiction to try any minor, it having full jurisdiction of the subject-matter, that, nevertheless, a defendant under eighteen years has a statutory right that he shall not be prosecuted for crime until the matter has first been submitted to the juvenile court. So far as this relates to the jurisdiction of the court, it relates to jurisdiction of the person and not of the subject-matter, and may be therefore waived. But where the defendant asserts his right by suggestion to the court, the court's first duty is then to hear and determine in what court the defendant is entitled to be tried."

[3, 4] After this matter was submitted to us for decision, the petitioner filed an affidavit to which was attached a letter from the district attorney of Riverside county and also what purports to be a copy of the minutes of the superior court of Riverside county made at the time that the case of Eddie J. Downs was before that court. No transcript of the proceedings has been produced. These purported minutes are not authenticated in any way, and not entitled to be admitted as evidence. However, waiving all these objections, and viewing all the evidence submitted in the most favorable light to Eddie J. Downs, we can infer from the so-called evidence that he did make a request to the superior court of Riverside county to be transferred to the juvenile court. Following this request, several witnesses, including Eddie J. Downs, were sworn and examined in open court. What these witnesses testified to is not shown by any of the minutes or other papers produced, but, immediately after these witnesses were sworn and examined, the superior court pronounced judgment, sentencing Eddie J. Downs to the state prison at San Quentin.

The presumption is, therefore, that the superior court did its duty and did examine these witnesses regarding the age of Eddie J. Downs, and we must conclude that the superior court determined the facts in regard to the age of Eddie J. Downs. Where the court has determined such facts in favor of the existence of jurisdiction, its determination, even though erroneous, is binding against a collateral attack. Ex parte Spencer, 83 Cal. 460, 23 P. 395, 17 Am. St. Rep. 266; Ex parte Williams, 87 Cal. 78, 24 P. 602, 25 P. 248; In the Matter of Maginnis, 162 Cal. 200, 121 P. 723; In re Tassey, supra.

The other contention made by petitioner is entirely without merit, and needs no discussion.

Under no view of the record here presented would the release of the prisoner on habeas corpus be authorized.

The writ is discharged, and the prisoner, Eddie J. Downs, remanded to the custody of the warden of the state prison at San Quentin.

We concur: KOFORD, P. J.; NOURSE, J.

95 Cal. App. 589

STREI et al. v. BROOKS et al. (two cases). (Civ. 5894.)

District Court of Appeal, First District, Division 1, California. Dec. 19, 1928.

1. Frauds, statute of 🔑63(2)—To relieve lessee of rent liability, surrender of lease, being within Statute of Frauds, was required to be written or established by executed oral agreement (Civ. Code, § 1624).

A surrender of a lease, being within Statute of Frauds (Civ. Code, § 1624), was required to be in writing or established by an executed oral agreement in order to relieve lessee of obligation to pay rent.

2. Landlord and tenant 🔑194(1)—Lessors' written consent to lessee's assignment of lease and acceptance of rent from assignee held not "surrender" discharging assignor's rent obligation.

Lessors' written consent to lessee's assignment of his interest in lease to his cotenant and acceptance of rent from assignee was not sufficient to constitute a "surrender" of the lease and a consequent discharge of assignor's obligation to pay rent.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Surrender.]

3. Landlord and tenant 🔑233(2)—Whether there was surrender of lease, so as to relieve lessee of rent obligation, was fact question.

Question whether there was a surrender of lease, so as to relieve lessee of obligation to pay further rent, was question of fact.

4. Landlord and tenant 🔑199—Lessor's statement that he had no objection to lessee's transfer of lease, so long as he received rent, held not promise to release lessee from further rent obligation.

Where one lessee sold his interest in business to his cotenant, lessor's statement, in answer to inquiry whether, in event of sale of such business, buyer could get sole right to lease, that lessor had no objection to any arrangement which lessees might make between themselves provided rent was paid, *held* not equivalent to a promise to release lessee who sold out his interest from further obligation for rent.

5. Landlord and tenant 🔑190(1)—Alterations made at request of sublessee's assignee held not "eviction" releasing assignor from rent obligation.

Where alterations in premises were made by owner at request of sublessee's assignee and for sole benefit of latter, such changes did not constitute an eviction as to assignor so as to relieve him from liability for further rent to his lessor.

[Ed. Note.—For other definitions, see Words and Phrases, First, Second, and Third Series, Eviction (Of Tenant).]

6. Landlord and tenant 🔑195(2)—On abandonment of premises by lessee's assignee lessors held entitled to elect to leave premises vacant and recover rent as it accrued.

Where lessee's assignee abandoned premises solely because he was unable to pay rent and there was no re-entry by lessors or by owner, lessors *held* entitled to elect to leave premises vacant and recover rent as it became due, and were not obliged to rent premises, though they could have done so.

Appeals from Superior Court, Alameda County; J. J. Allen, Judge.

Two actions by Alice Josephine Strei, as administratrix of the estate of William Ernest Strei, deceased, and another, against C. Earl Brooks and another. From the judgments, plaintiffs appeal. Reversed in part.

John G. Robertson, of Oakland, for appellants.

Snook, Snook & Chase, of Oakland, for respondents.

PER CURIAM. The above actions, which involve claims for rent under the same lease but covering different periods, were tried together, and both appeals are presented on the same record.

The deceased, W. E. Strei, and U. S. Johnson were lessees from John McCaslin of a certain store building in Oakland, Cal. On November 29, 1922, they sublet the premises by a lease in writing to defendants C. Earl Brooks and R. G. Bartlett for the term of four years and eleven months at the monthly rental of $225. The rent has been paid in full to March 1, 1926, and in addition $50 was paid on account of the rent for that month. On or about May 14, 1924, there being at that time no default in the payment of rent, Brooks sold to Bartlett his interest in the business which they were then conducting on the premises, and also assigned to him his interest in the lease. Subsequently Bartlett obtained the consent of Strei and Johnson with that of McCaslin and his wife to the assignment. Bartlett remained in possession till the month of April of 1926, when he vacated the premises. In the first cause of action plaintiffs sought to recover the rent for the months of March, April, May, and June, 1926, less the partial payment made in March, and by the second the rent for the months of August, September, and October, 1926. Defendant Bartlett failed to appear, and a judgment by default was entered against him. Defendant Brooks —who will be hereinafter referred to as the respondent—by his answer alleged, and the court found, that on May 14, 1924, and previous to the time when the rent sought to be recovered became due, the plaintiffs, in consideration of his selling his interest in the business to Bartlett, agreed to release and discharge him from further liability under the lease and to accept Bartlett as the sole tenant; that pursuant to this agreement respondent sold his interest in the business and assigned the lease to Bartlett, whereupon plaintiffs released him from further liability and accepted Bartlett as the sole tenant. It was further alleged and found that on or about March 13, 1926, the plaintiffs entered upon the premises and so changed and altered the same that they were unfit for the purposes for which they were leased, and that the lease was thereby rescinded as to respondent Brooks. From these findings the court concluded that Brooks had been released and discharged from any liability for rent and entered judgment accordingly.

Plaintiffs appeal from this portion of the judgment, claiming that the findings with respect to the agreement to discharge respondent from liability, and the conclusion that the lease was rescinded by the alterations made upon the premises, are unsupported, and, further, that the court erroneously admitted parol evidence to prove the alleged agreement of release.

[1] The terms of the lease are not disclosed by the record, but it is not claimed that they were such that an assignment by respondent would relieve him from the obligation to pay the rent; the effect of his contention that he was released from his obligation being that as between him and the plaintiffs there was a surrender of the term. A surrender, however, being within the Statute of Frauds (Civ. Code, § 1624), was required to be in writing or established by an executed oral agreement (Welcome v. Hess, 90 Cal. 507, 27 P. 369, 25 Am. St. Rep. 145; Silva v. Bair, 141 Cal. 599, 75 P. 162; Underhill Landlord and Tenant, § 704), neither of which was here shown; and unless the facts were such as to estop the plaintiffs from disputing the alleged surrender the claim of respondent cannot be sustained.

[2] Aside from plaintiffs' written consent to respondent's assignment of his interest in the lease and the acceptance of rent from Bartlett, the assignee thereof, neither of which was sufficient to constitute a surrender and a consequent discharge of the obligation of respondent (Brosnan v. Kramer, 135 Cal. 36, 66 P. 979; Samuels v. Ottinger, 169 Cal. 209, 146 P. 638, Ann. Cas. 1916E, 830; Bonetti v. Treat, 91 Cal. 223, 27 P. 612, 14 L. R. A. 151; Voss v Levi, 33 Cal. App. 671, 166 P. 359; Wellman v. Conroy, 50 Cal. App. 141, 194 P. 728), the only fact upon which the latter's contention rests is a certain conversation between him and the plaintiff Strei before the making of the sale and assignment mentioned. This conversation —the only one which preceded the sale and assignment—was testified to by respondent as follows: "* * * I told him (Strei) I was anticipating either selling or buying the sole right of the business next door that we were interested in together, and I was interested in knowing whether he would release me from the lease in case I purchased that business, and Mr. Strei's answer to me—and I told him I might buy or sell; I didn't know which at that time. We were dickering, and I did not even give Mr. Bartlett the information on that because that was my own personal information—my own personal matter; and when I saw Mr. Strei, Mr. Strei said 'Why, yes, I don't care who buys. I will release either one of you. All I am interested in is getting my money for the rent.'"

Subsequently, in response to questions by his counsel, the witness gave the following testimony regarding the conversation:

"Would you state that conversation again, just what Mr. Strei said with reference to the one who bought or the one who sold? (Answer:) Mr. Strei said—I told him I was figuring on either buying or selling the business that we were co-operating in next door. and that I was interested in knowing whether he would release me from the lease in case I purchased the business———.

"(Question:) You mean in case you purchased the business? (Answer:) In case I sold the business or in case I purchased. I was actually interested in knowing if I could get the sole right to that lease, and Mr. Strei's answer was he didn't care who purchased, that he would release either one of us, whoever purchased.

"(Question:) He would release either one, whoever purchased? (Answer:) He would release either one of us as long as he received his money for the rent; he didn't care who purchased it.

"(Question:) Well, what with regard to the one who sold? You say he would release either one who purchased? What did he say with reference to the one who sold? (Answer:) He would release either one of us from the lease so long as he received his money; that he did not care which one purchased the business.

"(Question:) And that was the extent of the conversation at that time? (Answer:) Yes."

On cross-examination the witness testified that the following was substantially the statement made by Strei: "I will release either of you from the lease so long as I get my money."

[3, 4] While the question whether there was a surrender was a question of fact (Triest v. Goldstone, 173 Cal. 240, 159 P. 715; Steel v. Thompson, 59 Cal. App. 191, 210 P. 430), here it is manifest from the conversation between respondent and Strei that the latter was not referring to the covenant to pay the rent, and that there was no promise to release either of the lessees from his obligation in this respect, whatever may have been the intention of the parties with regard to other covenants contained in the lease. As he states,

respondent was interested in knowing whether, in the event of a sale, "the buyer could get the sole right to the lease," and it is equally clear from Strei's answer to the inquiry that the latter had no objection to any arrangement which the lessees might make between themselves provided the rent was paid or, as he expressed it, "so long as I receive my money" This, however, was not equivalent to a promise to release respondent from further obligation, nor was it sufficient to justify his subsequent reliance thereon as having that effect.

[5] It further appears that after the assignment Bartlett, the assignee, requested the owner McCaslin to make certain alterations in the premises. These consisted in the removal of two windows and the substitution therefor of folding doors in the front of the building. This change was for the sole benefit of the lessee; it was not made by the plaintiffs, whose only connection therewith was that they at the request of Bartlett consented thereto, and did not constitute an eviction.

[6] The evidence shows that Bartlett abandoned the premises, and appellants object to a further finding that after this occurred the premises could have been rented by the plaintiffs, but that they failed and neglected to do so. These facts, if true, were immaterial. The premises, as the evidence shows, were abandoned by Bartlett for no reason other than that he was unable to pay the rent, and there was no re-entry by the plaintiffs or by the owner. Under such circumstances the plaintiffs might elect to leave the premises vacant and recover the rent as it became due. Respini v. Porta, 89 Cal. 464, 26 P. 967, 23 Am. St. Rep. 488; Bradbury v. Higginson, 162 Cal. 602, 123 P. 797.

We are satisfied that there was no reasonable ground for the conclusion that the facts constituted a surrender or that respondent was released from liability for the rent.

The judgments appealed from, in so far as it is adjudged therein that plaintiffs take nothing as against defendant C. Earl Brooks, and that the latter is given judgment for his costs of suit, are reversed.

---

95 Cal. App. 727

WYSER v. TRUITT et al. (Civ. 3654.)★

District Court of Appeal, Third District, California. Dec. 22, 1928.

Rehearing Denied Jan. 21, 1929.

1. Appeal and error ⚷719(6)—Sufficiency of evidence to sustain findings cannot be considered on appeal, where bill of exceptions does not attack findings.

Appellate court cannot consider the insufficiency of the evidence to support findings, where specifications set forth in bill of exceptions do not attack any of the findings.

2. Quieting title ⚷44(4)—That grantor was in possession, claiming ownership, held sufficient showing of source from which to deraign title.

Where grantor was in possession of premises conveyed, claiming to be owner thereof, and occupying position of an owner and grantor in possession, this was a sufficient source from which to deraign title.

3. Taxation ⚷734(9)—Tax sale held void, where notice of sale failed to state amount of penalties.

Sale of property for delinquent taxes was void, where notice of tax sale stated that land would be sold for amount due, including penalties and costs, without stating or indicating the amount due on account of penalties to be added to delinquent taxes, and without indicating that penalties were included in amount of tax.

4. Judgment ⚷691—Judgment quieting title of purchaser at tax sale against trustee in deed of trust held not binding on trustor not party to action.

Judgment quieting title of purchaser of land sold for delinquent taxes against trustee in trust deed executed by delinquent taxpayer *held* not binding on trustor therein not a party to the action.

5. Appeal and error ⚷499(1)—Refusing continuance because of injury to defendant's attorney held not sustained, in absence of showing by bill of exceptions of request or motion for continuance.

Contention that trial court erred in refusing continuance of trial on account of injury to defendant's attorney could not be sustained, where bill of exceptions failed to show any request for a continuance, any motion made for that purpose, that defendant sought to obtain other counsel, or whether he could or could not obtain counsel, if reasonable delay were granted, but merely contained physician's certificate that attorney had been injured.

Appeal from Superior Court, Los Angeles County; Elliot Craig, Judge.

Action by Marion R. Wyser against J. Truitt, William Lender, and others. Judgment for plaintiff, and defendant last named appeals. Affirmed.

Catherine A. McKenna and J. Irving McKenna, both of Los Angeles, for appellant.

Tanner, Odell & Taft, of Los Angeles, for respondent.

PLUMMER, J. Action by the plaintiff to quiet title to lot 18, Factory Center tract, in the county of Los Angeles. The plaintiff had judgment, and the defendant William Lender appeals.

The plaintiff's title is based upon a conveyance from Alfred A. Burt, the record owner; the deed from Burt to the plaintiff being executed and delivered while the grantor Alfred

---

★Rehearing denied.

A. Burt was in possession of the lot in question. The appellant's title is founded upon a deed from the tax collector of Los Angeles county.

The complaint sets out that the plaintiff, at the time of filing the complaint, and for a long time prior thereto, had been and was the owner and in the possession of the premises referred to; that the defendants claim and assert an interest therein adverse to plaintiff; and that the claims of the defendants, and of each of them, were without right, etc. The complaint contains a prayer that the defendants be required to set forth their title, if any; that the plaintiff have judgment as prayed for, etc. The court found that all the allegations of the complaint are true and correct in so far as the same relate to lot 18 in block 5, Factory Center tract, as per map recorded in Book 22, pages 18 and 19, of Maps, in the office of the recorder of Los Angeles county, and also that all the allegations of the answer of the defendant William Lender are untrue, except that the defendant has paid taxes, including penalties and costs, on said lot 18, which with interest thereon then amounted to $45; and also that the said defendant William Lender had, in good faith, erected certain buildings partly on lot 18. The judgment required the plaintiff to pay to Lender the amount of taxes, together with interest on such amount at 7 per cent. per annum, paid by the defendant Lender, and also granted permission to the defendant Lender to remove any building that he had placed on lot 18, or partly on lot 18.

The cause is before us upon a bill of exceptions.

[1] The respondent makes the preliminary objection that the court cannot consider the insufficiency of the evidence to support the findings in this cause, for the reason that the specifications set forth in the bill of exceptions do not attack any of the findings. This objection appears to be well taken. The specifications set forth, first: That the court abused its discretion in denying the defendant a continuance of the trial of the case for a week or ten days; and, second: That the evidence does not support the decision in this, that in this character of a case the plaintiff was obliged to prove title in herself from a paramount source; it having been shown that defendant Lender was in actual possession of the said lands described in the action; that plaintiff failed to establish title, and failed to show the necessary evidence to prove title in plaintiff. It was therefore error for the court to allow plaintiff to attack defendant's title; and, third, that the decision is against law, in that the court erred in overruling the defendant's objections to the sufficiency of the plaintiff's evidence to establish title in plaintiff; fourth, that there was no evidence to show any invalidity of the defendant's title.

In Beeson v. Schloss, 183 Cal. 618, 192 P. 292, the court said: "The question of the sufficiency of the evidence to sustain the findings cannot be considered on appeal from the judgment where the bill of exceptions relied on contains no specifications of the insufficiency of the evidence"—citing Millar v. Millar, 175 Cal. 799, 167 P. 394, L. R. A. 1918B, 415, Ann. Cas. 1918E, 184; Carter v. McCanty, 181 Cal. 749, 186 P. 346. "Consequently, we are unable to consider the point that the evidence in the case does not sustain the findings." The same ruling was held in the case of Schultz v. City of Venice, 200 Cal. 50, 251 P. 913.

[2, 3] Notwithstanding the insufficiency of the specifications in that they do not attack the findings of the court or set forth wherein the evidence is insufficient to sustain the findings, we have examined the transcript, and find that the testimony shows that at the time of the execution of the deed from Alfred A. Burt, Alfred A. Burt was in possession of the premises referred to, claiming to be the owner thereof, and occupied the position of an owner and grantor in possession. This was a sufficient source from which to deraign title by the plaintiff. Rockey v. Vieux, 179 Cal. 681, 158 P. 712. It may be stated here that whatever title the appellant claimed is derived from the tax deed based upon an alleged assessment of lot 18 against Alfred A. Burt as the owner thereof. Thus both claimants, if title is possessed by either, deraign the same from a common source. After showing title in herself, the plaintiff introduced affidavits establishing the invalidity of the assessment constituting the basis upon which a deed was thereafter executed by and on the part of the state of California, through which source title was purported to be conveyed to the defendant William Lender. The assessment was in the following words: "No. 1590 Factory Center, as per Bk. 23, P. 1819 Maps, records of L. A. County, Lot 18, Blk. 5, assessed to Alfred A. Burt Lowest acceptable bid $1.14." The notice of sale was in the same language, and concluded with the statement that it would be sold for the amount due including penalties and costs, without stating or indicating the amount due on account of penalties to be added to the delinquent taxes, and also failed to indicate in any way that penalties were included in the amount of the tax. In the case of Bussenius v. Warden, 71 Cal. App. 717, 236 P. 371, such a description of the properties sold and the amount of money to be paid therefor, as set forth in the notice in this case, has been held insufficient to sustain a tax deed. After reciting the facts in that case, which are exactly the same, relating to the assessment and published notice of sale, as the circumstances with which we are dealing, the court there said: "It thus appears that although the proposed sale was conditional upon non-payment of penalties, the delinquent list as published was defective in that it failed to state the amount of those

penalties. Respondents contend, and apparently there is no answer thereto, that by reason of this defect, the subsequent sale to the State was void, and that consequently the deed relied upon by appellant was likewise void."

[4] The state of California, not having acquired a good title to the lot in question, by reason of the sale to it could not, of course, convey anything additional to what it had acquired upon such sale. The record shows that, after obtaining a deed from the state of California to lot 18, based upon the tax sale and conveyance in pursuance thereof, the defendant Lender began an action to quiet title, and obtained judgment quieting title as against two certain defendants named, respectively, Title Insurance & Trust Company, a corporation, and Frank W. Dishbrow. No judgment was entered against the grantor of the plaintiff in this action. The record shows that, some time prior to the beginning of the last action to quiet title, Alfred A. Burt had executed a trust deed wherein the Title Guarantee & Trust Company, a corporation, was named as trustee, and the appellant's claim now is that, by reason of the action just referred to, wherein the title of Lender was quieted as against the trustee named in the trust deed, the trustor or the person who executed the trust deed is also bound and foreclosed of any right to the lot in question by reason of the judgment quieting title as against the trustee named in the trust deed. This contention, however, is untenable. The case of MacLeod v. Moran, 153 Cal. 97, 94 P. 604, approved in the case of Hollywood Lumber Co. v. Love, 155 Cal. 270, 100 P. 698, completely answers the contention of the appellant, in that it is held in both cases that, while a deed of trust does include a power authorizing a trustee to make a conveyance in the event that the money to secure the payment of which the trust deed is executed is not repaid, a trust deed does not divest the trustor of his ownership in the property. Or, as said in the MacLeod Case, quoting from the syllabus: "The legal title in the trustees is conveyed solely for the purpose of security, and carries no other incident of ownership than the right to convey upon default, but leaves a legal estate in the trustor or his successors as against all persons other than the trustees and those lawfully claiming under them." There is no pretense that Lender claims or ever claimed under the trustee named in the trust deed executed by Alfred A. Burt. To support appellant's contention, the case of Sax v. Clark, 180 Cal. 287, 180 P. 821, is cited. The Sax Case differs from the case at bar in just the particulars we have mentioned. In the Sax Case a party was claiming as a successor to or under the trustee. The trustee being in such a case a predecessor in interest, of course his successor in interest was bound, but claiming through or under a trustee is entirely different from claiming adversely to the owner of the premises by reason of a judgment quieting title only against the trustee.

[5] The appellant also contends that the court erred in refusing a continuance of the trial of this cause on account of an injury suffered by his attorney. The bill of exceptions fails to show any request for a continuance, or any motion made for that purpose. The bill of exceptions contains only a certificate of a physician, which is in the following words: "June 1, 1926. This is to certify that Mr. J. J. McKenna, wife and daughter are confined to their home for an indefinite length of time, due to injuries received in an automobile accident. Signed: C. C. Phillips, M. D. Attending Physician." The bill of exceptions does not show that any request was made to the court for a continuance. The bill of exceptions does not show that the appellant sought to obtain other counsel, or whether he could or could not obtain counsel, if a reasonable delay were granted. Upon motion for new trial, affidavits were presented to the trial court showing that the attorneys for the defendant named had met with an automobile accident, and that certain counsel appeared for them out of courtesy. The affidavits, however, do not disclose that anything additional could be presented, save and except the matters which we have considered.

The entire case being a matter of record, and the records being before the trial court, and it not appearing that any other or different conclusion could be reached than that which had been reached, the court very properly denied the motion for new trial.

There being no merit in appellant's contentions, the judgment is affirmed.

We concur: HART, Acting P. J.; SHIELDS, Justice pro tem.

95 Cal. App. 414

ROBERTSON v. LANGFORD, County Auditor.

(Civ. 6209.)★

District Court of Appeal, First District, Division 1, California. Dec. 13, 1928.

Rehearing Denied Jan. 11, 1929. Hearing Denied by Supreme Court Feb. 11, 1929.

1. Justices of the peace 🔑32—Since amendment of Constitution, justice court has lost identity as constitutional tribunal and become merged in general term of inferior courts which Legislature may establish (Const. art. 6, §§ 1, 11, 15 as amended in 1911).

Since amendment in 1911 of Const. art. 6, §§ 1, 11, 15, the justice court as such lost any peculiar identity it theretofore had as a constitutional court, and became merged within the general term of inferior courts that the Legislature might see fit to establish, with the power of the Legislature in respect to retaining that court limited only as it is by the Constitution in respect to establishing any inferior courts.

2. Statutes 🔑212—Statutes are assumed to have been enacted in light of decisions having direct bearing thereon.

In construing statutes it is assumed the Legislature knew existing laws and judicial decisions, and enacted the statutes in the light of such decisions as have a direct bearing on them.

3. Constitutional law 🔑13—Prior course of legislation and judicial decisions and evils intended to be remedied are considered in construing amendment of Constitution.

In construing an amendment of the Constitution, the course of legislation and judicial decisions prior to its adoption and the evils intended to be remedied are to be considered.

4. Courts 🔑42(5)—City could by charter provide for such a court as to suspend as to it Code provision for justices of peace in city (Const. art. 11, § 8½, as amended in 1914; Code Civ. Proc. § 103).

Under Const. art. 11, § 8½, as amended in 1914, a city adopting a charter could provide therein for such a court (in such section termed a municipal court) as would as to such city entirely suspend and render unnecessary the provisions of Code Civ. Proc. § 103, for justices of the peace in cities, such section of the Constitution providing that in any city when such municipal court has been established there shall be no other court inferior to the superior court.

5. Statutes 🔑51—Laws, statutory or by way of charter, may be enacted by reference.

Laws, whether statutory or by way of charter, may be enacted by reference.

6. Courts 🔑187—Court provided by charter held municipal court, precluding establishment of any other inferior court (Const. art. 11, § 8½ as amended in 1914).

The court provided for by charter of San Jose adopted in 1915, though termed a police charter, in view of the jurisdiction conferred on it *held* a municipal court, within Const. art. 11, § 8½, as amended in 1914, so that there could be no other inferior court in the city.

7. Courts 🔑187—Jurisdiction and functions, not name, determines character of court.

The character of a court is not determined by the name given it, but by the nature of its jurisdiction and functions.

Appeal from Superior Court, Santa Clara County; F. B. Brown, Judge.

Mandamus by Richard F. Robertson against Arthur B. Langford, County Auditor of Santa Clara County. Writ denied, and plaintiff appeals. Affirmed.

Hearing denied by Supreme Court: SHENK, J., dissenting.

George W. Waldorf and Jones & Boalt, all of San Jose, for appellant.

Fred L. Thomas, Dist. Atty., and John P. Fitzgerald, Chief Deputy Dist. Atty., both of San Jose, for respondent.

PARKER, Justice pro tem. This is an appeal from an order and judgment of the superior court of the state of California in and for the county of Santa Clara, denying plaintiff's prayer for a writ of mandate commanding defendant as county auditor to draw his warrant for the salary of plaintiff as justice of the peace of the city of San Jose. A statement of the case follows:

Pursuant to the notice of election of officers given by the proper authorities of Santa Clara county the appellant, Richard F. Robertson, became a candidate at both the primary and general elections held in the year 1926 for the office of justice of the peace of the city of San Jose. At the general election appellant, receiving the highest number of votes cast, was declared elected to said office by the board of supervisors of said county of Santa Clara, and a certificate of election to said office was issued to appellant. Thereafter appellant duly qualified as such official, giving the necessary bond, properly approved, taking the requisite oath, and filing and recording said oath and bond as required by law. Respondent does not question either the validity of plaintiff's election or his qualification to hold the office of justice of the peace of the city of San Jose if said office has a legal existence, but maintains that at the time of said election and at all times subsequent thereto said office of justice of the peace of the city of San Jose did not legally exist, for the reason that the charter of the city of San Jose makes full provision for a municipal court, clothed with all the powers and endowed with all the jurisdiction of justice of the peace, and that, therefore, under the Constitution of the state there is no room for any other inferior court. It is the further contention of respondent Auditor that, assuming the existence of said office and the right of appellant

---

★Rehearing denied. Hearing denied by Supreme Court.

to receive salary, the liability to pay said salary is with the city of San Jose and is not a valid obligation of the county of Santa Clara.

The city of San Jose is within the territorial limits of Santa Clara county; said city is the county seat of Santa Clara county. It may be added that no question is presented concerning the salary or the amount thereof. It is conceded that the salary of the office, if such office exists, is $2,400 per annum, the city of San Jose being a city of the second and three-quarters class.

The Constitution of the state of California provides:

Article 6, § 1: "The judicial power of the state shall be vested in the Senate, sitting as a court of impeachment, in a supreme court, district courts of appeal, superior courts, such municipal courts as may be established in any city or city and county, and such inferior courts as the legislature may establish in any incorporated city or town, township, county or city and county."

Article 6, § 11: "The legislature shall determine the number of each of the inferior courts in incorporated cities or towns, and in townships, counties, or cities and counties, according to the population thereof and the number of judges or justices thereof, and shall fix by law the powers, duties and responsibilities of each of such courts and of the judges or justices thereof." (Remainder of section omitted.)

Acting under the powers thus limited the Legislature enacted section 103, Code of Civil Procedure, which reads in part as follows, deleted to illustrate its application to the instant case: "In every city of second and three-fourths class there must be one justice of the peace, to be elected in like manner by the electors of such cities or towns respectively; and such justices of the peace of cities shall have the same jurisdiction, civil and criminal, as justices of the peace of townships and township justices' courts. Said justices of the peace and justices' courts shall also have jurisdiction of all proceedings for the violation of any ordinance of any city in which courts are established, both civil and criminal, and of all actions for the collection of any license required by any ordinance of any such city, and generally exercise all powers, duties and jurisdiction, civil and criminal, of police judges, judges of police courts, recorders' courts or mayor's courts, within said city."

If this were the entire law upon the subject there would be little difficulty in determining the present issue; in fact the present issue would never have arisen. However, the Constitution of this state recognized the wisdom of local government in cities of certain population. By section 8 of article 11 provision was made for local charters and the mode of framing and adopting the same. Section 8½ of article 11 sets forth what such charters may contain. To obtain a clearer understanding of the provisions of section 8½ of article 11, we will first quote the section as it stood in 1911, being the same as the previous enactment of 1896. In 1911 the section, as far as applicable, read: "It shall be competent, in all charters framed under the authority given by section 8 of article eleven of this constitution, to provide, in addition to those provisions allowable by this constitution and by the laws of the state, as follows: 1. For the constitution, regulation, government, and jurisdiction of police courts, and for the manner in which, the times at which, and the terms for which the judges of such courts shall be elected or appointed, and for the qualifications and compensation of said judges and of their clerks and attaches."

In Ex parte Dolan, 128 Cal. 460, 60 P. 1094, the Supreme Court construed this constitutional provision to mean that the police court created under the provisions of a city charter could not be given exclusive jurisdiction of crimes and misdemeanors cognizable by such a tribunal. The court says: "Under the power given by the constitutional provision, the charter may fix the jurisdiction of the police courts, but no authority is conferred upon the charter by the constitutional provision whereby it may oust any other court of jurisdiction it already had." This case was decided in 1900.

In 1907, while the constitutional provision remained as above cited, the case of Graham v. Mayor of Fresno came before the Supreme Court and the opinion is found in 151 Cal., at page 465, 91 P. 147. In this case we meet practically the same question as is presented in the instant case. The Graham Case involved the application of section 103, Code of Civil Procedure, to the city of Fresno. Concretely, the issue presented was whether the constitutional provision authorizing cities to provide by charter for police courts limited the scope or effect of section 103, Code of Civil Procedure, as far as applied to a city which had, pursuant to constitutional authority, provided by charter for the creation and organization of a police court. The court reaches a conclusion expressed as follows:

"We cannot find in subdivision 1 of section 8½ of article 11 any intention to interfere with the power of the Legislature in the matter of provision for justices of the peace for cities and towns. That subdivision is limited in terms to 'police courts,' and there is no mention whatever therein of justices of the peace or justices' courts. The term 'police court' ordinarily refers to an inferior municipal court with a limited jurisdiction in criminal cases only, a court with the power to try certain misdemeanor cases arising from the violation of state law or municipal ordinance, and with the power to conduct preliminary examinations in cases of felony and certain misdemeanors, and to hold defendants to answer for trial for the same, and does not include the justices' courts established by our law.

"The term should probably be here construed to also include such inferior courts as may properly be held to be purely municipal, though given by the state certain jurisdiction in state as distinguished from municipal matters, courts coming within the class specified in the constitution as 'such inferior courts as the legislature may establish in any incorporated city or town or city and county,' such as a city recorder's court or a mayor's court. * * * But the city justice of the peace provided for by section 103 of the Code of Civil Procedure does not come within this category. * * * Justices of the peace are part of the constitutional judicial system of the state, having concurrent jurisdiction with superior courts in certain matters expressly given by the constitution (art. VI, sec. 11), and also having such jurisdiction in civil and criminal cases as is given by the general laws of the state to all justices of the peace. In this regard there is no distinction whatever between township and city justices. * * * A city justice is simply a part of this general state system, elected for a certain subdivision thereof. * * * The constitution in terms provides that the legislature shall determine the number of such justices of the peace to be elected in townships, incorporated cities and towns, or cities and counties, and shall fix by law the powers, duties, and responsibilities of such office (art. VI, sec. 11). In view of the explicit provisions of the constitution as to justices of the peace for cities and towns as well as townships and cities and counties, and the decisions of this court in regard thereto, it is inconceivable that this amendment" (referring to the then existing subdivision 1 of section 8½, article XI, state Constitution) "limited in terms to police courts, was intended to trench in the slightest degree upon the power of the legislature to provide for justices' courts in cities and towns as part of the general state system of justices' courts, and we cannot give it any such effect."

In 1914 the Constitution was amended, and paragraph 1, section 8½, article 11, was amended to read as follows: "For the constitution, regulation, government, and jurisdiction of police courts, and for the manner in which, the times at which, and the terms for which the judges of such courts shall be elected or appointed, and for the qualifications and compensation of said judges and of their clerks and attaches; and for the establishment, constitution, regulation, government and jurisdiction of municipal courts, with such civil and criminal jurisdiction as by law may be conferred upon inferior courts; and for the manner in which, the times at which, and the terms for which the judges of such courts shall be elected or appointed, and for the qualifications and compensation of said judges and of their clerks and attaches; provided, such municipal courts shall never be deprived of the jurisdiction given inferior courts created by general law. In any city or any city and county, when such municipal court has been established, there shall be no other court inferior to the superior court; and pending actions, trials, and all pending business of inferior courts within the territory of such city or city and county, upon the establishment of any such municipal court, shall be and become pending in such municipal court, and all records of such inferior courts shall thereupon be and become the records of such municipal court."

The charter of the city of San Jose, as adopted in the year 1915 and approved by the Legislature of the state of California in said year (Stats. 1915, p. 1897), provides as follows: "There is hereby constituted a police court in and for the city of San Jose, consisting of one police judge. * * * Said police court and police judge shall have all the powers, authority and jurisdiction, both civil and criminal, that are now or may hereafter be conferred by law upon justices of the peace in California, and in addition thereto, said police court and police judge shall have exclusive jurisdiction of all proceedings for the violation of any ordinance of the city of San Jose. In all cases in which the police judge is a party" or in which he is disqualified or unable to act, "any justice of the peace of the county of Santa Clara may, at the request of the president of the council or of said police judge, act in his place or stead."

The respondent herein concedes the force and effect of the cited case of Graham v. Mayor of Fresno, supra, as applying only to the constitutional provision as it read at the time of the decision. It is contended that under the present reading of the Constitution the Graham Case has not the slightest bearing upon the question under consideration.

[1] Prior to 1911 the judicial power of the state was vested in the Senate, in a Supreme Court, superior courts, justices of the peace, and such inferior courts as the Legislature might establish in any incorporated city or town or city and county. Article 6, § 1, Const. In that year the Constitution was amended to read: "The judicial power of the state shall be vested in the Senate, sitting as a court of impeachment, in a Supreme Court, District Courts of Appeal, superior courts and such inferior courts as the legislature may establish in any incorporated city or town, township, county, or city and county." Article 6, § 1, Const. The amendment to the section in 1924 simply added "such municipal courts as may be established in any city or city and county."

It will be thus noted that the framers of the Constitution as it now stands intended to and did oust from the judicial scheme justices courts as such, and with the exception of the courts named, with jurisdiction therein fixed, left to the Legislature complete freedom in the establishment and constitution of all other inferior courts. It seems clear, whatever may have been the view of the courts prior to 1911, that since that date the justice's court as such lost any peculiar identity it may theretofore have had as a constitutional tribunal, and became merged within the general term of inferior courts as the Legislature might see fit to establish.

It was contended, after the amendment of 1911, that the office of justice of the peace was abolished. This contention was made in a proceeding entitled, "In the Matter of Application of J. A. Woods for a writ of Habeas Corpus," reported in 161 Cal. 238, 118 P. 792 (1911). The opinion of the court says: "The recent amendment of sections 1, 11, and 15 of article VI of the Constitution does not abolish the justices courts and other inferior courts which had been previously established by acts of the legislature. They remain in existence with the jurisdiction vested in them by the acts creating them, until the legislature shall, *in the exercise of the power given by the section as amended, otherwise provide.*"

Later, in People v. Creeks, 170 Cal. 368, 149 P. 821, the court adhered to the views expressed in the Woods Case.

Section 11 of article 6 was amended in 1911 to the same effect, namely, by the omission of all reference to justices' courts or justices of the peace as such. Likewise section 15 of article 6 carried on in its amendment the scheme and plan of dropping justices' courts and justices of the peace from express constitutional classification and authority.

With these amendments before us we conclude that since 1911 the justice court, whether in cities or cities and counties, townships or counties, has existed subject to the will of the Legislature, and that the power of the Legislature to retain that court called justice's court, or to provide other inferior courts, either supplementary to or supplanting the justice's court, is unlimited except in one particular. And that particular is that where the power of the Legislature is constitutionally limited with regard to the establishment or organization of any inferior court it is likewise so limited with regard to justice courts. In other words, we find the organic law providing specifically for courts of general jurisdiction and establishing the jurisdiction of the said courts and the qualifications of the judges thereof, and the terms, limiting the power of the Legislature over such courts. The same organic law then leaves with the Legislature the power to provide the minor tribunals to cover jurisdiction not therein fully provided for.

Thus we approach article 11 of the Constitution. The subject of this article is cities, counties and towns. Sections 8 and 8½ of article 11 were and are framed and designed upon the principle of local self-government in as far, at least, as municipal affairs might be involved. Quoting Judge Angellotti, then Chief Justice, in Ex parte Braun, 141 Cal. 209, 74 P. 782: "Whatever conflict may be found in the opinions of" the Supreme "Court as to the precise meaning of the term ["municipal affairs"], it has always been conceded by all the justices that the object" of the constitutional provision "was to secure to the municipality that had" under its provisions "adopted a charter for its own government, the maintenance of its charter provisions in municipal matters, and to deprive the Legislature of the power, by laws general in form, to interfere in the government and management of the municipality."

Section 8 of article 11 provides in detail for the framing of city charters and the approval thereof. Section 8½ then sets forth what such charters may provide *in addition to the provisions allowed by the Constitution and by the laws of the state*, the italicized clause being synonymous with the clause "any other or general provision of law to the contrary notwithstanding."

Section 8½ has been quoted in full hereinbefore, and we may now return to further analysis thereof with respect both to its present form and its history and the construction placed upon it in its prior form as indicative of the construction it should now receive.

As we have seen, section 8½, as it formerly stood, permitted the constitution, regulation, government and jurisdiction of police courts, with nothing further defining the term or specifying or in anywise pointing out the character of such a tribunal. Many cities under this privision attempted to vest in this court an exclusive local jurisdiction, and in some instances attempted to clothe this court with the civil jurisdiction of inferior courts. Such attempts met with the disapproval of the Supreme Court, as in the cases cited, supra. For instance, in Ex parte Dolan, 128 Cal. 460, 60 P. 1094, the holding to the effect that exclusive jurisdiction of misdemeanors was concurrently in the police court and the justice's court. Also, Graham v. Mayor of Fresno, supra, holding that the police court under the charter was purely local and in no wise a substitute for or embracing the jurisdiction of the justice's court, this latter case announcing that pursuant to constitutional provisions the justice's court was an essential and integral part of the judicial plan of the state. Then in 1911, as noted, the severing and disjoinder of justices' courts from the judicial scheme as outlined in the Constitution.

[2, 3] We assume as a matter of construction that when the organic law was amended in 1914 the framers had in mind all of these decisions and were mindful of the constitutional change of 1911. In the construction of a statute it is assumed that the Legislature knew the existing laws, and that it had knowledge of existing judicial decisions, and

enacted statutes in the light of such decisions as have a direct bearing upon them. 23 Cal. Jur. 783, and cases therein cited. It is settled that the court, in order to determine correctly the construction to be placed upon constitutional provisions, has undoubted power to take into consideration the course of legislation and judicial decisions prior to the adoption of such provisions and the evils intended to be remedied. The provisions must be considered with reference to their history, the prior state of the law, the conditions existing prior to their adoption and the good to be gained. Mundell v. Lyons, 182 Cal. 292, 187 P. 950; Matter of Russell, 163 Cal. 672, 126 P. 875, Ann. Cas. 1914A, 152; 5 Cal. Jur. 592.

[4] Having these aids to construction before us, we note that in 1914 the Constitution was amended as indicated hereinbefore (sec. 8½, art. 11), and remains to date as then amended, although changed in other particulars and readopted in 1918. The amendment gave to cities, in addition to the power theretofore granted, the right to provide for the constitution, regulation, government, jurisdiction of municipal courts and judges thereof; and to make more clear the intent it was specifically provided that such municipal courts shall *never be deprived of the jurisdiction given inferior courts created by law.* The language thus italicized might have been more fortunately chosen. It would be unwarranted to conclude that it was intended to mean that no subsequent enactment or change in the organic law could effect that object. It is a fair and reasonable construction to interpret the meaning to be that no such municipal court shall ever be constituted or established possessing less jurisdiction than that given inferior courts under the general law; in other words, that such courts should absorb all of the jurisdiction remaining without that of courts of record. However, this construction is not essential to this decision, but, if adopted, more clearly illustrates the intent of the framers of the constitutional provision.

Going further, the Constitution then provides: "In any city * * * when such municipal court has been established, there shall be no other court inferior to the superior court." This provision by its plain words demonstrates an intent to invest in the municipal court all of the jurisdiction possible to invest in an inferior court. The framers of the provision knew that no power could be conferred on a city to establish a court exercising jurisdiction coextensive with or trenching upon that of the superior court provided for in the Constitution. And knowing this, the provision was adopted with an intent to definitely allocate all of the jurisdiction remaining to be vested in this inferior municipal court.

We conclude, therefore, that at the time of the adoption of the charter in 1915 the city of San Jose was authorized to provide in that charter for such a court as would entirely suspend and render unnecessary the provisions of section 103 of the Code of Civil Procedure in so far as it might be made applicable to a city of that class operating under its own charter.

Appellant, merely for the purpose of argument, however, is ready to concede the correctness of this conclusion. But, he urges, granting the power in the city under its charter to establish such a court, nevertheless it has not exercised that power. Appellant urges that all that the city has done is to establish a police court such as was formerly permitted under the old provisions of the Constitution, and such as referred to in the case of Graham v. Mayor of Fresno, supra, and that the municipal court permitted under the amendment has never been established.

This brings us to the city charter.

As hereinbefore outlined, the charter specifically provides: "Article XI.—There is hereby constituted a police court in and for the city of San Jose, consisting of one police judge. * * *

"Said police court and police judge shall have all the powers, authority and jurisdiction, both civil and criminal, that are now or may hereafter be conferred by law upon justices of the peace in California, and in addition thereto, said police court and police judge shall have exclusive jurisdiction of all proceedings for the violation of any ordinance of the city of San Jose." St. 1915, P. 1897.

The said charter then provides that in case of disqualification, sickness or inability to act, any justice of the peace of Santa Clara county may serve.

The jurisdiction of justices of the peace in California is set forth in the Code of Civil Procedure—sections 103 and 112, and many other sections scattered throughout the Code of Civil Procedure and Penal Code. We deem it unnecessary to cite each and every section of all of the codes having a bearing upon this question of the jurisdiction of a justice's court or justice of the peace. It will suffice to say that justices' courts have jurisdiction in all matters cognizable by inferior courts. By this it is not meant that this jurisdiction is inherent, because no jurisdiction attaches to such a tribunal unless especially conferred. But the Legislature by statute, without enumerating each specific statute or code section, has conferred upon the justice's court a jurisdiction covering all matters not vested in the courts of record, and in some instances, pursuant to constitutional freedom, it has conferred a jurisdiction concurrent with the Superior Court.

[5] Laws, whether statutory or by way of charter, may be enacted by reference. Greene v. Town of Lakeport, 74 Cal. App. 1, 239 P. 702; 23 Cal. Jur. 685, § 75 and cases cited.

[6, 7] Therefore it will be at once noted that the charter did provide for a tribunal exactly filling that classed as a municipal court as provided in the amended Constitution, section 8½, article 11.

The sole question remaining then has to deal with the name by which the court is designated, to wit, police court. Appellant's contention is that no matter what jurisdiction may be conferred, yet the name police court so distinguishes and characterizes the tribunal as to render abortive any attempt at enlargement of the jurisdiction which might have been vested in the old police court formerly provided for. The argument is neither convincing nor persuasive. The character of a court is determined not by its name but by the nature of its jurisdiction and functions. City of Colton v. Superior Court [Cal. App.] 257 P. 909; Ex parte Soto, 88 Cal. 624, 26 P. 530; Ex parte Baxter, 3 Cal. App. 720, 86 P. 998. The language found on page 720 of 3 Cal. App. (86 P. 998) in the Baxter Case is particularly applicable and is to the effect that to limit a court by name would be to grasp at form rather than substance.

We conclude that the designation of the city court as a police court is of no importance; that the character of the court is to be determined by the jurisdiction conferred. This is more apparent when we consider that when the charter conferred upon this court the jurisdiction it did, thus fulfilling the Constitution's grant of power, then, under the plain terms of the section 8½, article 11, another inferior court could not be maintained within the city.

We hold that section 8½, article 11, of the state Constitution, should be construed and is construed to give to cities coming within its scope the power to establish a court combining the jurisdiction of all inferior courts, and that the name given the court in this instance does not indicate a limitation as against the express terms of the charter. In other words, the Constitution now gives to these cities the power and right to provide for themselves such municipal courts as they may determine to be necessary, limited only to the jurisdiction of inferior courts. It does not confer power to establish a police court and then in addition thereto the municipal court referred to in section 8½ of article 11. Both cannot exist in the same city, and the determination of which is established follows from the jurisdiction which is conferred rather than the name applied. Summing it up, the power conferred by the Constitution permits the city to establish a municipal court with all the jurisdiction that may be conferred upon inferior courts. And this the city of San Jose has done. By the further provisions of the Constitution, when this has been done there shall be no other court inferior to the superior court. It is too plain for further diagram.

From what has been set forth herein it follows that plaintiff has no claim for salary by reason of his election to an office which does not exist, and therefore the defendant auditor was within his duties in refusing to issue to plaintiff the warrant sought.

Judgment affirmed.

We concur: TYLER, P. J.; CASHIN, J.

BALDWIN et al. v. PACIFIC ELECTRIC RY. CO. et al.★

McGUFFIN v. SAME.

(Civ. 3647.)

District Court of Appeal, Third District, California. Dec. 18, 1928.

Rehearing Denied Jan. 17, 1929. Hearing Granted by Supreme Court Feb. 14, 1929.

1. Railroads ⚷351(2)—Instruction it was not negligence for railway company to not have signal or light at crossing where motorists were struck held misleading, under evidence showing light maintained at crossing could be misunderstood.

Instruction, that it was not negligence of itself for railway company to not have wigwag installed or not to have crossing where motorists were struck lighted with artificial lights, *held* erroneous and misleading, where evidence showed that there was a gate and light at crossing, but that light was in such position that it might have been taken for tail-light of automobile.

2. Railroads ⚷307(3)—Railroad voluntarily erecting signal device at crossing must operate it so it will not become menace because of being misunderstood.

When railway company voluntarily erects and maintains signal devices, whether they consist of wigwags, lights, or gates, such instrumentalities must be operated so as to constitute warning of danger, and not a contrivance which may, from its manner of operation, become a menace by reason of its being readily misunderstood.

3. Highways ⚷197(1)—Persons using public highways may assume highway will not be obstructed by device increasing peril.

Every person using public highway has right to assume that highway will not be obstructed by any device that will lead to or increase his peril in use of highway.

4. Railroads ⚷307(4)—Railway companies maintaining gate certain height above highway at night must be held to have known law regarding automobile headlights.

Railroad in erecting and maintaining gate across highway 3½ feet above highway in nighttime must be held to have had knowledge of law regulating adjustment of automobile headlights which, if law is observed, brings rays of light from automobile to surface of highway at specified distance.

★Superseded by opinion of Supreme Court 281 P. 380

5. Appeal and error 🔑1170(9)—Railroads 🔑351(2) — Instruction on motorist's duty to have automobile under control on approaching crossing held erroneous and prejudicial, where testimony showed no knowledge of crossing (Const. art. 6, § 4½).

In action for damages for death of motorists killed at crossing at nighttime by electric car, instruction that it was duty of motorist driving, in approaching crossing, to have automobile under such control that he could stop it in case crossing appeared dangerous, *held* erroneously given, where evidence showed no knowledge by either driver or guest in automobile of presence of crossing and error was not cured by Const. art. 6, § 4½.

6. Appeal and error 🔑1170(9)—Railroads 🔑351(2)—Instruction on motorist's duty to stop, look, etc., when approaching railroad crossing, held erroneous and prejudicial, where evidence showed no knowledge of crossing (Const. art. 6, § 4½).

In actions for damages for death of motorists killed at crossing at nighttime by electric car, instruction that, if automobile driver's view of approaching car was obstructed by any objects so that he could not see car approaching, ordinary care required him to stop and look and listen, *held* erroneously given, where evidence showed no knowledge by either driver or guest in automobile of presence of crossing and error was not cured by Const. art. 6, § 4½.

Appeals from Superior Court, Orange County; Z. B. West, Judge.

Actions for damages for death by Nellie Baldwin and others, and by Mrs. James T. McGuffin, against the Pacific Electric Railway Company and others. The two cases were tried together, and from the judgments plaintiffs appeal. Reversed.

Bertrand J. Wellman, of Los Angeles, and Norval N. Edwards, of Orange, for appellants.

E. E. Morris and Frank Karr, both of Los Angeles, and S. W. Reinhaus, of Santa Ana, for respondents.

PLUMMER, J. By stipulation, the two cases above named were tried together before the same jury, and are before this court upon a single record. One action is based upon the death of James T. McGuffin, the husband of Mrs. Addie McGuffin, and one action is based upon the death of Elwood E. Baldwin, the husband of Mrs. Nellie Baldwin. The deaths of the respective parties were caused by a collision between an automobile driven by James T. McGuffin (in which Elwood E. Baldwin was riding as a guest), with an electric car owned and operated by the defendant Pacific Electric Railway Company, a corporation.

The record shows that on or about 10:30 p. m. of the 18th day of May, 1924, James T. McGuffin and Elwood E. Baldwin were returning by automobile from the town of Santa Ana, to their homes in the town of Whittier; that they were driving northward along that certain state highway known as and called the "Fullerton State Highway"; that at a certain point on said highway, where its direction is northerly and southerly, it is intercepted by an electric railway track owned by, and upon which electric cars are operated by, the defendant Pacific Electric Railway Company, a corporation, and also by a certain other railroad owned by, and upon which the Los Angeles & Salt Lake Railroad Company, a corporation, operated trains drawn by steam locomotives. The record further shows that these railroads, which run in a westerly and easterly direction, are somewhere between 100 and 200 feet apart, and that the line owned and operated by the defendant Pacific Electric Railway Company lies to the south of the line owned and operated by the Los Angeles & Salt Lake Railroad Company. It appears by the record that the two defendant companies maintained and operated gates across the highway where their lines intercept the same. One gate is located a very few feet south of the line maintained by the Pacific Electric Railway Company, and one gate is maintained a few feet north of the line maintained and operated by the Los Angeles & Salt Lake Railroad Company. These gates are operated by a watchman stationed in a tower some 40 feet easterly from the east boundary line of the Fullerton highway. It appears, also, that somewhere in the neighborhood of 1,000 feet east of the Fullerton highway the two railroad lines intersect each other, and one of the duties of the towerman is to signal to the trains approaching on either railroad relative to the right of way which may belong to the trains being operated upon the respective railroads. The improved portion, or what we may call the concrete slab of the Fullerton highway was, at the time of the collision herein referred to, 18 feet in width. The gate operated by the respective companies, situate south of the Pacific Railway Company's line, was lowered from the east side of the highway. It appears that one end of the gate operates upon a pivot attached to a post east of said highway. The gate in question was in the shape of the letter "Y," having two boards which extended about halfway across the improved slab, forming a juncture there, and then continuing out over the remaining portion of the highway as one board only. On the night in question it appears that a red lantern had been suspended under the easterly portion of the gate at a point about midway of the east one-half of the concrete slab. The position of the lantern thus suspended would be about the center of the portion of the highway traversed by automobiles being driven northward. On the night mentioned. the automobile driven by McGuffin, and in which Baldwin was riding as a guest, was traveling in a northerly direction. The red lantern suspended under the gate was so constructed that the light was projected therefrom in a southerly direction, having a shield or back which prevented the rays extending in a northerly direction. It also would appear that the lantern was so constructed as not to illuminate or disclose the presence of the gate from which it was suspended.

There is testimony in the record from which the jury could conclude that the night was dark and foggy. There is also testimony in the record from which the jury might conclude that it was a light night and that the moon was shining. Testimony was introduced, which seemed to be uncontroverted, that there was a full moon on the night of the collision. This evidence appears only from the World's Almanac, which of course does not take into account either the presence or absence of fog. In their course northerly it appears that at some little distance south of the point where the collision occurred, the automobile in which the deceased parties were riding passed certain other cars traveling in the same direction, and upon coming to where the highway is intersected by the Pacific Electric Railway, apparently swerved to the left, at least was at that point driven along the westerly half of the concrete slab through the one-board portion of the gate referred to, and either was stopped or stalled upon the railroad track, or was hit by an electric car propelled by the agents of the Pacific Electric Railway Company, at the instant it came upon the line of the company. The contention of the plaintiffs was, in the court below and here, that the driver of the automobile mistook the red light suspended below the gate, as we have mentioned, for the tail-light of an automobile proceeding northerly, and turned to the left to avoid coming in contact therewith and to effect a passage by such automobile, and at that instant discovered the presence of the one-board portion of the gate, and in an attempt to avoid a collision therewith, slowed down the automobile to such a degree that it either stalled or stopped upon the railroad track and was hit or struck by the car operated by the electric company when it reached the railroad track. There is considerable testimony in the record to the effect that there was a distinct interval of time between the sound produced by breaking through the gate and the noise of the collision of the electric car with the automobile. There is also testimony in the record that it was one continuous crash; that one sound followed the other instantly. The action is primarily based upon the alleged negligent manner in which the red light was suspended beneath the gate; that it was suspended in such a manner as not to disclose the presence of the gate, but in such a manner as to be readily mistaken by an automobile driver for the tail-light of another machine traveling in a northerly direction. The allegation of the complaint in each case is substantially in these words in so far as this question is concerned: "That said defendants carelessly, negligently, and unlawfully failed and neglected to sufficiently light and illuminate said gates whereby they could not be seen or distinguished and because whereof the said automobile in which the said Elwood L. Baldwin was riding ran into and against said gates and was thereby caused to stall on the said railway tracks of the defendant Pacific Electric Railway Company, and the defendants further carelessly, negligently and unlawfully drove, maintained, and operated said electric car whereby the same struck and collided with the said stalled automobile with great force and violence whereby, and because of the negligence of the defendants in failing to light and illuminate said gates as above stated, and negligence in operating the said electric car as above stated, injuries were inflicted upon the said Elwood L. Baldwin from which he then and there died." The gate, when lowered, was about 3½ feet above the highway, and had, within a few feet of the farthest end thereof, that is, the end farthest from the base, a leg which dropped down to the pavement and rested upon a coil of springs which, for a few moments when lowered, would cause the gate to oscillate slightly and raise the red light up and down for the period of time that the gate oscillated.

The place where the collision occurred established that the automobile was traveling along the left side or left one-half thereof, which would be the westerly portion of the concrete slab. The record contains testimony to the effect that a crossing whistle was blown by the electric car, and that a bell or gong was sounded in the tower when the gate was lowered. There is also testimony in the record, of several witnesses, that they heard no whistles from the electric car until the blowing of a few short whistles immediately preceding the collision. There is further testimony in the record that the lights of the electric car were seen by occupants of other automobiles following the car driven by the deceased McGuffin. There is no testimony in the record, which we have been able to discover, which indicates that either one of the deceased was familiar with the crossing in question, or had any knowledge of its existence. The rails of the electric road were flush with the pavement, and our attention has not been called to any objects, other than those which we have mentioned, which would indicate the presence of an intersecting railroad. The record also contains evidence, from which the conclusion might properly be drawn, that for the last 150 or 200 feet traversed by the automobile before the collision, it was moving at a speed of about 25 miles per hour, and as it reached the gate suddenly slowed down and moved forward to the railroad tracks upon which it was either stopped or stalled. The distance between the gate and the nearest rail was about 8 feet.

From the foregoing statement it is readily apparent that the jury might have reached either one or the other of two conclusions, to wit: That the lantern hung beneath the gate was a like color with the tail-lights of automobiles, and was placed in such a position that an automobile driver, unfamiliar with the surroundings, might have readily mistaken the light suspended from the gate, for the tail-light of an automobile and swerved to the left in order to avoid the same, and at that instant, perceived the presence of the gate, and immediately did what he could to stop the forward progress of the machine, and in the emergency of so doing, either stopped or stalled his engine, with the automobile resting on the railroad track. Or the jury might have come to the conclusion that at least the automobile driver was driving along without taking the reasonable and necessary precautions for his own safety and the safety of his guest, which the law requires to be exercised by all automobile drivers to escape the charge of contributory negligence in the event of injury. Under these circumstances, it becomes necessary to consider the alleged errors of the court in giving instructions to the jury.

At the request of the plaintiffs, the court, among others, gave the following instructions to the jury: "While a railroad crossing is a warning of danger, if the conditions are such that it cannot be seen or known to a person exercising reasonable care, it is not a warning, and all that is said in these instructions about a railroad crossing being a warning of danger, only applies to those crossings that a reasonably careful person could see and know were there." This instruction correctly and properly called the attention of the jury to the fact, as we have hereinbefore stated, that there was nothing in the testimony indicating the presence of a railroad other than what we have herein set forth and considered. The testimony does not show that there was any railroad embankment on either side of the highway, nor does it show that there was any visible portion of the railroad on either side of the highway, and if the testimony is true that the night was dark and somewhat foggy, it is evident that the lights of the automobile in which the deceased parties were traveling would not disclose any objects save those which were immediately upon or across the highway.

[1] Following the instructions given at the request of the plaintiffs, the court, at the request of the defendant, gave three instructions alleged by the appellants to constitute reversible error. These instructions are, in the order in which we will consider them, numbered, respectively, XXIX, XVI, and X.

Instruction No. XXIX is in the following words: "You are instructed that there is no law requiring the railroad company or either of the defendants to place or maintain any wigwag signal at this crossing nor to maintain any artificial lights at said crossing, and therefore it was not negligence of itself for the railway company to not have a wigwag installed or not to have said crossing lighted with artificial lights."

Instruction No. XVI reads as follows: "It was the duty of Mr. McGuffin in approaching this crossing to approach the same with his automobile under such control that he could stop the same in case the crossing appeared dangerous, and if he failed to so approach the crossing, then he was guilty of negligence, and if such negligence contributed proximately in any decree to the happening of the accident, then Mrs. McGuffin cannot recover, and if such negligence was alone the proximate cause of the accident, neither of the plaintiffs in these cases can recover and your verdict should be for the defendants in both cases."

Instruction No. X is as follows: "In approaching this crossing if Mr. McGuffin's view of the approaching car was obstructed by any objects whatever so that he could not see the car approaching, then ordinary care for his safety and that of the safety of Mr. Baldwin, required him to stop and then to look and listen for approaching cars, and to stop at some place before reaching the tracks, in a place of safety where looking would be effective and where he would have an unobstructed view of the track, and then and there see and hear that which could have been seen or heard approaching upon the tracks with the use of ordinary care, and if he failed in this respect he was negligent, and if such negligence contributed proximately in any degree, no matter how slightly, to the happening of the accident, Mrs. McGuffin cannot recover, and if such negligence was alone the proximate cause of the accident neither of the plaintiffs can recover and your verdicts should be for the defendants in both cases."

[2, 3] As an abstract proposition of law, instruction No. XXIX is a correct statement, but as applied to the circumstances disclosed by this case, it was not only erroneous but also misleading. The law is well settled that unless there is some statute or ordinance requiring the installation of a wigwag or other signal, or the illumination by artificial lights of a railroad crossing, a railroad company is under no necessity of installing signals or lights; but it is also the law that when a railroad company voluntarily assumes the task of erecting and maintaining signal devices, whether they consist of wigwags, lights, or gates, such instrumentalities must be so operated as to constitute a warning of danger, and not a contrivance which may, from its manner of operation, become a menace by reason of its being readily misunderstood. Thus, in the present case, while a gate across a highway is not in and of itself a nuisance,

it may be so operated as to become such. Every person using a public highway has a right to assume that that highway will not be obstructed by any device that will lead to, or increase, his peril in the use of such highway. The testimony in this case leads unavoidably to the conclusion that if the gate under consideration had not been there, McGuffin and Baldwin would not have met their deaths but would have passed on in safety. This raises the direct question whether the red lantern, suspended in the manner shown by the testimony, was not such as to mislead both of the deceased persons. It also presents a question of fact as to whether the gate thrown across the improved highway, lighted only by a red lantern swung beneath it, was so placed and so operated as to reasonably warn an approaching automobile driver, and so as to be perceived by him at a reasonable distance, to enable any one lawfully using the same to bring his automobile to a stop before reaching the gates. If the gate was not, under the conditions, readily perceivable by an automobile driver at such a distance therefrom as to enable him to bring his machine to a stop, then and in that case it was a menace and not a safety gate. If the gate was not so perceivable at a sufficient distance to warn one of its existence in time to stop, and this is especially true where the evidence does not show that the deceased had knowledge of the railroad, then the jury might have found that the management of the gate constituted a direct and proximate cause of the injury, for the simple reason that upon perceiving the existence of the gate, an automobile driver might very readily, in the emergency calling for sudden action in attempting to stop his machine, stall it upon the railroad track. Almost identical with the situation here presented are the circumstances disclosed in the case of Record v. Pennsylvania R. Co. et al., 76 N. J. Law, 800, 72 A. 62, where the charge was that the gateman had neglected to place warning lights upon a gate suspended across a street, and an automobile driver, failing to see the gate in time to avoid a collision therewith, turned his automobile to one side in order to avoid a collision with the gate and came in contact with a trolley pole. The writer of the opinion in that case used the following language: "By the mere erection of the safety gates the company recognized the crossing as a dangerous one. (Smith v. Atlantic City R. R. Co., 66 N. J. Law, 310, 49 A. 457; 3 Elliott, R. R. 1171.) Without proper management such a fixture, when constructed across the public thoroughfares, would become a public nuisance per se. It is the settled law that the public streets and sidewalks are presumed to be free from obstructions to the full width (Durant v. Palmer, 29 N. J. Law, 544), and an intention to obstruct the public streets by the law-making power of a municipality will not readily be inferred by the courts." It is true that in this case an ordinance required the maintenance of a safety gate and the maintenance of lights at nighttime to indicate its presence. But as we will subsequently show by the authorities, if the maintenance of safety gates is voluntarily assumed, they must be operated with the same care and prudence as though required by ordinance or statute. A case bearing the same title, to wit, Record v. Pennsylvania R. Co. et al., reported in 75 N. J. Law, 311, 67 A. 1040, in an appeal by a different defendant in the same case, it appears from the facts that the driver of the automobile, in order to avoid a collision with the gates, turned to one side and came in contact with a trolley pole. The court there held as in the former case relative to the maintenance of the gate without lights, and further said: "Nor do we think that the sudden turning of the car by the plaintiff in the face of danger showed such a want of reasonable care as to make his alleged negligence a court question." The testimony in that case showed that the automobile driver was not familiar with the railroad crossing, having only passed over it once or twice. That the duty voluntarily assumed by the railroad companies in this case is exactly the same as it would have been if required by statute is amply supported by the authorities.

[4] In the case of Pennsylvania R. Co. v. Charles E. Yingling, 148 Md. 169, 129 A. 36, 41 A. L. R. 398, involving the operation of a safety gate, we find the following statement of the law: "If the accident, however, had taken place during the period of time when the defendant had voluntarily assumed to safeguard the crossing by a watchman or gateman, through the failure of the watchman or gateman to discharge his duty by reason of his absence, failure to signal, or to lower the gates, or of any other proximate default, there can be no question that the failure thus to discharge an obligation voluntarily assumed would have been negligence on the part of the company, as is illustrated by the cases cited by the appellee. Chicago & A. R. Co. v. Wright, 120 Ill. App. 218; Lockridge v. Minneapolis & St. L. R. Co., 161 Iowa, 86, 140 N. W. 834, Ann. Cas. 1916A, 158; Roby v. Kansas City Southern R. Co., 130 La. 880, 41 L. R. A. (N. S.) 355, 58 So. 696; Sights v. Louisville & N. R. Co., 117 Ky. 436, 78 S. W. 172; Dolph v. New York, N. H. & H. R. Co., 74 Conn. 538, 51 A. 525; Chicago & A. R. Co. v. Blaul, 175 Ill. 183, 51 N. E. 895; McAdoo v. State, 136 Md. 452, 111 A. 476; Ernst v. Hudson River R. Co., 39 N. Y. 61, 65, 100 Am. Dec. 405." And further, in the same case, the court says: "The undertaking to perform a voluntary act renders the [defendant] liable if he performs it improperly, but not if he merely discontinues the act." Again, in the case of Gallagher v. Montpelier & W. R. R. R., 100 Vt. 299, 137 A. 207, 52 A. L. R. page

744, the Supreme Court of Vermont, in considering the maintenance of gates, adopted the rule which we have stated. We quote therefrom as follows: "While it appears to be well settled that where a railroad company maintains a flagman, gates, or other signals or warnings at a crossing, whether voluntarily (Dolph v. New York, N. H. & H. R. Co., 74 Conn. 538, 51 A. 525; Martin v. Baltimore & P. R. Co., 2 Marv. [Del.] 123, 42 A. 442), or by statutory requirement, the public generally has a right to presume that such safeguards will be reasonably maintained and attended (Chicago & A. R. Co. v. Blaul, 175 Ill. 183, 51 N. E. 895), and in the absence of knowledge to the contrary (Sights v. Louisville & N. R. Co., 117 Ky. 436, 78 S. W. 173; Stegner v. Chicago, M. & St. P. R. Co., 94 Minn. 166, 102 N. W. 205; 17 Am. Neg. Rep. 574), the fact that the gates are open (Stegner v. Chicago, M. & St. P. R. Co., supra), or automatic bell not ringing (Cleveland, C., C. & St. L. R. Co. v. Heine, 28 Ind. App. 163, 62 N. E. 455), or that the flagman is absent from his post, or, if present, is not giving a warning of danger (Dolph v. New York, N. H. & H. R. Co. and Martin v. Baltimore & P. R. Co., supra), is an assurance of safety upon which a traveler familiar with the crossing may rely, within reasonable limits, such assurance does not excuse the traveler from using such precaution as a prudent person would use in like circumstances. 33 Cyc. 1029, 1030." Likewise, in 22 Ruling Case Law, p. 1006, § 235, we find the following: "And although a railroad company may be under no duty to construct gates at a crossing, if a company does so, it is bound to operate the same in a prudent manner and is liable for injuries due to a failure to perform its duty." In volume 3 (2d Ed.) Elliott, Railroads, § 1171, the law is thus stated: "It is the duty of a railway company to exercise ordinary care in the management of gates at crossings, and it is responsible to a traveler who is himself without fault and is injured by a negligent management of such gates." As heretofore stated, in the case at bar the lower part of the gate was 3½ feet above the improved portion of the public highway, and the defendants, in erecting and maintaining that gate and placing it across the highway at nighttime, must be held to have had knowledge of the law regulating the adjustment of headlights which, if the law is observed, brings the rays of light from an automobile to the surface of the highway at a specified distance, and so presents a fact whether, without sufficient lighting by the defendant, an approaching automobile driver, having no knowledge of the existence of the railroad, would have warning of the lowered gate, by reason of his headlights disclosing the presence thereof at a sufficient distance to enable the automobile to be brought to a stop at a safe distance from the railroad. In all these matters instruction No. XXIX was well calculated to mislead the jury.

[5, 6] We come next to a consideration of instructions numbered XVI and X. The very case relied upon by the respondents to support their request for the giving of these instructions is predicated upon an element which is entirely lacking so far as disclosed by the testimony in the case at bar. We refer to the case of Christman v. Southern Pac. Co., 38 Cal. App. 196, 175 P. 808. The court in that case used the following language, which distinguishes the circumstances there presented from those which we are considering, to wit: "With complete knowledge that he was approaching a railroad crossing which he knew to be regularly in use, he drove his auto truck at a rate of speed so great that, as he himself knew, his machine was bound to go upon the track, at all times after the moment of his first opportunity to look for the train. Having thus neglected the most obvious precautions for taking care of his own safety at a time and place where he had ample opportunity to use those precautions, the plaintiff is not entitled to recover damages for the injuries received." Had instructions XVI and X been predicated upon the knowledge of the deceased of the presence of the railroad crossing, or been predicated upon circumstances sufficient to give an approaching automobile driver reasonable notice of the presence of a railroad crossing, then and in that case the duty imposed by the instructions upon the automobile driver would have applied. However, with the testimony showing no knowledge, of either McGuffin or Baldwin, of the presence of the railroad in question, and also without any allusion to, or mention of, the presence of circumstances sufficient to warn persons of the existence of the railroad, the court charges "that it was the duty of Mr. McGuffin, in approaching *this* crossing, to approach the same with his automobile under such control," etc. The language is the same in both instructions, charging as a matter of fact with regard to the crossing. The law, of course, is well settled that any one approaching a railroad crossing of which he has knowledge, or of which the circumstances are such as to give him reasonable notice of the existence thereof, must stop, look, listen, etc., and exercise his faculties to safeguard himself; but to instruct the jury, without any consideration of the knowledge of the existence of the railroad, or of there being any facts and circumstances to indicate its presence, that the automobile driver was under the legal obligation to stop, look, and listen to avoid the charge of contributory negligence, is not to correctly state the law as applied to the circumstances of this case.

We do not deem it necessary to consider the refusal of the court to give certain instructions requested by the plaintiffs, as those questions may not arise on a subsequent trial.

In view of the facts of this case and the different conclusions which might properly be reached by the jury, we are of the opinion that section 4½ of article 6 of the Constitution cannot be held to cure the errors of the trial court in giving the instructions requested by the respondents.

The judgments are reversed.

We concur: FINCH, P. J.; SHIELDS, Justice pro tem.

ENGELBERG v. SEBASTIANI. (Civ. 6565.)★

District Court of Appeal, First District, Division 2, California. Dec. 21, 1928.

Rehearing Denied Jan. 18, 1929. Hearing Granted by Supreme Court Feb. 18, 1929.

1. Sales 🔑3—Contract of sale of growing grapes held one of executed sale rather than one to sell.

Contract, which, in addition to using the terms of present sale and purchase of growing grapes, expressly provides that it is "the intention of this contract to constitute an absolute sale of all said grapes," *held* one of executed sale rather than one to sell.

2. Sales 🔑267—Contract, even if construed as executory contract to sell growing grapes, held to expressly contract against any implied warranty of soundness or merchantability (Civ. Code, § 1768).

Contract for sale of growing grapes, even if construed as one to sell rather than one of executed sale, by provision that "the buyer shall take delivery of all grapes regardless of car shortage, railroad strike, embargo, rain or any other act of any character whatsoever, whether the act of nature or within or without the control of either or both of the parties," *held* to expressly contract against any implied warranty of soundness or merchantability, relative to Civ. Code, § 1768, providing that one who agrees to sell merchandise not then in existence thereby warrants that it shall be sound and merchantable.

3. Sales 🔑267—Under contract of sale of growing grapes, held, seller could disregard instructions in notice from seller to pick and pack in certain manner for certain markets.

Under contract of sale of growing grapes, excluding any mildewed or sunburned or not having at least 18 per cent. sugar content, providing that they are not being sold for any particular purpose and that the contract embodied every covenant and promise on behalf of the parties, so long as seller delivered grapes of the stipulated quality and used due care in harvesting them he did all that was required and could disregard instructions in notice from buyer to pick and pack the grapes in a certain manner for certain markets.

4. Sales 🔑101—Provision of contract of sale for termination thereof if buyer failed to accept and pay for any of grapes sold held waived by the parties thereafter operating under contract.

Though contract of sale of grapes provided that, if buyer failed to accept and pay for any of them as therein provided, seller reserved the option to dispose of the grapes at best market price and charge the loss to buyer and the contract should become void thereafter, and though seller so disposed of the first lot of grapes refused by buyer, yet the parties having thereafter continued to operate under the contract, buyer thereafter accepting and paying for grapes at contract price, this constituted a waiver of the provision for termination of contract.

5. Sales 🔑101—Provision for termination of contract if buyer failed to accept and pay for any, being for seller's benefit, could be waived by him.

Provision in contract of sale of grapes that, if buyer failed to accept and pay for them, seller could dispose of them and charge loss to buyer and thereafter contract should be void, being for seller's benefit, he could waive the provision for termination, though so disposing of the first lot of grapes refused by the buyer.

6. Food 🔑2—Fresh Fruit Act as to manner of packing held not to apply to wine grapes (St. 1921, p. 1235, § 6, and section 5, as amended by St. 1923, p. 663).

Fresh Fruit Act (St. 1921, p. 1235), regulating the condition and manner in which fruit when delivered for shipment or offered for sale shall be packed, does not apply to wine or juice grapes, section 5, as amended by St. 1923, p. 663, exempting from the provision of the act all fresh fruit intended for use in manufacture of "by-products," and section 6 defining by-products as any product manufactured from fresh fruits or their juices.

7. Evidence 🔑129(1)—Rejecting evidence of condition of other grape crops in vicinity in action for price of crop sold held not error.

The testimony being very full on both sides as to the condition of the crop of grapes covered by the contract of sale, rejecting evidence, in action for price, of condition of other grape crops in the vicinity was not error.

8. Evidence 🔑318(2)—Letter from consignee offered by buyer sued for price held properly rejected as hearsay.

Letter from an eastern consignee offered by defendant in action for price of crop of grapes sold to him *held* properly rejected as hearsay.

9. Sales 🔑358(1)—Whether grapes picked damp would stand shipping to the east held immaterial in action for prices of grapes expressly "not sold for any specific purpose."

Under provision of contract of sale of grapes that they "are not being sold for any specific purpose," objection was properly sustained to question asked in action for price whether grapes picked in a damp condition would stand shipping to the east.

10. Judgment 🔑256(7)—Judgment cannot be entered for amount of verdict and interest (Code Civ. Proc. §§ 626, 664; Civ. Code, § 3287).

Though plaintiff suing for price of goods sold was, under Civ. Code, § 3287, entitled to recover interest as damages, and jury should have been so instructed, yet instruction not having been given and verdict having been merely for

---

★Opinion adopted in part by Supreme Court 279 P. 795.

the amount prayed, judgment could not be entered for that amount and interest, in view of Code Civ. Proc. § 626, providing that, when verdict is for plaintiff in action for money, the jury must find the amount of recovery, and section 664 providing that, in case of trial by jury, judgment must be entered in conformity with the verdict.

Appeal from Superior Court, Sonoma County; H. L. Preston, Judge.

Action by Louis Engelberg against Sam Sebastiani. Judgment for plaintiff, and defendant appeals. Modified and affirmed.

W. F. Cowan and A. W. Hollingsworth, both of Santa Rosa, for appellant.

Barrett & McConnell, of Santa Rosa, and Samuel M. Samter, of San Francisco, for respondent.

DOOLING, Justice pro tem. This action was brought to recover a balance due under a contract for the sale of a crop of grapes by plaintiff and respondent, Engelberg, to defendant and appellant, Sebastiani. In two counts respondent sought to recover for two lots of grapes refused by appellant and sold for his account by respondent. In a third count respondent sought to recover for certain grapes delivered to and received by appellant. Appellant by answer alleged that the grapes in question were not of the quality required by the contract, and that respondent in picking them had mingled mouldy and rotten grapes with good grapes, thereby rendering all of them unfit and unsalable, and also on those grounds cross-complained for damages alleged to have been suffered thereby. The case was tried by jury, and verdict went for respondent for the full amount prayed.

[1] The contract was construed by the court as constituting an executed sale, and the jury were so instructed. Appellant complains of this instruction and the theory on which the case was tried as a result of the court's construction of the contract. So far as it is material in the determination of this question, the contract read as follows:

"The party of the first part hereby sells to the party of the second part, and the party of the second part hereby buys and purchases of the party of the first part all grapes now growing on Madrone Vineyard in Sonoma County, California, in seller's unlidded lugs at seventy-six ($76.00) and no/100 Dollars per ton F. O. B. Platform, excluding therefrom any grapes that might show mildew or might be sunburned, and the second party agrees to accept, receive and pay for the grapes purchased hereunder when the said grapes, or any thereof, show eighteen (18%) per cent or a better percentage of sugar. * * *

"The price of said grapes shall be seventy-six ($76.00) and no/100 Dollars per ton for all varieties, F. O. B. platform Madrone, California; it being understood, however, that the said grapes are not being sold for any specific purposes and the buyer shall take delivery of all grapes regardless of car shortage, railroad strike, embargo, rain, or any other act of any character whatsoever, whether the act of nature or within or without the control of either or both of the parties hereto, it being the intention of this contract to constitute an absolute sale of all of said grapes."

This contract was executed on August 29, 1923, at which time the grapes were well formed on the vines, but not yet ripe or ready for picking, the first delivery under the contract having been made on September 15, 1923.

Relying on the familiar rule announced in Blackwood v. Cutting Packing Co., 76 Cal. 212, 18 P. 248, 9 Am. St. Rep. 199, that a contract, though it uses the terms of present sale, will be construed as a contract to sell rather than an executed sale where anything remains to be done to put the goods in deliverable condition, and particularly where the portion of the crop to be delivered is not yet identified, appellant insists that the contract here was an executory contract to sell and not an executed sale. The question becomes material because of appellant's insistence that, if title did not pass until appropriation and delivery, then, under section 1768 of the Civil Code, there was an implied warranty that the grapes should be sound and merchantable under the provision of that section that "one who agrees to sell merchandise not then in existence, thereby warrants that it shall be sound and merchantable."

Whether this contract constituted a present sale is to be determined by ascertaining the true intention of the parties. Thus in the leading case of Blackwood v. Cutting Packing Co., supra, the court said: "It seems well settled that the question as to whether the title has passed is one as to the intention of the parties. And such intention is, as a matter of course, to be gathered from the language of the parties, considered in the light of all the circumstances of the case." It is only where the language used does not clearly show an intent to pass title that the courts resort to the presumption that where something remains to be done to place the goods in condition for delivery the contract is executory. In this case the parties, in addition to the usual language of purchase and sale (which is not controlling as to their intent), have expressly provided that it is "the intention of this contract to constitute an absolute sale of all of said grapes." The use of the words "absolute sale" indicates a deliberate intent, deliberately expressed, to bring about an executed sale rather than a contract to sell. This case seems to fall within the rule announced in Hamilton v. Klinke, 42 Cal. App. 426, 183 P. 675. In that case there was a contract for the sale of a crop of beans then growing on certain described land and containing a provision that this contract "constitutes an absolute sale." The court, after quoting the language hereinabove quoted from Blackwood v. Cutting Packing Co., supra, said:

"The court [i. e., in the Blackwood Case] found that there were certain enumerated things to be done connected with the contract which had a controlling force indicating that it was not intended to mean a sale.

"In the present case we cannot discover that Klinke was to do anything which he would not naturally or ordinarily be required to do in case of a sale." (Although, we may remark, he was to grow and harvest the beans and deliver them in sacks.) "Besides, to make his intention unmistakable the following was made part of the contract: 'It is mutally understood that this contract, * * * constitutes an absolute sale.'"

Both the circumstances of the case before us (substitute crop of grapes for crop of beans) and the language used are so similar to the Klinke Case that we think that case is controlling here. It follows that the contract was one of executed sale.

[2] However, even if the contract should not be so construed, we are satisfied that the parties have expressly contracted against any implied warranty of soundness or merchantability by providing that "the buyer shall take delivery of all grapes regardless of car shortage, railroad strike, embargo, *rain or any other act of any character whatsoever, whether the act of nature or within or without the control of either or both of the parties.*" Language more sweeping or better calculated to place all risks upon the buyer could hardly have been used.

[3] The court, on motion of respondent, struck out certain portions of the cross-complaint. These portions consisted of allegations that appellant notified respondent that he had a market for certain grapes in New York and for certain other grapes in San Francisco, and directed that the grapes be picked and packed in a certain manner for shipment to those points, and that his instructions were disregarded, whereby the grapes were rendered unfit for those markets to appellant's damage. The trial court held that the only obligation upon respondent was to deliver grapes free from mildew and sunburn and with at least 18 per cent. sugar content, and to use ordinary care in the handling and harvesting, and the portions of the cross-complaint not stricken out fully tendered the issue as to whether respondent had failed to do these things to appellant's damage. There was no error in the trial court's action. The contract expressly provides for the quality of grapes to be delivered and the manner in which they are to be delivered. It further provides that "said grapes are not being sold for any specific purposes," and that "the terms herein contained embody each and every covenant and promise on behalf of the parties hereto." So long as respondent delivered grapes of the quality provided by the contract and used due care in harvesting them, he was doing all that was required of him under the contract.

[4, 5] The contract contained the further provision that: "In the event of a failure of the second party to accept and pay for any grapes, as hereinbefore provided, the party of the first part reserves the option to immediately dispose of any grapes covered by this contract whether on the vine or not paid for as herein provided at the best market price obtainable, and charge second party with any loss that might be occasioned by such disposal, and this agreement shall become null and void thereafter." From this provision appellant argues that after respondent disposed of the first lot of grapes refused by appellant the contract was terminated, and that any delivery to appellant thereafter was not made under the contract, but must be held to have been made for the reasonable market value and not for the contract price. The parties, however, continued to operate under the contract, and appellant thereafter accepted and paid for a large quantity of grapes at the contract price. This constituted a waiver of the provision for the termination of the contract. The provision further was for the benefit of the seller and could in any event be waived by him. Of a similar provision in a contract for the sale of land, i. e., that on default of the buyer "the agreement shall be void," our Supreme Court, after reviewing many cases, said in Wilcoxson v. Stitt, 65 Cal. 596, 4 P. 629, 52 Am. Rep. 310: "In the light of these cases, and we find none to the contrary, we feel constrained to hold that the meaning of the clause under discussion in the agreement in this case is that such agreement is void only at the election of the plaintiff, who can avoid it or enforce it at his option."

[6] Appellant further complains of the action of the trial court in refusing a number of instructions based on the provisions of the California Fresh Fruit Act (Stats. 1921, p. 1235) regulating the condition and manner in which fruit when delivered for shipment or offered for sale shall be packed. However, section 5 of that act, as amended in 1923 (Stats. 1923, p. 663), exempts from the provisions of the act all fresh fruits intended for use in the manufacture of by-products. Section 6 of the act (Stats. 1921, p. 1237) defines "by-products" as "any product manufactured from fresh fruits, fresh vegetables, or their juices." The transcript leaves in no doubt the fact that the grapes covered by this contract were wine or juice grapes and not table grapes.

[7-9] The court did not err in rejecting evidence of the condition of other grape crops in the vicinity. The testimony was very full on both sides as to the condition of the crop covered by the contract. Nor was it error to exclude evidence of directions given by appellant to respondent as to the manner in which

grapes should be picked. Both parties in that regard were bound by the provisions of the contract. Appellant's offer of a letter from an eastern consignee was properly rejected as hearsay, and an objection was properly sustained to the question whether grapes picked in a damp condition would stand shipment to the east under the provision of the contract above noted that "said grapes are not being sold for any specific purposes."

We likewise find no error in the evidence received over appellant's objection. In fact, in view of the length of the trial (the clerk's transcript covers over 650 pages), it is remarkable that appellant has only pointed out five trivial instances in which he claims any error was committed in the admission of evidence.

Appellant complains of the giving and refusal to give a great number of instructions. For the most part, these complaints are based upon appellant's erroneous theories of the case heretofore discussed. An examination of the instructions given and refused satisfies us that the jury were fully and fairly instructed concerning rights of both parties under their contract and the law applicable thereto.

[10] One serious question remains to be considered. The court failed to give the jury any instruction concerning the allowance of interest. The jury brought in a verdict for plaintiff for $7,003.39, the full amount prayed. Thereupon the plaintiff moved the court for an order directing the clerk to add to the judgment upon the verdict interest at the rate of 7 per cent. per annum upon the various sums making up the total of the verdict from the date when each sum became due under the contract. This the court did and judgment was entered in the total sum, including such interest, of $8,122.75. Respondent was entitled to interest as a matter of law (Ryland v. Heney, 130 Cal. 426, 62 P. 616; Brazil v. Azevedo, 32 Cal. App. 364, 162 P. 1049), and the trial court should so have instructed the jury. Having failed to instruct them on this point, had the trial court any power to add the interest to the principal sum found due by the jury?

Section 664, Code of Civil Procedure, provides: "When trial by jury has been had, judgment must be entered by the clerk, in conformity to the verdict." This language is mandatory. It has always been the rule in this state that the court cannot enter a judgment different from that returned by the jury except where it would have been proper to direct a verdict or as a condition to denying a motion for new trial. City and County of San Francisco v. Superior Court (Cal. App.) 271 P. 121; Slater v. Mayzie, 69 Cal. App. 87, 230 P. 453; Alpers v. Schammel, 75 Cal. 590, 594, 17 P. 708. In the last-cited case, judgment was entered by the clerk for $86 more than the verdict of the jury. Counsel for respondent argued that this represented 4 months' interest on the principal sum. Said the Supreme Court (75 Cal. 594 [17 P. 709]): "This was in excess of the authority vested in the clerk by the statute. The judgment should have been entered for the amount of the verdict, with interest at the legal rate from the day on which it was returned by the jury. The respondents' mode of accounting for the insertion of a sum greater than the verdict on the judgment is not sustained by the record, and if it was, *it would not be in accordance with the mode pointed out by statute.*"

This is the only case in California which touches at all upon this precise question. It is, however, in keeping with section 664, Code of Civil Procedure, above pointed out, and section 626, Code of Civil Procedure, which provides: "When a verdict is found for the plaintiff in an action for the recovery of money, or for the defendant, when a counterclaim for the recovery of money is established, exceeding the amount of the plaintiff's claim as established, the jury must also find the amount of recovery." Section 3287, Civil Code, provides for interest on money judgments. It is found in the chapter of the Civil Code entitled "Damages in General" and under the article headed "Interest as Damages."

In other jurisdictions the courts are sharply divided on the subject. In the following cases the courts have held that interest cannot be added to the verdict: Meffert v. Lawson, 315 Mo. 1091, 287 S. W. 610; Shoup v. Waits (Fla.) 107 So. 769; Gillett v. Clark, 6 Mont. 190, 9 P. 823; American Soda Fountain Co. v. Shell, 160 N. C. 529, 76 S. E. 631; Wichtreet v. Fasnacht, 17 La. Ann. 166. In the following cases the court has held that interest could be added: Hack v. Lashley, 197 Ky. 117, 245 S. W. 851; Ewing v. Foley, 115 Tex. 222, 280 S. W. 499, 44 A. L. R. 627; St. Louis R. Co. v. Oliver, 17 Okl. 589, 87 P. 423, 10 Ann. Cas. 748; Alloway v. Nashville, 88 Tenn. 510, 13 S. W. 123, 8 L. R. A. 123; Marsh v. Kendall, 65 Kan. 48, 68 P. 1070; McAfee v. Dix, 101 App. Div. 69, 91 N. Y. S. 464.

In the Missouri, Florida, and North Carolina cases holding that the court had no such power, and in the Kansas case holding that it had, it appeared that there were statutes similar to one or more of our Code sections above quoted.

While the question is not free from difficulty, we have reached the conclusion that under the provisions of our Code the judgment must conform strictly to the verdict of the jury and the court had no power to add interest to the judgment. So long as the right to trial by jury is guaranteed the parties should have the right to have every issue passed upon by the jury.

The judgment is accordingly modified by reducing the amount thereof from $8,122.75

to $7,003.39, and as so modified it is affirmed, the appellant to recover his costs on appeal.

We concur: KOFORD, P. J.; STURTEVANT, J.

---

95 Cal. App. 617

In re VISAXIS' ESTATE.★

VISAXIS v. VISAXIS et al.

(Civ. 6234.)

District Court of Appeal, Second District, Division 2, California. Dec. 20, 1928.

Rehearing Denied Jan. 18, 1929. Hearing Denied by Supreme Court Feb. 18, 1929.

1. Wills 🔑229—Interest of legatee under earlier will held sufficient to entitle him to institute contest of proceedings for probate of later will of testator, where earlier will was offered for probate in connection with contest. (Code Civ. Proc. § 1327).

Legatee under earlier will of deceased *held* to have sufficient interest to entitle him to contest the probate of a later will, under Code Civ. Proc. § 1327, where earlier will was offered in connection with the contest of the second one, though such legatee was not an heir at law of testator.

2. Wills 🔑263—Court held to have jurisdiction in will contest by legatee under prior will as between contestant and person served with citation, notwithstanding failure to serve all legatees under subsequent will (Code Civ. Proc. §§ 1328, 1329).

Failure to serve citation in proceedings for probate of will on all legatees under prior will of testator, under Code Civ. Proc. §§ 1328, 1329, *held* not to deprive court of jurisdiction in contest proceedings, under section 1327, by legatee under subsequent will; contest being permitted to proceed as between contestant and those upon whom citation is served.

3. Wills 🔑248—Jurisdiction over will contest attaches when petition is filed (Code Civ. Proc. § 1327).

Jurisdiction of court over will contest, under Code Civ. Proc. § 1327, attaches upon filing of petition.

4. Wills 🔑264—In will contest by legatee under prior will, refusal to bring in another legatee under prior will as new party held not error (Code Civ. Proc. §§ 389, 1327).

In will contest by legatee under prior will, under Code Civ. Proc. § 1327, trial court's denial of motion to bring in another legatee under the prior will as a new party *held* not error, under section 389, since new party was not indispensable to complete determination of controversy.

5. Parties 🔑51(4)—Court has no authority to bring in new party for determination of controversy irrelevant to issues between original parties (Code Civ. Proc. § 389).

Under Code Civ. Proc. § 389, requiring court to order new parties to be brought in when necessary to complete determination of controversy, court has no authority to bring in controversy with stranger which is not related to the action between the parties.

6. Witnesses 🔑211(2)—Testimony of physicians in will contest that testator had tumerous or cancerous growth on tongue and was syphilitic held privileged (Code Civ. Proc. §§ 1327, 1881, subd. 4).

In will contest, under Code Civ. Proc. § 1327, testimony of physicians that testator had a tumorous or cancerous growth on his tongue and was syphilitic and testimony as to connection of disease with mental capacity *held* within scope of Code Civ. Proc. § 1881, subd. 4, precluding examination of physician as to information acquired in attending patient which was necessary to enable him to prescribe or act for the patient.

7. Evidence 🔑16—It is matter of common knowledge that "606" is name frequently used for salvarsan, a specific for syphilis.

It is matter of common knowledge that "606" is a name frequently used for salvarsan, a specific for syphilis.

8. Witnesses 🔑219(1)—Patient, client, or parishioner may deprive himself of protection afforded by law of confidential communications if he discloses to others the identical matters disclosed to his physician, lawyer, or priest.

A patient who has consulted a physician, a client who has consulted a lawyer, or a parishioner who has confessed to a priest may deprive himself of the protection of the law of confidential communications if he discloses the same matters to others who do not come under the ban of that law.

9. Witnesses 🔑219(1)—One who has introduced evidence of facts claimed to be privileged may not object that additional testimony offered as to those facts is privileged.

One who might otherwise object to testimony on ground of privilege is estopped to do so when he has introduced evidence which discloses the facts which he claims to be privileged.

10. Trial 🔑75—One introducing evidence of certain facts waives right to object to benefits of evidence of same facts.

One who introduces evidence of certain facts waives right to object to offer of evidence of same facts on the part of his opponent.

11. Trial 🔑75—Striking physician's testimony as to testator's syphilitic condition held error notwithstanding privilege, where contestant introduced similar evidence (Code Civ. Proc. § 1881, subd. 4).

In will contest, action of trial court in striking testimony of physicians as to tumorous growth on testator's tongue, and his syphilitic condition *held* error, though such testimony was privileged within Code Civ. Proc. § 1881, subd. 4, where contestant at whose instance the testimony was stricken out previously introduced witness who testified that testator had cancer on tongue and was taking treatments from physicians, including 606 treatment, and where contestant offered death certificate showing lues was contributory cause of death, and that treat-

---

★Rehearing denied. Hearing denied by Supreme Court.

ment administered to deceased was radium and antisyphilitic.

12. Wills 🔑53(2)—Evidence of testator's mental condition before or after execution of will, in so far as it establishes testator's capacity at time of execution, is admissible in will contest (Code Civ. Proc. § 1327).

Evidence as to testator's mental condition before and after execution of will is relevant and admissible in will contest, under Code Civ. Proc. § 1327, in so far as it tends to show testator's mental condition at time of executing will.

13. Wills 🔑330(1)—Instruction that proof of testator's subsequent insanity would not carry presumption of its past existence held properly refused (Code Civ. Proc. § 1327).

Requested instruction in will contest, under Code Civ. Proc. § 1327, relative to presumption of sanity and concluding with statement that proof of testator's subsequent insanity would not create presumption of its past existence, *held* properly rejected where there was testimony to the effect that testator was of unsound mind both before and after execution of the will.

14. Trial 🔑261—Refusal of instruction containing statement which should not go to jury is proper.

Trial judge acts properly in refusing a proposed instruction if any statement contained therein is such that it could not go to the jury.

15. Wills 🔑330(3)—Refusal of requested instruction that uncle is not obliged to provide for nephews held error in contest of uncle's will by nephew as legatee under prior will (Code Civ. Proc. § 1327).

Refusal of instruction that uncle is under no obligation to provide for his nephews by will *held* error, under Code Civ. Proc. § 1327.

16. Wills 🔑330(3)—Requested instruction that uncle need not provide for nephew by will held not covered in will contest by instruction permitting jury to consider evidence of natural objects of testator's bounty in determining his mental capacity (Code Civ. Proc. § 1327).

Instruction in will contest, under Code Civ. Proc. § 1327, that jury had right to consider evidence of natural objects of testator's bounty in determining his mental capacity, did not cover requested instruction to the effect that uncle is under no obligation to provide for nephews by will.

17. Wills 🔑330(1)—Refusal of instruction that opinion of subscribing witnesses as to testator's mental capacity was entitled to more weight than that of merely passive witnesses held error (Code Civ. Proc. § 1327).

Law presumes that subscribing witnesses had attention directed to and noted the mental capacity of the testator, and refusal of instruction in will contest, under Code Civ. Proc. § 1327, that opinion of subscribing witnesses was entitled to more weight on question of mental capacity than opinion of other witnesses who were merely passive, was error.

18. Appeal and error 🔑1002—Evidence will not be held insufficient to support verdict, where conflict appears from record.

Evidence cannot be held insufficient to support verdict, where record shows conflict in evidence.

19. Wills 🔑400—Error in striking evidence and refusing instructions in will contest, in which preponderance of evidence was contrary to jury's verdict, warranted reversal (Code Civ. Proc. § 1327; Const. art. 6, § 4½).

In will contest, under Code Civ. Proc. § 1327, in which undoubted preponderance of evidence showed testamentary capacity of testator, but jury found against the will, error of trial court in striking testimony of witnesses and refusing instructions was such as might have caused miscarriage of justice and therefore warranted reversal, under Const. art. 6, § 4½.

Appeal from Superior Court, Los Angeles County; Edward T. Bishop, Judge.

Proceeding by Maria B. Visaxis and another for probate of the will of Basil Visakis, sometimes known as Basil Vitsaxes, deceased, contested by George C. Visaxis. From an order revoking the probate of the will first presented and admitting to probate an earlier will, petitioner named appeals. Judgment reversed, and contest remanded.

E. C. Pyle, of Los Angeles, for appellant.

George Beebe and Lyon, Fleming & Robbins, all of Los Angeles, for respondent.

WORKS, P. J. This is an appeal from an order or judgment revoking the probate of a certain will and admitting to probate an earlier will made by the decedent. The will affected by the revocation was executed October 8, 1926. The earlier will was executed August 3, 1922. The testator died October 19, 1926.

[1] The contestant through whose efforts the probate of the will of 1926 was revoked, the respondent here, was not an heir at law of the testator, but he was a legatee under the will of 1922. Section 1327 of the Code of Civil Procedure provides: "When a will has been admitted to probate, any person interested may, * * * contest the same or the validity of the will." Appellant contends that respondent is not a "person interested" within the meaning of the section, especially as the will of 1922 had not been admitted to probate before the contest of the will of 1926 was instituted. This contention is directly nullified by what the Supreme Court said in Estate of Langley, 140 Cal. 126, 73 P. 824. In that case an earlier will had been offered for probate and the proceeding was yet pending when the contest of a later document was sustained. It was determined that, under such circumstances, the interest of a devisee under the earlier will was sufficient to entitle him to contest the later one. Here the earli-

er will was offered for probate in connection with the contest upon the second one, and it was admitted to probate by the judgment from which the present appeal is prosecuted. On the point here presented, see, also, Ruth v. Krone, 10 Cal. App. 770, 103 P. 960; Estate of Land, 166 Cal. 538, 137 P. 246; In re Phillips' Estate, 261 P. 709.

[2, 3] It is insisted by appellant that the trial court was without jurisdiction to proceed with a hearing of the contest for the reason that the citation mentioned in sections 1328 and 1329 of the Code of Civil Procedure was not served upon all the legatees under the will of 1926. We can see no reason why a will contest should not proceed as between the contestant and those upon whom the citation is served. It is settled that jurisdiction over a will contest attaches upon the filing of the petition (Estate of Maescher, 78 Cal. App. 189, 248 P. 537, and cases cited), and the Supreme Court has said, in language, however, apparently unnecessary to a decision of the case before it: "It is not, as we understand it, and cannot be successfully claimed that the trial court was without jurisdiction to proceed with the trial as to contestant and such defendants as had been served with citation." Estate of Land, supra. We think the point presented is not tenable.

[4, 5] At the commencement of the trial appellant moved the court, under a notice of motion previously given, for an order bringing in a new party. This party was a legatee under the will of 1922, being situated exactly as was contestant in an interest in a denial of probate to the will of 1926. The motion to bring him in as a party was denied, and appellant contends that the ruling was error. Section 389 of the Code of Civil Procedure, concerning civil actions, provides that "when a complete determination of the controversy cannot be had without the presence of other parties, the court must then order them to be brought in," and appellant argues her point upon an assumed analogy furnished by the section. The Supreme Court has thus construed the enactment: "This section does not give the court power to bring into the action for determination a controversy between a defendant and strangers to the action which is irrelevant to the action between the parties already before it, except for the purpose of making its determination of the controversy between the parties already before it complete, and without prejudice to the rights of others. A defendant cannot inject into the action a controversy between himself and an outsider, even though it affects the property to which the action relates, unless some party already before the court is interested in, or will be affected by, the determination of such controversy." Alpers v. Bliss, 145 Cal. 565, 79 P. 171. The ruling of the trial court was not error.

[6] The ground of contest of the will of 1926 was that, at the time of its execution, the testator was not of sound and disposing mind and memory. Two physicians, Dr. Hommel and Dr. Freytag, testified upon this issue. For several months preceding his death the testator had been afflicted with a tumorous or cancerous growth on his tongue and was a victim of syphilis. Dr. Hommel testified that the condition of the testator's tongue had no effect on his brain cells, and Dr. Freytag said that on the morning of October 8, the day upon which the second will was executed, the testator was of sound mind. This testimony of both witnesses, as well as other statements of a similar nature, was stricken out by the court, and it is insisted that the ruling was erroneous. Dr. Hommel treated the testator for the diseases above mentioned from June 16 to September 22. Dr. Freytag, who was Dr. Hommel's assistant, acted in a similar capacity from September 23 to October 12. Both physicians testified that syphilis, in some of its stages, may affect the mind.

Subdivision 4 of section 1881 of the Code of Civil Procedure, as it stood when the contest was tried—for it has been amended since that time in certain particulars—provided that a physician cannot, "without the consent of his patient, be examined * * * as to any information acquired in attending the paitent, which was necessary to enable him to prescribe or act for the patient." It appears to us that the testimony of the physicians which was stricken came directly within the inhibition of the statute, for it related to and was based upon information acquired during attendance upon the testator and which was necessary to enable them to treat him.

Appellant contends, however, that the right to object to the testimony of the physicians was waived by contestant, for the reason that contestant himself had introduced evidence, before Drs. Hommel and Freytag took the stand, which in effect estopped him to object to their testimony. Early in the presentation of contestant's case he offered one Xydias as a witness. This man testified that he had been a friend of the testator in his lifetime; that he and his wife, prior to the illness of testator, had been going "almost twice or three times a week" to call at the house of testator, and that during the illness they went there "almost every day, maybe miss a day or two between," and that the illness began in June or July. The witness was asked: "Did you observe the treatments he was having?" The answer: "Well, I know the treatments he was having, he has some injections with, I recollect, '606,' and he has some radium treatments about four, sixteen hours, and some X-ray treatment. * * * I was present." Xydias then testified that he accompanied testator "on the occasions that he had these treatments," and he proceeded: "Well, right on the beginning of his sickness he came to my house and he asked me to introduce him to my doctor, because he was a throat specialist, and at that time he had a cancer on the tongue and, of course, he didn't know his sickness, so he told me to bring him to my doctor. So I did, to Doctor Hommel, on Hollywood Boulevard, and the next day when we make the appointment I was pretty busy so I send my wife there to go with him and, of course, they did that. The first time the doctor saw him he said, 'I can't say the kind of disease you have, but the only thing I have to take your blood for examination and then I can tell you the correct disease.'" The witness said a little later: "He has this '606'; he has the radium treatment, and he has some X-ray treatments."

Later still the record shows this:

"Q. Well, when was he taking this '606'? A. Well that is the injections he was taking on the first part of June" (here an objection was made that the witness did not know what "606" is, but it was overruled), "and later on the doctor say, "Well, your physical condition is very strong,' and prescribed six more additional and, of course, besides some iron. Now, of course, I didn't know anything about it and the deceased told me, and the doctor, too."

Appellant also directs attention to the fact that contestant offered in evidence the certificate of the death of the testator. This paper showed the cause of death to be "Pneumonia Lobar," with the contributory causes, "Ca. of Tongue with metastases also Lues," and the treatment administered, "radium & anti-syphilitic."

[7] We think that from the quoted testimony of Xydias and the death certificate the jury could not have failed to understand the nature of one of the afflictions from which the deceased was suffering. It is a matter of common knowledge that "606" is a frequently employed name for salvarsan, a specific used in the treatment of syphilis. Xydias said that this remedy was administered to the testator by means of "injections," and it is commonly understood that syphilis is treated in that manner. The death certificate showed that one of the causes contributing to the testator's death was "lues." The meaning of this term is possibly not so well understood as is the meaning of the expression "606." The dictionary defines it as "syphilis." The showing of the certificate as to the nature of the treatment rendered the patient is particularly graphic. The character of the testator's horrible ailment was communicated to the world by the witness and by the death certificate, in an open courtroom, even if in some terms that all present did not understand. We have not quoted all of Xydias' testimony concerning the cancerous condition in the testator's mouth, for he did refer to that condition. No such quotation is necessary as the record is full of references to the condition, from the testimony adduced on both sides of the contest, and every one in the courtroom was bound to know of the existence of that affliction in the testator. Under these circumstances, is it to be said that the contestant waived the right to object to the testimony of the two physicians on the ground of privilege?

[8-11] It is to be understood that this is not a question whether the testator waived the privilege during his lifetime. Appellant does not make that point. Still, as a basis for the settlement of the point which is made it is not impertinent to observe that the books are full of cases to the effect that a patient who has consulted a physician, the client who has consulted a lawyer, or the parishioner who has confessed to a priest may deprive himself of the protection afforded by the law of confidential communications if he discloses the same matters to others who do not come under the ban of that law. The citation of authority upon this point is wholly unnecessary. We think, as the beneficiary of the privilege may thus waive his right, that there is from that circumstance reason to say that one situated like the contestant here may waive the right to object to testimony on the ground of privilege, by a disclosure in court of the privileged matter himself. The privilege exists, on grounds of public policy which are well known, for the purpose of keeping from the public those matters which come within the law of confidential communications. It would seem that one who might otherwise object on the ground of privilege is estopped to do so when he has introduced evidence which discloses the very intelligence which he claims is privileged. There appears to us to be a close analogy between this point and another which has frequently been decided. Where one introduces evidence of certain facts he waives the right to object to the offer of evidence of the same facts by his opponent. South St. Louis Ry. Co. v. Plate, 92 Mo. 614, 5 S. W. 199; Hobbs v. Board, 116 Ind. 376, 19 N. E. 186; Chicago, K. & N. Ry. Co. v. Wiebe, 25 Neb. 542, 41 N. W. 297; Carstens v. Stetson & Post Mill Co., 14 Wash. 643, 45 P. 313; Warren Live Stock Co. v. Farr (C. C. A.) 142 F. 116; Starcher v. South Penn Co., 81 W. Va. 587, 95 S. E. 28; Adams v. Ristine, 138 Va. 273, 122 S. E. 126, 31 A. L. R. 1413; Peter & Burghard Co. v. Marion Bank (Ind. App.) 149 N. E. 79; Jameson v. Tully, 178 Cal. 380, 173 P. 577. We think the trial court erred in striking out the testimony of Dr. Hommel and Dr. Freytag.

[12-14] The contest was tried by a jury. Appellant requested the trial judge to give the following instruction, but the request was refused: "The court instructs you, that the law always presumes a person to be sane, and the burden is upon the contestant of the will of the deceased to show affirmatively, and by a preponderance of the evidence, that

the testator was of unsound mind at the very time he executed the will. Insanity exists as a matter of law only from the time it is shown to exist, and proof of subsequent insanity on the part of the testator will not create, nor will it carry a presumption of its past existence."

We think, because of the last sentence in this proposed instruction, the trial judge acted properly in refusing to give it. If the sentence could be construed to mean that proof of subsequent insanity *alone* would not have the effect stated in the latter part of the sentence, it might be proper in a case in which only that sort of proof was before the jury, but that point we are not called upon to decide. In this contest there was testimony, relating to periods both before and after the execution of the will, that the testator was of unsound mind. If the instruction had been given to the jury, we think it must have been understood by the members of that body as forbidding them to consider evidence of the testator's condition of mind after the will was executed, and as so understood the sentence in question is an incorrect statement of the law. "Evidence as to mental condition before and after the execution of the will may be relevant and admissible, but it is important only in so far as it tends to show mental condition at the time of executing the testamentary document. That is to say, facts as to mental condition, whether anterior or subsequent to the date of the execution, depend for their probative force upon the clearness and certainty with which they tend to demonstrate the condition of mind and memory at the moment the will is executed." Estate of Sexton, 199 Cal. 759, 251 P. 778. Language to the same effect is to be found in Estate of Smith, 200 Cal. 152, 252 P. 325. It is true that in Estate of Perkins, 195 Cal. 699, 235 P. 45, the court said: "Insanity exists as a matter of law only from the time it is shown to exist and proof of subsequent insanity will not create nor carry a presumption of its past existence." Immediately above this statement, however, and on the same page of the report, the court said: "Evidence as to mental condition before or after the execution of the will is important only in so far as it tends to show mental condition at the time of the execution of the will." Estate of Perkins is cited as authority for the above quotation taken from Estate of Sexton. The law is well settled that a judge properly refuses a proposed instruction if any statement contained in it should not have been given to the jury. People v. Lips, 59 Cal. App. 381, 211 P. 22.

[15, 16] The judge also refused to instruct the jury that: "An uncle is under no obligations to provide for his nephews, either when living, or by will, and failure to name them, or any of them, in the will, does not, under the law, raise the presumption that they were forgotten." This instruction was offered for the reason that respondent was a nephew of the testator.

It is said in Estate of Keegan, 139 Cal. 123, 72 P. 828, a will contest, that it was not error to give the same instruction here requested. The purpose of this instruction is partially shown by the latter portion of it, and we think that, if it was not improper to give it in the case cited for the reason indicated, there is additional reason why it should have been given here. The contestant was a nephew of the testator, and the evidence disclosed that fact to the jury. The interest which was sufficient to entitle him to file the contest, as we have above pointed it out, was unknown to the jury. It was not mentioned in the instructions. At any rate, the giving of the proposed instruction would have aided in disabusing the members of the jury of an impression they may well have had, to the effect that the contest was instituted under some right that the contestant had as a nephew. It was decided in Estate of Martin, 170 Cal. 657, 151 P. 138, that it was error to refuse to instruct the jury, the proceeding being a will contest, that "the heirs of the deceased had no vested rights in the property of their ancestor because of their relationship." As it was held necessary there to caution the jury that the "heirs" had no vested interest in the property of the testator, we think, for the reasons already stated, that it was necessary here to instruct the jury as requested. The court instructed the jury as follows: "In determining the mental condition of the deceased at the time of making the will, it is proper to take into consideration evidence surrounding those who in the absence of the Will would be the natural and legal objects of his bounty. You have a right to take into consideration the fact that he had a brother, and evidence of the relations existing between them, and in showing his state of mind, of any evidence there may be of his reasons for not providing adequately for him in his Will, and whether such reasons were based on delusions or not." This instruction did not, we think, cover the matters stated in the proffered instruction that was refused. In truth, the first sentence of the given one may possibly have confused the jury on the very point as to which it was designed to inform them by the refused one.

[17] The trial judge refused to give the following instruction, requested by appellant: "The court instructs you relative to the testimony of the subscribing witnesses to the will, that the law presumes that such subscribing witnesses had their attention directed to and noted the mental capacity of the testator, and that by reason thereof, their opinion is entitled, and you should give the same in your consideration of the evidence more weight than you would give to the opinion of a witness who was merely passive."

The substance of this proffered instruction is stated to be the law in Estate of Holloway, 195 Cal. 711, 733, 235 P. 1012, and the statement was repeated in Estate of McDonough, 200 Cal. 57, 251 P. 916. As the instruction was designed to inform the jury as to the law, it was error to refuse to give it.

[18] Appellant presents, in various forms, the point that the evidence was insufficient to support the verdict. We think the record shows a conflict, and the point therefore is not well taken.

[19] The respondent, in view of the possibility that error might be found in the record, invokes the provisions of section 4½ of article 6 of the Constitution, which is to the effect that a reversal of a judgment shall not occur "unless, after an examination of the entire cause, including the evidence, the court shall be of the opinion that the error complained of has resulted in a miscarriage of justice." We have examined the entire cause, including the evidence, and think a miscarriage of justice may reasonably have been occasioned by the errors of the trial court. An undoubted preponderance of the evidence tended toward proof of the testamentary capacity of the testator. If we are to judge from the printed page, this is one of those will contests, so frequently mentioned by courts of review, in which juries have overturned wills upon very doubtful reason.

Judgment reversed and contest remanded for a new trial.

We concur: CRAIG, J.; THOMPSON, J.

206 Cal. 213

WOLF v. DONAHUE et al. (L. A. 9199.)

Supreme Court of California. Jan. 8, 1929.

1. Evidence 🔑590—Trial court should closely scrutinize testimony of interested parties offering themselves to re-establish lost contract by deceased to will property.

Trial court should closely scrutinize testimony of interested parties who offer themselves to re-establish lost or destroyed written contract or agreement by deceased person regarding disposition of his property by will, lest an irremediable wrong be done to deceased's heirs.

2. Appeal and error 🔑931(5)—Where evidence sustains judgment, appellate court must assume trial court properly scrutinized testimony of interested witnesses offering themselves to re-establish deceased's written contract to will property to plaintiff.

Where evidence was legally sufficient to sustain judgment for plaintiff, appellate court must assume that trial court scrutinized testimony of witnesses offering themselves to re-establish lost or detroyed written contract by deceased to make will leaving his property to plaintiff in light of interest which each witness may have had in result of trial.

3. Specific performance 🔑114(2)—In complaint for specific performance it was unnecessary to allege decedent received adequate consideration for contract to will property to plaintiff and that it was fair and equitable.

In complaint for specific performance, it was unnecessary to allege in specific terms that decedent received adequate consideration for contract to make will leaving all his property to plaintiff if she would perform household duties and other services for decedent, and that contract was fair and equitable as to decedent, but it was sufficient to set forth facts from which court could conclude that contract was supported by adequate consideration and was fair and just.

4. Specific performance 🔑86—Where decedent agreed to will property to plaintiff if she would perform household duties and care for decedent, and plaintiff performed, plaintiff was entitled to specific performance (Civ. Code, § 1624, subd. 7; Code Civ. Proc. § 1973, subd. 7).

Under Civ. Code, § 1624, subd. 7, and Code Civ. Proc. § 1973, subd. 7, where decedent entered into contract in writing with plaintiff whereby plaintiff was to come and devote her time exclusively to household comfort of decedent and care for him so long as he lived, in consideration for which decedent agreed to will all his property to plaintiff, and plaintiff fully performed contract but decedent died without leaving will, plaintiff was entitled to specific performance of contract.

5. Appeal and error 🔑992—Appellate court will not review ruling admitting secondary evidence to prove contents of letters burned unless evidence is inherently improbable.

Appellate court will not review trial court's ruling admitting secondary evidence to prove contents of letters which plaintiff burned, in which decedent agreed to make will leaving his property to plaintiff if she would do household work and care for him until he died, unless proof is manifestly insufficient to warrant secondary evidence or unless evidence offered to establish loss is inherently improbable or incredible.

6. Evidence 🔑187—Secondary evidence to prove contents of letters burned in which decedent agreed to will property to plaintiff held properly admitted.

Admitting secondary evidence to prove contents of letters which plaintiff burned, in which decedent had agreed to make will leaving his property to plaintiff if she would perform household duties and care for decedent until he died, *held* not abuse of discretion.

7. Specific performance 🔑86—Equity will decree specific performance of agreement to will property (Civ. Code, § 1624, subd. 7; Code Civ. Proc. § 1973, subd. 7).

Court of equity will decree specific performance of an agreement to make particular disposition of property by last will and testament which is valid under Civ. Code, § 1624, subd. 7, and Code Civ. Proc. § 1973, subd. 7.

Department 1.

Appeal from Superior Court, Los Angeles County; William C. Doran, Judge.

Action upon a contract for the transfer of real and personal property by Jennie Wolf against James Donahue and others. From a judgment for plaintiff, defendants appeal. Affirmed.

Koenig & Ramsaur and Victor H. Koenig, all of Los Angeles, for appellants.

Thomas A. Wood and Michael F. Shannon, of Los Angeles, for respondent.

SEAWELL, J. This appeal was taken from a judgment decreeing that by a contract and agreement entered into by and between Daniel Donahue and respondent, Jennie Wolf, in 1911, she was entitled to all of the real and personal property standing in the name of Daniel Donahue at the time of his decease and claimed by the administrator of his estate as property belonging to his estate and directing that conveyances of the real property be executed and delivery of the personal property be made to respondent by said administrator after the payment of all lawful subsisting claims and demands against said estate and costs of administration.

Daniel Donahue, who located in California a number of years ago, died intestate, a resident of Ocean Park, county of Los Angeles, on or about December 3, 1923, at about the age of 68 years, leaving real and personal property situate in the county of Los Angeles standing in his name aggregating about $54,000 in value. An original mortgage in the sum of $12,000 upon the real property had been reduced by the payment of $3,000, leaving an existing balance due of $9,000. Daniel Donahue left no child or children, his heirs at law being three brothers and three sisters, appellants herein, all of whom are past or well along in middle life.

Decedent and respondent, Jennie Wolf, were first cousins, their respective fathers being brothers. Before coming to the United States of America from England, respondent, who was then a small child, and her mother lived at the home of Daniel's father. Upon coming to America, respondent subsequently married and located at New Haven, Conn., where she and her husband, who was a landscape gardener, resided until the latter's death, which occurred May 11, 1911. Respondent was left a widow, with one son, aged about 17 years, and two daughters, aged about 11 and 14, respectively. A correspondence had its inception in 1910 by respondent writing a letter to Daniel Donahue's wife addressed to her residence at Ocean Park, in which she stated that her husband was thinking of coming to Ocean Park to engage in landscape gardening. No answer was received to this letter until about one year later, at which time it was answered by Daniel Donahue. In the meantime he and his wife had become divorced, and the husband of Jennie Wolf had deceased. In this letter he lamented his loneliness and ill health. He was then engaged in conducting a fish and poultry market at Ocean Park. In his letter, not being previously informed as to the death of respondent's husband, he inquired if he was still thinking of coming to California to engage in landscape gardening and wrote encouragingly of the outlook. In her return letter she informed him of her husband's death and told him that any notion she had previously entertained of coming to California would have to be abandoned because of her husband's demise. Within two weeks after writing the above information to Daniel Donahue, she received a second letter from him in which he expressed his sorrow at the death mentioned and advised her not to worry, as living troubles, doubtless having in mind his separation from his wife, were worse than death. He further suggested that as long as her husband was dead he could not see how that event should interfere with bringing her family to California and making their home with him. He said he was very ill and could not attend to both his home and business and he needed some one to look after the home, and that if she came to his home she would never be sorry for so doing; that neither she nor her children should ever be in want; and that when he should pass away he would see to it that everything he had would be hers and her children would be well cared for. She showed the letter to a neighbor, with whom she advised, who corroborated respondent on substantial matters as to the contents of said letter. Her testimony is that she replied to his letter and informed him that she was conducting a wardrobe, drycleaning, dressmaking, and remodeling business at New Haven, was among neighbors and friends and was getting along well, and that she was not inclined to break up her home and go to California without any assurance that she would improve her situation. The correspondence extended through a period of about five months, in which he repeated his promise to leave her his estate upon his death if she would come to California, do his housekeeping, and help him in his business. On October 9, 1911, he forwarded to her transportation for herself and three children and she disposed of her personal effects and went with her children to his home at Ocean Park and remained a member of his household until his death, December 3, 1923. The poultry and fish business he was conducting was of unknown value. The market was destroyed by fire in September, 1912. He owned two lots at Ocean Park valued at $700 and $4,000 respectively. Some time after the destruction of the market by fire he re-established the poultry business at his home and subsequently erected a quadruple apartment house. Her testimony as to the services she rendered during the 12 years of her residence in decedent's home, for which she received no compensation, constitutes a full chapter of long hours spent in dressing and preparing fowls of all kinds for the market, caring for and raising fowls, assisting in conducting the poultry business, cooking, washing, and doing work of a housekeeper, as well as doing menial service in keeping the apartment house in order.

[1, 2] Testimony was given by several witnesses which either directly supported or tended to support respondent's claims. Testimony, on the other hand, was offered by the brothers and sisters tending strongly to rebut the contention that decedent had agreed or contracted to leave his property by will to respondent for personal services or assistance to be rendered by her to him. In this class of cases the temptation is strong for those who are so inclined to fabricate evidence giving color to the claim that a written agreement subsequently lost or destroyed was made by a decedent to dispose of his property at death to the claimant. For this reason the trial court should closely scrutinize the testimony of interested parties who offer themselves to re-establish an alleged lost or destroyed written contract or agreement, lest an irremediable wrong be done to the heirs of a decedent whose lips cannot speak in protest against the consummation of a wicked design. But where the evidence is legally sufficient to sustain the judgment, as in the instant case, we must assume that the trial court scrutinized the testimony of the witnesses in the light of the interest which each may have had in the result of the trial.

The contract upon which the action was brought consisted of a number of letters that passed between said Daniel Donahue and respondent, Jennie Wolf, which had long since been destroyed by said respondent. The contents of said correspondence, which began in May and concluded in October, 1911, by respondent coming to Daniel Donahue's home, were re-established by parol evidence. The letters written by Jennie Wolf in reply to his, if not destroyed by him shortly after being received, were probably destroyed by a fire which consumed his place of business in 1912.

At the time respondent took her place in the Donahue household his real property was of small value, not exceeding $4,700, and there is no evidence showing that he possessed personal property of any consequence. The trial court found that on or about October 9, 1911, he entered into a contract in writing with respondent whereby the respondent was to come to Ocean Park and bring with her her children and devote her time solely and exclusively to the household comfort of Daniel Donahue, doing the household duties, cooking, mending and working for the said Daniel Donahue and to care for him during his illness and look after his general welfare and comfort so long as he should live; that in consideration of those services he agreed that upon his death he would leave a will devising and bequeathing to the said Jennie Wolf all the property of which he might die seized, real and personal; that both accepted the terms of said contract and the respondent fully and faithfully performed all of its terms and conditions on her part to be performed and that said Daniel Donahue died on December 3, 1923, leaving no will or other instrument conveying said property to said respondent. The court specifically found that respondent, in addition to doing all the household work, assisted said Donahue through a series of years in the conduct and management of his business, to wit, a fish and poultry market and grocery store, and in the preparing and dressing of poultry for market; that said Donahue in the spring of 1913 erected an apartment house upon a lot which he owned at the time he entered into said contract and for a period of nine years respondent did a large part of the general work required to keep the same in habitable condition, such as sweeping and cleaning said apartments, washing blankets and curtains, and doing the janitor work in general. The court further found that said Daniel Donahue at the time he entered into said contract with Jennie Wolf owned two lots, one situate in Ocean Park and the other situate in the city of Venice, state of California, being then of the value of $4,000 and $700, respectively, and also a fish and poultry business of unknown value; that on September 1, 1912, the building located on one of said lots and the building in which the fish and poultry business was conducted were destroyed by fire; that thereafter the poultry business for a time was conducted at the residence of said Daniel Donahue. The court found the contract was fair, just, and equitable in all respects as between the parties thereto. The court lastly found that all of the property left by said Daniel Donahue, deceased, was in the process of being probated, and that it was subject to all just claims and demands against said estate and the costs of administration, and that Jennie Wolf was entitled to a decree carrying into effect the full performance of said contract; that appellants, who are the heirs at law of said Daniel Donahue, hold the legal title to said real property of which said Daniel Donahue died possessed as trustee for the use and benefit of said Jennie Wolf. As conclusions of law from the facts found, the court concluded that Jennie Wolf is the equitable owner of all of the property of which said Daniel Donahue died seized and possessed, subject to the payment of his debts and the costs, charges and expenses of administration. Said appellants and the administrator of the estate of Daniel Donahue, deceased, were directed to execute all necessary conveyances in favor of said Jennie Wolf and to pay over to her all personal property that may have come into their possession as heirs at law or as the administrator of said estate.

[3, 4] We are of the opinion that the court did not commit reversible error in overruling appellants' general demurrer to the amended complaint on the ground that it did not contain in specific terms an allegation that the decedent received adequate consideration for the contract and that it was fair and equitable as to him. The rule is thus stated in Magee v. Magee, 174 Cal. 276, 162 P. 1023:

"It is not necessary, however, that the complaint for specific enforcement should declare, in the very words of the code, that there was 'an adequate consideration for the contract' and that it was 'just and reasonable.' These allegations, standing alone, would be objectionable as embodying the mere conclusion of the pleader. The proper mode of pleading is to set forth the facts from which the court may conclude that the contract is supported by an adequate consideration and is, as to the defendant, fair and just. Stiles v. Cain, 134 Cal. 171 [66 P. 231]; White v. Sage, 149 Cal. 613 [87 P. 193]."

The amended complaint conforms with the requirements above announced, inasmuch as the facts from which the court concluded that the contract was supported by an adequate consideration and was as to decedent fair and just are very fully set forth and from them, supported by the evidence, the court concluded that this was a proper case to enter its decree for specific performance. The motion for a nonsuit was properly denied, as we have held that the findings, which justify the conclusions, are, in turn, supported by the evidence.

[5, 6] Appellants complain that it was error for the court to admit secondary evidence to prove the contents of the letters which the respondent claims she burned. She testified that it was her habit to burn or destroy letters shortly after answering them, and as she attached no particular importance to the letters at the time, and did not suspect they would have a future value, she destroyed them. Her testimony on the subject is that she probably burned them with accumulated papers and letters the first time she cleaned house after receiving them, or at the time she was preparing to leave for California. No suspicion arises from the bare circumstance of burning the letters as related by the respondent, and, inasmuch as the trial court was satisfied that said letters contained the substance of the contract contended for and were not destroyed with the intent of accomplishing a sinister purpose, this court will not review its ruling unless the proof is manifestly insufficient to warrant the secondary evidence or unless the evidence offered to establish the loss is inherently improbable or incredible. Kenniff v. Caulfield, 140 Cal. 34, 73 P. 803; King v. Samuel, 7 Cal. App. 55, 93 P. 391. It cannot be said, as a matter of law, that the trial court abused its discretion by ruling the evidence admissible.

[7] The statutes of this state provide that a person may make a valid agreement binding himself legally to make a particular disposition of his property by last will and testament. Civ. Code, § 1624, subd. 7; Code Civ. Proc. § 1973, subd. 7. It is well settled in this state by numerous decisions that a court of equity will decree specific performance of such an agreement upon the recognized principles by which it is governed in the exercise of this branch of its jurisdiction. Owens v. McNally, 113 Cal. 444, 45 P. 710, 33 L. R. A. 369; Doolittle v. McConnell, 178 Cal. 697, 174 P. 305; Rogers v. Schlotterback, 167 Cal. 35, 138 P. 728; McCabe v. Healy, 138 Cal. 81, 70 P. 1008; Steinberger v. Young, 175 Cal. 81, 165 P. 432. There are cases involving questions of public policy, as, for example, the marriage of the promisor to a person other than the promisee subsequent to the time he contracted to dispose of his estate, or cases where the contract is contrary to good morals, or where the rights of intervening innocent third parties would be affected thereby, in which instances specific performance will not be decreed. None of these objections appear in the instant case.

It may be proper to state in passing that none of the brothers or sisters in the instant case were upon close or intimate terms with the decedent during the years that respondent lived in his household, and that their relations with him were not such as to indicate that their interest in his welfare was more than that of brothers and sisters who had long been separated.

Judgment affirmed.

We concur: CURTIS, J.; PRESTON, J.

---

206 Cal. 130

GROSS v. HAZELTINE et al. (L. A. 10722.)

Supreme Court of California. Dec. 31, 1928.

1. New trial ⚷116(2)—Notice of intention to move for new trial, having been filed before receiving notice of entry of judgment, held timely (Code Civ. Proc. § 659).

Where defendants filed notice of intention to move for new trial before receiving notice of entry of judgment, defendants not having filed notice of appeal or taken any other step that might be construed as waiving service of notice of judgment entry, *held* that new trial proceedings were timely, under Code Civ. Proc. § 659.

2. New trial ⚷139—Parties by conduct cannot waive court's jurisdiction to pass on new trial dependent on notice (Code Civ. Proc. § 660).

In view of Code Civ. Proc. § 660, providing that service of notice of the entry of judgment is necessary to start the time running within which a trial court may pass on new trial proceedings, the parties cannot by their conduct waive the court's jurisdiction in respect thereto.

3. Appeal and error ⚷345(1)—Appeal taken before termination of new trial proceedings, where notice of intention to move for new trial had been made, but motion never was, held timely (Code Civ. Proc. §§ 660, 939).

Defendants gave notice of intention to move for new trial before being served with notice of entry of judgment, and before they filed notice of appeal. Motion for new trial was not made, and defendants thereupon filed notice of appeal from the judgment. *Held*, in view of Code Civ. Proc. § 660, providing that service of notice of the entry of judgment is necessary to start time running within which a trial court may pass on new trial proceedings, that appeal was timely, under section 939, providing for taking of appeal from judgment within 30 days after termination in trial court of new trial proceedings.

4. Appeal and error ⚷345(1)—Bill of exceptions on appeal, filed before termination of new trial proceedings, held timely, no way existing to determine limitation (Code Civ. Proc. § 650).

Bill of exceptions on appeal, filed before termination of new trial proceedings, *held* timely, under Code Civ. Proc. § 650, providing for filing bill of exceptions within 10 days after notice of decision denying motion for new trial or other termination of the new trial proceedings, for reason that there is no way to determine limit of time within which bill should have been prepared and served, in the absence of termination.

5. Appeal and error ⚷345(1)—Filing and service of notice of intention to move for new trial defers time for appeal and preparation of bill of exceptions (Code Civ. Proc. §§ 650, 939).

Filing and service of notice of intention to move for new trial defers time for appeal under Code Civ. Proc. § 939, and preparation of bill of exceptions, covering only record of trial and judgment, under section 650, until termination of new trial proceedings.

In Bank.

Appeal from Superior Court, Imperial County; Franklin J. Cole, Judge.

On rehearing. Former opinion (269 P. 925) adopted, and motions to dismiss the appeal and exclude the bill of exceptions from the record denied.

Surr & Hellyer, of San Bernardino, for appellants.

Harry W. Horton, of El Centro, for respondent.

PER CURIAM. By reason of an oversight this cause was prematurely submitted for decision and decided, in disregard of a stipulation of the parties allowing time for the filing of further briefs. Upon petition for rehearing this fact was brought to our attention, and the decision (269 P. 925) was promptly set aside to permit of further briefing, and particularly to allow respondent to urge a point which he stated had "not been raised in California as yet." Examination of the briefs so filed and of the contention most strongly relied on by respondent, which contention will receive consideration below, has failed to convince us that the conclusion announced in our former opinion was erroneous. That opinion is hereby adopted as and for the decision of the court.

[1-3] Respondent presents a motion to dismiss the appeal herein and to exclude the appellants' bill of exceptions from the record. The action was brought to recover a money judgment and to foreclose a mechanic's lien for services performed. Judgment was entered for the plaintiff on December 18, 1926. Thereafter, and on January 3, 1927, the defendants filed their notice of intention to move for new trial, but a motion for new trial was never actually made. In passing, it might be said that the respondent failed to serve notice of the entry of judgment, and the new trial proceedings were therefore timely instituted, under the provisions of section 659 of the Code of Civil Procedure, for the appellants at the time had not filed their notice of appeal, or taken any other step that might be construed as a waiver of service of notice of the entry of judgment. The notice of appeal from the judgment was filed March 9, 1927.

Respondent now moves to dismiss the appeal, upon the ground that it was not taken within the time prescribed by law. The motion is without merit. Under the provisions of section 660 of the Code of Civil Procedure service of notice of the entry of judgment is necessary to start the time running within which a trial court may pass upon new trial proceedings. The parties cannot by their conduct waive the court's jurisdiction in this respect. Strehlow v. Mothorn, 197 Cal. 112, 239 P. 850; Moore v. Strayer, 175 Cal. 171, 165 P. 530. In view of the respondent's failure to serve notice of the entry of judgment, it cannot now be said that the time within which the trial court might have passed upon the new trial proceedings has expired. This being so, the appeal is within time, for section 939 of the Code of Civil Procedure provides for the taking of an appeal from a judgment within 30 days after termination in the trial court of new trial proceedings.

However, even if it be assumed that notice of entry of judgment had been served in the instant case on the very day judgment was entered, it would avail the movant nothing, for the trial court would have had 2 months thereafter, or until February 18, 1927, within which to dispose of the new trial proceedings. Section 660, supra. The appellants, under section 939, supra, would then have 30 days additional or until March 20, 1927, within which to prosecute their appeal. The appeal, having been taken on March 9, 1927, was, therefore, well within time, and the motion to dismiss will have to be denied.

[4] The motion to exclude the bill of exceptions from the record is grounded upon the assertion that the proposed bill was not served within time. In our opinion this motion must also be denied, for section 650 of the Code of Civil Procedure provides, among other things, for the preparation and service of a proposed bill of exceptions within 10 days after notice of decision denying motion for new trial or other termination of the new trial proceedings. If, as already shown, there has been no termination in this case of the new trial proceedings there is no way to determine the limit of time within which the proposed bill should have been prepared and served. Moreover, the respondent's motion, made under section 473 of the Code of Civil Procedure to vacate the settlement and allowance of the bill of exceptions was denied by the trial court, and apparently no appeal has been prosecuted from the order denying the requested relief.

[5] The contention now urged by respondent in opposition to such conclusion is that, "if a motion for a new trial is never made, it should not be the law that the mere filing and service of a notice of intention to move for a new trial should automatically defer the time

for appeal or the preparation of a bill of exceptions covering only the record of the trial and judgment in the trial court. * * * To hold to the contrary is to extend the time for appeal [and for preparation of a bill of exceptions] in a manner and for purposes never contemplated by law." A most serious and fatal objection to this contention is that it has already received the attention of this court and been disposed of adversely. Estate of Bergland, 177 Cal. 227, 228, 229, 170 P. 400; Anstead v. P. G. & E., 201 Cal. 198, 199, 200, 256 P. 209.

For the foregoing reasons, the motions to dismiss and to exclude the bill of exceptions from the record are, and each is, denied.

205 Cal. 719

In re DE CACCIA'S ESTATE.

DE CACCIA et al. v. BARRINGTON et al.

(S. F. 12731.)

Supreme Court of California. Dec. 15, 1928.

1. Wills 🔑289—Court cannot presume testator made printed words part of holographic will without some evidence appearing on face of instrument showing such intention.

Where printed words "Oakland, California," appearing on paper, were in no way essential to validity of instrument as holographic will, court will not presume that testator made them part of instrument without some evidence appearing on face of instrument itself manifesting such an intention.

2. Wills 🔑132—Mere presence of printed matter on stationery used for holographic will does not destroy effect of instrument as holographic will.

Mere presence of printed matter on stationery used for purpose of writing holographic will, which forms no part of written instrument, and to which no reference directly or indirectly is made, will not destroy effect of such instrument as holographic will.

3. Wills 🔑132—Printed words, "Oakland, California" on stationery, followed by date written in handwriting approximately on same line, did not invalidate holographic will.

Printed words "Oakland, California," on stationery used, followed by date in testator's handwriting written approximately on same line, *held* not to invalidate holographic will on ground that instrument was not entirely in handwriting of deceased, where printed words formed no part of written instrument, and no reference was made to them therein.

In Bank.

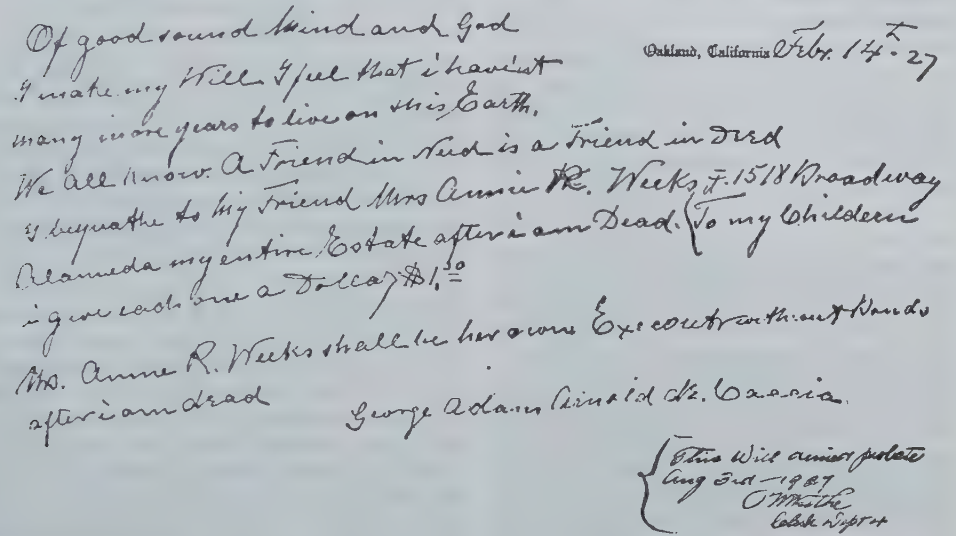
Appeal from Superior Court, Alameda County; Lincoln S. Church, Judge.

Petition by William de Caccia for the probate of the last will and testament of George Adam Arnold de Caccia, alias, deceased, opposed by Lillian E. Barrington and others. Millard and Phillis de Caccia, minors, by and through Lucille de Caccia, their guardian, filed an answer denying the allegations of the written contest. From an order denying the probate, proponents appeal. Reversed.

Carter & Peterson, Fred C. Peterson, D. T. Gardner, and W. Reginald Jones, all of Oakland, for appellants.

Edward R. Eliassen and Walter H. Eliassen, both of Oakland, for respondents.

CURTIS, J. George Adam Arnold de Caccia, at the time of his death, was a resident of the county of Alameda. He had been a resident of Oakland, in said county, but, at the time of his death, and at the time he made and signed the document hereinafter referred to, and claimed to be his last will and testament, he was a resident of Alameda, in said county. He died on the 15th day of February, 1927, and left surviving him as his only heirs at law, Lillian E. Barrington, Arnold de Caccia, Anna Cavanagh, William de Caccia, his children, and Phillis and Millard de Caccia, minor children of a predeceased son. He left a document, which appellants claim was entirely written, dated and signed by him, and was therefore his last will and testament. By this document decedent purported to leave his entire estate, except $1 to each of his children, to Mrs. Annie R. Weeks. The said Annie R. Weeks assigned all of her interest in the estate of said deceased to the said William de Caccia, the son of said deceased, and the two grandchildren of deceased, Phillis and Millard de Caccia. Thereupon the said William de Caccia filed a petition for the probate of said instrument as the last will and testament of said deceased. His petition was opposed by the said Lillian E. Barrington, Arnold de Caccia, and Anna Cavanagh, three of the surviving children and heirs of said decedent. These three children were not mentioned in the assignment by Mrs. Annie R. Weeks of her interest in said estate to William de Caccia, the son, and Phillis and Millard de Caccia, the grandchildren of said decedent. These three children of said deceased, omitted from said assignment, filed their written contest and opposition to the probate of said document as the will of decedent. Among other grounds set forth in their written contest and opposition was that said alleged or purported will of said decedent, bearing date the 14th day of February, 1927, was not wholly written, dated, and signed by the said decedent. William de Caccia, and Phillis and Millard de Caccia, by and through Lucille de Caccia, their guardian, filed an answer in which they denied the allegations of the written contest and opposition, and particularly those referring to the failure of decedent to properly execute the document dated February 14, 1927, as an holographic testament. Before the trial, all grounds of contest except that attacking the due and legal execution of said purported will were withdrawn, and a trial was had upon the one issue as to whether the instrument in question was entirely written, dated, and signed by the hand of the testator. The said instrument, claimed by appellants to be the last will of said decedent, was written upon stationery upon which the words, "Oakland California," were printed, and the whole document containing both the printed and written matter was as follows:



Of good sound Mind and God   Oakland, California Febr. 14th 27
I make my Will I feel that i havent
many more years to live on this Earth.
We all know. A Friend in Need is a Friend in Deed
I bequathe to my Friend Mrs Annie R. Weeks of 1518 Broadway
Alameda my entire Estate after i am Dead. (To my Children
i give each one a Dollar $1.00
Mrs. Anne R. Weeks shall be her own Executrix without Bonds
after i am dead   George Adam Arnold De. Caccia.

This Will denied probate
Aug 3rd — 1927
[illegible]
Clerk Deputy

It was stipulated at the trial that all of the written matter appearing on said document was in the handwriting of the decedent, and that the words, "Oakland, California," were not written by the decedent, but were embossed on said paper prior to the time the decedent wrote his purported will thereon. The stationery used was a double sheet of paper, and, when folded, consisted of four pages, the first of which would be the page on which were the printed words, "Oakland, California." The two inside pages would be pages 2 and 3, and the remaining outside page would be page 4. Decedent, for the purpose of writing his will, unfolded the double sheet, and used only the two outside pages, being pages 1 and 4. In writing his will, he began the same near the upper left-hand corner of 4, and directly opposite the words, "Oakland, California," appearing on page 1. Had he continued this first line of his will in a straight line across the portion of the two pages upon which he wrote the same, the last words of said line would have been directly opposite the printed words, "Oakland, California." The decedent, however, was apparently not an experienced penman, and, as stated by counsel for one of the parties hereto, he wrote "a large, scrawling hand." In writing he did not follow a straight line, but gave his words a slightly upward slant toward the top of the page. The result of this peculiarity was that the last words in the first line of the instrument were slightly nearer the top of the page than the printed words, "Oakland, California," were. However, the line stopped over an inch to the left of these printed words. The next two lines of the writing were parallel to and approximately of the same length as the first, with the last words of the second line lower than the printed words. The fourth written line extended further across the page than the preceding lines to a point almost directly under and about one-half inch distant from the last letters of the printed word, "California." The balance of the writing extended substantially across the two pages, except two lines which contained the closing words of the two paragraphs of the instrument. The whole instrument consisted of nine lines only, including these two partial lines.

The trial court held that the words, "Oakland, California," were a part of the instrument executed and signed by the decedent, and therefore that the instrument was not entirely in the handwriting of the deceased, and for that reason could not be and was not his last will and testament. Based upon this finding, the court made its order denying the probate of said instrument as the last will and testament of decedent. From this order the proponents have appealed.

This court has frequently given consideration to instruments which were either holographic wills or which were claimed to be such. Estate of Rand, 61 Cal. 468, 44 Am. Rep. 555; Estate of Billings, 64 Cal. 427, 1 P. 701; In re Soher, 78 Cal. 477, 21 P. 8; Estate of Thorne, 183 Cal. 512, 192 P. 19; Estate of Francis, 191 Cal. 600, 217 P. 746; Estate of Bernard, 197 Cal. 36, 239 P. 404; Estate of

Oldham (Cal. Sup.) 265 P. 183. A review of all of these cases, we think, is entirely unnecessary for the purpose of considering the question arising in the present proceeding. Estate of Bernard, supra, and Estate of Oldham, supra, however, we think, have a direct bearing upon the legal status of the instrument under consideration in the estate now before us. In the former of these two cases decedent used stationery bearing the printed words, "Long Beach, California," for the purpose of drafting his will. The entire document, with the exception of these three words, was in the handwriting of the decedent. The document was held invalid as an holographic will. The decision was based, in part at least, upon the fact that immediately preceding this printed matter the testator had written certain words which were held to be a necessary part of his will, so that the caption of the instrument read: "The following 4 sheets of paper included, Long Beach, California, Oct. 12, 1918." Referring to this caption of the instrument, the court said: "It thus appears that the decedent not only wished to make the date a part of the document, but to make, also, the printed portion, designating the place of the making of the document, an essential part of the document." In Estate of Oldham, supra, the testator used his own stationery upon which were printed his name and the building in which his office was located, followed by the words, "Los Angeles, Calif.," on a separate line. After the words, "Los Angeles, Calif.,"| the testator wrote the date the document was to bear, and then proceeded to write out his will upon three sheets of paper, signing the same at its close, all in his own handwriting. In holding this to be a valid will this court said: "It will thus be seen that in the Estate of Bernard great stress was laid upon the caption or heading of the document containing the printed words, and it was expressly held that, by the use of this heading, the deceased had made not only the date, which was absolutely necessary to the validity of the document as a testamentary disposition, but also 'the printed portion, designating the place of the making of the document, an essential part of the document.' In the instrument now before us, and which, it is contended, is the last will of John Y. Oldham, deceased, we find no reference whatever to the printed words appearing upon stationery used by the deceased in the preparation of said instrument. These printed words are not expressly, by direct reference, or impliedly, by inference or otherwise, made a part of the written instrument set forth on the sheets of paper upon which they appear."

The instrument now before us resembles in many respects that held to be a valid holographic will in the Estate of Oldham, supra. The date simply follows the printed words appearing upon the instrument. The printed words are not preceded by any writing of the decedent in which a reference is made to said printed matter, as was found to be the case in Estate of Bernard, supra, indicating that it was the intention of the testator to make them a part of the instrument. It is true that decedent in the writing of the document began the same to the left and directly opposite to the printed words, and that the first line written by him ended slightly nearer the top of the page than were the words, "Oakland, California," but there was nothing in this line, or, for that matter, in any part of the instrument, referring in any manner to said printed words, much less indicating an intention to make them, as was said in Estate of Bernard, supra, "an essential part of the document." Respondents make mention of the fact that the first line of the will is slightly above the printed words, and rely upon this circumstance as indicating an intention by the testator to make the printed words a part of the will. Even if the testator intentionally wrote some part or the whole of the first line above the printed matter, but did not make any reference therein to the printed words, we hardly see how the mere fact of this relative position of the words in the instrument would indicate any intention to make the printed words a part of the will. We think it quite evident, however, from an inspection of a photostatic copy of the will contained in the record that the position of the last few words of the first line of the writing being above the printed words, or nearer the top of the page than the printed words, was due not so much to any intention of the testator to so locate them as it was to his poor penmanship, or his habit of writing, which was to give to his writing an upward slant, rather than to write horizontally across the page. Not only the first line, but the whole instrument, shares unmistakably this peculiar characteristic in decedent's writing. The fact, therefore, that a part of the first line, written by the deceased, was slightly above the printed words, does not, in our opinion, show any intention to make the printed matter upon the paper a part of the document written thereon.

It is further contended by respondents that the deceased used scrupulous care to write the date, "Feb. 14th-27," on the same line and as close as possible to the printed words, "Oakland, California," and thus manifested a clear intention to connect the printed words in the instrument with the date of its execution. The difference between the relative position of the printed words and the written date following in the instrument now before us and in that considered in Estate of Oldham, supra, is so slight as to be almost negligible. In the Oldham will the date was so nearly in line with the words, "Los Angeles, Calif.," that in deciding that case we referred to them as "being followed by the date, written approximately on the same line." We do not believe that this slight difference in the two instruments in this respect would justify a decision in one upholding it as a legal instrument and in the other a decision declaring it invalid. In other words, we are of the opinion that the two instruments in the respect just referred to are so similar that the rules governing their construction must apply alike to both documents, and that, if one was upheld as a valid will, the same ruling must apply to the other. In Estate of Oldham, supra, upon this branch of the case, the court said: "It is claimed only that these [printed] words appearing upon the first sheet, being followed by the date, written approximately on the same line, are thus made a part of the written document itself. In Estate of Bernard a similar situation was referred to, and was considered as a possible circumstance which, taken in connection with the fact that these printed words appeared in the caption of the instrument along with words written by the deceased, tended to show an intent on the part of the deceased to make the printed words a part of the instrument itself. This circumstance, standing alone, as it does in the present proceeding, is so slight that it would not warrant the conclusion that the deceased, by simply writing after the printed words the date of the document, thereby intended to make such printed words any part of the document itself."

[1-3] The foregoing excerpt from Estate of Oldham, supra, we feel is directly applicable to the facts in the present proceeding in so far as it refers to the position of the date following the printed matter in the purported will. The mere fact that the decedent placed the date immediately after and upon the exact line with the printed words in the instrument is not in itself sufficient to show that he thereby intended to make said printed words a part of said instrument. Nowhere in said instrument is there any reference made to the printed words upon the sheet of paper used by said decedent for the purpose of writing his will. The printed words are in no way essential to the validity of the instrument as an holographic will, and we are not to presume that the decedent made them a part of the instrument he executed without some evidence appearing upon the face of the instrument itself manifesting such an intention. The mere presence of printed matter upon stationery used by a person for the purpose of writing his holographic will which forms no part of the written instrument, and to which no reference directly or indirectly is made in the written instrument, will not destroy the effect of such instrument as an holographic will.

The order denying petition for the probate of said will is reversed.

We concur: WASTE, C. J.; LANGDON, J.; PRESTON, J.; SHENK, J.; RICHARDS, J.; SEAWELL, J.

206 Cal. 118

OHAVER v. FENECH et al. (Sac. 4232.)

Supreme Court of California. Dec. 31, 1928.

1. Appeal and error 🔑460(2)—Proceedings on mandatory injunction are stayed by appeal therefrom, but not so where injunction is strictly prohibitive.

All proceedings on a mandatory injunction are stayed by an appeal therefrom, while an injunction which is strictly prohibitive in character is not stayed on appeal from order granting same.

2. Injunction 🔑205—Character of injunction is determined by nature of its provisions and effect on parties against whom issued.

Whether an injunction is prohibitive or mandatory, in its operation upon the parties whom it affects, is determined not so much by the particular designation given to it by the court directing its issuance, as by the nature of its terms and provisions, and effect on parties against whom issued.

3. Injunction 🔑4, 5—"Prohibitive injunction" merely grants preventative relief, while "mandatory injunction" directly or indirectly grants affirmative relief.

Generally, when the injunction merely grants preventative relief, it is "prohibitive," but when it directly or indirectly grants affirmative relief it is "mandatory."

[Ed. Note.—For other definitions, see Words and Phrases, First, Second, and Third Series, Mandatory Injunction; Third Series, Prohibitory Injunction.]

4. Appeal and error 🔑460(2)—Appeal from injunction granting prohibitive and mandatory relief is stayed as to mandatory provisions, but not as to prohibitive provision.

Injunction may grant both prohibitive and mandatory relief, and, when it is of such dual character and an appeal is taken, appeal will not stay prohibitive features of injunction, but as to its mandatory provisions such injunction will be stayed.

5. Appeal and error 🔑460(2)—Injunction restraining defendants from feeding garbage to hogs at ranch held prohibitive, and operation not stayed by appeal; "prohibitive injunction."

Injunction restraining defendants from shipping garbage, and feeding same to hogs, maintained by them at a ranch, *held* prohibitive in character, and its operation not stayed by appeal from order directing its issuance.

6. Appeal and error 🔑477—Appellate court has inherent power to issue supersedeas to preserve litigation pending appeal.

Appellate court has inherent power to issue a writ of supersedeas so as to preserve the status quo of the subject of the litigation until final determination of appeal.

7. Appeal and error ⚿479(1)—That defendants would sustain loss by injunction did not warrant issuance of supersedeas depriving respondent of free use of his property.

That defendants in injunction, restraining them from shipping and feeding garbage to hogs maintained by them at a ranch, would sustain a loss, if the injunction was not stayed, *held* not to warrant appellate court in granting writ of supersedeas to preserve status quo of subject of litigation until final determination of the appeal, where effect of such action would be to deprive respondent of the free use and enjoyment of his property.

In Bank.

Writ of Supersedeas to Superior Court, Yolo County; W. A. Anderson, Judge.

Application for writ of supersedeas by I. K. Ohaver against Philip Fenech and others to restrain further proceedings pending an appeal. Petition denied.

Grover O'Connor, of San Francisco, and Huston, Huston & Huston, of Sacramento, for appellants.

Robt. H. Schwab and John A. McGilvray, both of Sacramento, for respondent.

CURTIS, J. On the 21st day of April, 1927, the appellants Philip Fenech, Sam Borg, and Antonio Ciapparro entered into a contract with the city of Sacramento, whereby they undertook and agreed to collect all wet garbage from the hotels, restaurants, hospitals, and clubs in said city for a period of ten years, and to convey the same in sanitary steel garbage wagons under the direction of the city manager of said city to a place without said city. In this agreement said appellants obligated themselves to establish a ranch for the feeding of said garbage to hogs at a point not nearer than 10 miles to said city of Sacramento, and that they would deposit with said city a bond of a reliable surety company in the sum of $5,000 for the faithful performance of said contract. Pursuant to said contract said appellants have deposited such a bond. They thereafter assigned their said contract to a copartnership consisting of four persons—the said appellants Philip Fenech and Sam Borg and appellants Eugene Ciapparro and P. Grech. The members of said partnership will be herein referred to as the appellants. For the purpose of carrying out their said contract, said appellants leased the Borchers Bros. Company ranch for the period of 10 years at a monthly rental of $250 per month, and have established, and are now maintaining at said ranch, feeding pens and other necessary appliances for the purpose of keeping a large number of hogs, to which they are feeding the garbage collected by them from the hotels and other establishments of the city of Sacramento. The value of said hogs, it is alleged, is in excess of the sum of $30,000.

This action was instituted by respondent in the superior court of the county of Yolo, the county in which said Borchers Bros. Company ranch is situated, for an injunction restraining appellants from shipping to, or receiving at, said ranch any of said garbage, which is described to be of a putrid, fermenting, decayed, and decaying character, and from feeding the same to the hogs maintained at said ranch. Thereafter respondent moved the court, after due notice to appellants, for a temporary injunction restraining the appellants from the commission of any of the acts just enumerated, which motion was granted, and on the 25th day of July, 1928, there was issued out of said superior court, in pursuance of its order granting said motion, a writ of injunction directed to the appellants, restraining them until the further order of said court from shipping or receiving at the said Borchers Bros. Company ranch any garbage or similar material of a putrid, fermenting, decayed, or decaying character, and from feeding said or any garbage to hogs in the locality of the said ranch. On July 26, 1928, and within the time allowed by law, the appellants filed with said superior court their notice of appeal to this court from said order, and thereupon applied to the judge of said superior court for an order staying all further proceedings under said order, and injunction issued thereunder, but the judge of said court refused to order a stay of said proceedings, and stated that in his opinion said appeal did not stay said injunction or any proceedings thereunder. Appellants thereupon filed their petition herein for a writ of supersedeas directed to said superior court and the judge thereof, restraining all further proceedings under said injunction pending said appeal. In said petition the foregoing facts are set forth, and in addition thereto it is alleged therein that it is practically impossible before the trial of said action to find and prepare a proper place where the appellants may maintain said hogs and where said garbage may be disposed of by feeding the same to said hogs.

[1] It is the position of the appellants that the injunction issued herein is a mandatory injunction, and, accordingly, that all proceedings thereon are stayed on appeal. That all proceedings on a mandatory injunction are stayed by an appeal therefrom is well settled by the decisions of this court. Stewart v. Superior Court, 100 Cal. 543, 35 P. 156, 563; State Inv. & Ins. Co. v. Superior Court of City and County of San Francisco, 101 Cal. 135, 35 P. 549; Foster v. Superior Court, 115 Cal. 279, 47 P. 58; Mark v. Superior Court, 129 Cal. 1, 61 P. 436; Clute v. Superior Court, 155 Cal. 15, 99 P. 362, 132 Am. St. Rep. 54; United Railroads v. Superior Court, 172 Cal. 80, 155 P. 463. It is equally well settled that an injunction which is strictly prohibitive in

---

⚿For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

character is not stayed on appeal from the order granting the same. Wolf v. Gall, 174 Cal. 140, 162 P. 115. In this case the court said: "By a line of decisions beginning with the early history of the state, the rule has been settled that an appeal does not stay the force of a prohibitive injunction, and that the lower court has full power to punish a violation of such injunction pending the appeal. (Merced Min. Co. v. Fremont, 7 Cal. 130; Heinlen v. Cross, 63 Cal. 44; United Railroads of S. F. v. Superior Court of San Francisco, 172 Cal. 80, 155 P. 463). It is otherwise where [it] is mandatory. The reason for this distinction is found in the inherent nature of an order which merely restrains or prohibits affirmative action. An appeal can operate as a supersedeas or stay only by arresting the enforcement by the court below of the judgment appealed from. (Dulin v. Pacific Wood & C. Co., 98 Cal. 304, 33 P. 123.) A prohibitive injunction requires no execution for its enforcement. It acts 'directly without process upon the defendant' (Heinlen v. Cross, 63 Cal. 44). In the case of a mandatory injunction, on the other hand, the contempt proceeding is a kind of process to carry into execution the affirmative command embodied in the judgment."

[2-4] In the present action the order granting the issuance of the injunction expressly refers to it and designates it as a mandatory injunction. The character of an injunction, however, and whether it is prohibitive or mandatory in its operation upon the parties whom it affects, is determined not so much by the particular designation given to it by the court directing its issuance, as by the nature of its terms and provisions, and the effect upon the parties against whom it is issued. Clute v. Superior Court, supra. As a general rule, we think we may say that when the injunction merely grants preventative relief it is prohibitive, but when it directly or indirectly grants affirmative relief it is mandatory. Mark v. Superior Court, supra. An injunction may grant both prohibitive and mandatory relief, and, when it is of this dual character, and an appeal is taken, such appeal will not stay the prohibitive features of the injunction, but as to its mandatory provisions said injunction will be stayed. People ex rel. Bradford v. Laine, 177 Cal. 742, 171 P. 941.

The main purpose of the present action, as shown by the petition and answer herein, is to restrain the appellants from shipping or receiving into the locality in which the respondent's property is situated the garbage from the hotels and restaurants of the city of Sacramento, and from feeding the same to hogs in said locality. This garbage when brought to said ranch and fed to said hogs, it was alleged, and the court found, so infected and polluted the atmosphere in the surrounding territory, including the premises upon which the respondent resides, as to endanger the comfort and health of respondent and his family, and to obstruct the free use and comfortable enjoyment by respondent and his family of their home situated upon said premises.

[5] It is perfectly clear from the authorities above cited that the injunction issued in this case, restraining the appellants from shipping garbage and feeding the same to the hogs maintained by them at the Borchers Bros. Company ranch, is prohibitive in character, and that its operation and effect are not stayed by the appeal taken from the order directing its issuance. It is contended by appellants that these restrictions upon the disposal of said garbage will necessarily require the removal by them of the hogs from the locality in which they are now maintained, and that the effect of said injunction will therefore be to compel them to take affirmative action in removing said hogs. This does not necessarily follow. The appellants may feed their hogs other food and maintain them in such a manner as not to render them a nuisance to their neighbors. So long as they pursue this course, the prohibitive terms of the injunction above set forth will not make it necessary for them to make any change in the locality in which their hogs are kept.

[6, 7] Appellants further contend that this court has the inherent power to issue a writ of supersedeas so as to preserve the status quo of the subject of the litigation until the final determination of the appeal. There is no question but that this court possesses such power. People v. Jackson, 190 Cal. 257, 212 P. 4; Luckenbach v. Krempel, 188 Cal. 175, 204 P. 591; Rogers v. Superior Court, 158 Cal. 467, 111 P. 357. The question is then presented whether the appellants have presented such a state of facts as will justify this court in exercising this power in their behalf. They have called to our attention the contract entered into by their assignors with the city of Sacramento, and the large outlay of time and money expended by them for the purpose of carrying this contract into effect, and the consequent hardship and loss they will sustain if the injunction is not stayed. These considerations, while important, are not sufficient to warrant this court in granting the appellants the relief prayed for when the direct effect of such action by this court would be to deprive the respondent of the free use and enjoyment of his property. "In such case it cannot be said that injury would result from an injunction, for no man can complain that he is injured by being prevented from doing to the hurt of another that which he has no right to do. Nor can it make the slightest difference that the plaintiff's property is of insignificant value to him as compared with the advantages that would accrue to the defendants from its occupation.

There can be no balancing of conveniences when such balancing involves the preservation of an established right, though possessed by a peasant only to a cottage as his home, and which will be extinguished if relief is not granted against one who would destroy it in artificially using his own land." Hulbert v. California, etc., Cement Co., 161 Cal. 239, 248, 118 P. 928, 932 [38 L. R. A. (N. S.) 436].

Let the temporary order staying the operation of the injunction be dismissed, and the petition be denied.

We concur: WASTE, C. J.; SHENK, J.; SEAWELL, J.; LANGDON, J.; PRESTON, J.; RICHARDS, J.

---

206 Cal. 221

WHEELER v. CRAIG et al. (L. A. 9836.)

Supreme Court of California. Jan. 12, 1929.

1. Mortgages 🔑496—Application to set aside foreclosure judgment, not void on face, is too late 18 months after entry (Code Civ. Proc. § 473).

Where judgment and decree of foreclosure is not void on its face, application to set aside judgment, not made until 18 months after entry, is too late, under Code Civ. Proc. § 473.

2. Mortgages 🔑440—Sufficient foundation held laid for issuance of order for publication of summons, where process servers attempted to find defendant (Code Civ. Proc. § 473).

In foreclosure action, sufficient foundation *held* to have been laid for issuance of order for publication of summons, where process servers attempted to find and serve defendant at places where she had resided and was residing and at offices with which she was connected, though process was not placed in hands of sheriff for service, especially where defendant sought no relief under Code Civ. Proc. § 473.

3. Mortgages 🔑496—Foreclosure judgment held not void authorizing attack 18 months after entry because defendant was served by publication.

Foreclosure judgment *held* not void on its face because defendant was served by publication, so as to authorize application to set judgment aside 18 months after its entry, where failure to serve defendant personally was due to fact that she was concealing herself and summons and complaint were mailed to her.

In Bank.

Appeal from Superior Court, Los Angeles County; Harry A. Hollzer and Reuben S. Schmidt, Judges.

Action by Helen Reehl Wheeler against Frances May Craig and others. From an order vacating judgment and decree of foreclosure, plaintiff appeals. Reversed.

Bicksler, Smith & Parke, of Los Angeles, for appellant.

L. E. Dadmun, of Los Angeles, for respondents.

T. E. Dadmun, amicus curiæ.

RICHARDS, J. This appeal is from an order made and entered by the superior court, in and for the county of Los Angeles, vacating the judgment and decree of foreclosure of a mortgage upon real estate in an action wherein the defendant and respondent was served by publication, and wherein her default and the judgment which followed it were based upon the order for and affidavits of publication as these appear in the record before us, and upon the recitals of the decree. The respondent presented no brief either before or after the issuance of an order to show cause, but her former attorney of record, upon the issuance of said order, was given leave as amicus curiæ to present a brief in support of the validity of the order appealed from. The original complaint herein was filed in said court on December 12, 1924. An amended complaint was filed on January 30, 1925. The application and affidavit for publication of summons was presented and filed on February 17, 1925, the application being based upon the showing that the defendant Frances May Craig was concealing herself for the purpose of avoiding service of summons. Both the original and amended complaint being verified, and both showing a good cause of action against said defendant, no affidavit of merits was required, although an affidavit of merits somewhat defective in form, but not fatally so, accompanied said application. The order for publication of summons was made on February 20, 1925. Thereafter several affidavits showing the due publication of the alias summons and the mailing of the same, together with a copy of the amended complaint, were presented and filed, and thereupon and on the 11th day of June, 1925, the said defendant having defaulted, the cause came on for hearing, and upon due proofs of the foregoing facts and also of the averments of the amended complaint the decree of foreclosure was duly made and entered and the property involved in said foreclosure was thereafter sold pursuant to said decree, the plaintiff becoming the purchaser thereof. The motion of the defendant and respondent was presented and filed on December 10, 1926, and was made upon the ground that the judgment was void upon its face, and was based solely upon the record in the action. The trial court on January 4, 1927, made and entered its order setting aside the judgment and decree of foreclosure, basing its order solely upon the ground specified in the defendant's motion and upon the record in the case. This appeal is from said order.

[1-3] The vital question presented upon this

appeal is as to whether or not the judgment which was vacated and set aside was void upon its face, since, if it was not so, the application to set aside the judgment, not having been made until 18 months after the entry of the judgment, must be held to have been made too late, and hence to have been made at a time when it was clearly beyond the power of the court to grant said application. Consolidated Construction Co. v. Pacific Elec. Ry. Co., 184 Cal. 246, 193 P. 238; Smith v. Jones, 174 Cal. 513, 516, 163 P. 890; section 473, C. C. P. Whether said judgment was or was not void upon its face is to be determined by the state of the record upon which the judgment was predicated, and hence depends upon the sufficiency of the substituted service of the summons and complaint upon said defendant and of the affidavits for publication of summons upon which the order therefor was made. We are satisfied from an examination of these affidavits that they constituted a sufficient showing of diligence on the part of the plaintiff in the effort of herself and her process servers to make personal service of the summons upon said defendant to support the issuance of said order upon the ground that the said defendant was concealing herself for the purpose of avoiding such personal service of process upon her. The affidavits in question were made by several agents and process servers of plaintiff, who set forth therein and with considerable of detail their unavailing efforts to find and to serve said defendant at the several places where the defendant had resided, and at one of which she was then residing, and also at the offices in the city of Los Angeles with which the defendant was connected. It is conceded that during the period when these process servers were quite persistently seeking to find and to serve the defendant at these several places she was residing at 322 North Milton street, Whittier, Cal., and was connected with the business offices of one A. A. Irish, at 605 Grosse Building, Los Angeles, but that the several visits of the aforesaid process servers were made to each of these places in vain, for the reason that they were met either with denials that the defendant was there or with refusals to permit her to be seen. When the order for publication of summons, based upon these affidavits, was made it directed that the summons and complaint in said action should be forthwith mailed to the defendant at each of these addresses by registered mail, and the affidavits of mailing show the full compliance with said order. We are satisfied from the above showing that a sufficient foundation was laid thereby for the making and issuance by the court of its order for the publication of summons, under the authority of Rue v. Quinn, 137 Cal. 651, 66 P. 216, 70 P. 732, wherein it was stated: "If the facts set forth in the affidavit have a legal tendency to show the exercise of diligence on behalf of the plaintiff in seeking to find the defendant within the state, and that after the exercise of such diligence he cannot be found, the decision of the judge that the affidavit shows the same to his satisfaction is to be regarded with the same effect as is his decision upon any other matter of fact submitted to his judicial determination." This language was quoted with approval in Clarkin v. Morris, 178 Cal. 102, 105, 172 P. 981.

The criticism which the former counsel of the respondent makes as amicus curiæ to the effect that it was not made to appear that the plaintiff had placed the process herein in the hands of the sheriff of Los Angeles county for service would not of itself militate against the sufficiency of the effort of her agents and process servers to make the service of the summons in question upon the defendant, in view of the repeated efforts made by them to gain access to the defendant for the purpose of making such service, since it does not appear that the official in question, had he been entrusted with the duty of making such service, could have done more than the plaintiff's process servers did in the premises. The respondent relied solely upon the record as the foundation of her motion to set aside said judgment and decree. In so doing, and by her silence otherwise, she admitted the truth of the facts set forth in the affidavits upon which the order for publication was based, and also admitted the due receipt of the summons and complaint herein directed to be served upon her by registered mail. She made neither effort nor showing for the seeking of relief under section 473 of the Code of Civil Procedure. She allowed a year and a half to expire after full knowledge imparted to her by the receipt through the mails of the summons and complaint in said action and after she must be reasonably presumed to have known that said judgment and decree of foreclosure had been made and that the property affected thereby had in due course been sold thereunder, before taking any steps to avoid the effect of such judgment. Upon her belated application to set aside said judgment and decree she made no further showing than as above set forth. We are satisfied that upon such showing the judgment was not void upon its face, and that, this being so, it was clearly beyond the power of the trial court to vacate and set aside said judgment and decree.

The order is reversed.

We concur: WASTE, C. J.; CURTIS, J.; LANGDON, J.; PRESTON, J.; SHENK, J.; SEAWELL, J.

206 Cal. 141

HARLOE v. CALIFORNIA STATE LIFE INS. CO. (Sac. 4125.)

Supreme Court of California. Dec. 31, 1928.

Insurance 🔑529—Death of insured from sunstroke held not effected exclusively and wholly by "external, violent and accidental means," within policy authorizing double indemnity.

Death of deceased, who was required to go outside of derrick in which he was working to repair water line when temperature was approximately 110 degrees, and who thereafter suffered sunstroke, *held* not caused by bodily injuries effected exclusively and wholly by "external, violent, and accidental means" within policy authorizing recovery of double indemnity.

[Ed. Note.—For other definitions, see Words and Phrases, First, Second, and Third Series, External, Violent and Accidental Means.]

Department 2.

Appeal from Superior Court, Sacramento County; Malcolm C. Glenn, Judge.

Action by Margaret Harloe against the California State Life Insurance Company. Judgment for defendant, and plaintiff appeals. Affirmed.

John D. Harloe, of San Francisco, and Butler, Van Dyke & Desmond, of Sacramento, for appellant.

C. E. McLaughlin and McLaughlin & McLaughlin, all of Sacramento, for respondent.

LANGDON, J. This is an appeal by the plaintiff from a judgment against her, after a general demurrer to her complaint had been sustained without leave to amend.

The complaint seeks recovery of $4,000 upon a policy of life insurance issued upon the life of plaintiff's deceased husband. The question involved in the case is whether the defendant is liable for $2,000, the face of the policy, or for double that amount by reason of the following provision contained therein: "In the event of death caused by bodily injuries effected exclusively and wholly by external, violent and accidental means, said death occurring within ninety days after the happening of the accident, the Company will pay the sum of $4,000.00 in lieu of $2,000.00."

The complaint alleges that, while the assured was in the performance of his regular duties, it became necessary, and the assured did, with the assistance of another employee, go outside of a derrick in which he was working, to repair a water line. At the time the temperature at the place of employment was, approximately, 110 degrees. In the repairing of said water line he suffered a sunstroke, from which he subsequently died.

The case is governed by the rule announced in Rock v. Travelers' Ins. Co., 172 Cal. 462, 156 P. 1029, L. R. A. 1916E, 1196; Olinsky v. Railway Mail Ass'n, 182 Cal. 669, 189 P. 835, 14 A. L. R. 784, and Ogilvie v. Ætna Life Ins. Co., 189 Cal. 407, 209 P. 26, 26 A. L. R. 116, which require a holding in the instant case that an effect which is the natural and probable consequence of an act or course of action cannot be said to be produced by accidental means.

The judgment is affirmed.

We concur: RICHARDS, J.; SHENK, J.

---

206 Cal. 199

HUGHES v. HARTMAN. (S. F. 12275.)★

Supreme Court of California. Jan. 4, 1929.

Hearing Denied in Bank Jan. 31, 1929.

1. Automobiles 🔑244(32)—Evidence held sufficient to warrant finding that it was defendant's truck which crowded plaintiff's automobile from highway.

Evidence *held* sufficient to justify finding of jury that it was defendant's motortruck which met and crowded plaintiff's machine from highway, and was therefore cause of plaintiff's injury.

2. Appeal and error 🔑1003—Objections directed to weight of evidence or contradictions therein were solely for jury's decision, and their findings will not be disturbed on appeal.

Objections directed to weight of the evidence or to apparent contradictions therein were matters solely for decision of the jury, and their findings thereon will not be disturbed on appeal.

3. Appeal and error 🔑1050(1)—Permitting witness to testify that defendant had been pointed out as driver of truck causing accident, though error because hearsay, held not prejudicial.

In action for injuries sustained when plaintiff's automobile was crowded from highway by motortruck, in which sole issue was whether truck belonged to defendant, testimony that defendant had been pointed out to witness as driver of the truck *held* inadmissible as hearsay, but error in admitting it was not prejudicial, where evidence clearly showed that defendant was driver of truck involved in accident.

4. Automobiles 🔑243(5)—Testimony that another automobile had been nearly forced off road by truck held admissible.

Where there was sufficient evidence to justify jury in believing that it was defendant's truck which crowded plaintiff's automobile off highway, testimony of driver of another car that he had slowed down because he had been nearly forced off road by a truck could be considered by jury as some proof that defendant was taking more than his share of road when accident occurred.

5. Automobiles 🔑243(14)—Testimony as to automobile tracks going over highway embankment given by witness at scene 2½ hours after accident occurred held admissible.

In action for injuries sustained when plaintiff's automobile was crowded from highway by

---

★Hearing denied in bank.

motortruck, testimony respecting tracks presumably made by plaintiff's machine as they left highway, given by witness who reached scene of accident about 2½ hours after it occurred, was not rendered inadmissible because many machines had passed during intervening time, where there was no evidence that any other machine than plaintiff's went over embankment at that point.

6. Appeal and error ⚿201(2)—Objection to trial judge's improper remark cannot be raised for first time on appeal unless prejudicial effect thereof could not be cured by subsequent action of trial court.

Objection to an improper remark made by trial judge during trial, in order to avail complaining party, must have been taken by him when remark was made or before close of trial, and will not be considered when raised for first time on appeal, unless it clearly appears that its prejudicial effect could not be cured by some subsequent action of trial court.

7. Appeal and error ⚿201(2)—In action involving identity of truck causing accident, objection to trial court's remark indicating defendant was owner could not be raised for first time on appeal.

In action for injuries sustained when plaintiff's automobile was crowded from highway by motortruck, in which sole issue was whether truck belonged to defendant, remark of trial court to counsel for plaintiff, "Well, you have got the man that did it," though improper, could not be considered by appellate court on objection raised for first time on appeal, since prejudicial effect thereof could have been cured by subsequent action of trial court.

8. Appeal and error ⚿1066—Where only issue was identity of truck causing accident, instructions respecting other violations of statute, though improper, held not prejudicial.

Where only issue was whether it was defendant's truck which forced plaintiff's automobile off highway and down embankment, instructions as to requirements of Motor Vehicle Act (St. 1923, p. 553, § 113, subd. (a), respecting speed and other matters not involved in issues and as to consequences of violations of such statute in matters other than involved, though error, *held* not prejudicial, since they could not have misled or confused jury.

Department 1.

Appeal from Superior Court, Santa Clara County; P. F. Gosbey, Judge.

Action by Jennie Fretz Hughes against A. H. Hartman. Judgment for plaintiff, and defendant appeals. Affirmed.

Wm. M. Abbott, K. W. Cannon, and J. E. Reardon, all of San Francisco, for appellant.

Crawford & O'Neill, of Gilroy, and Peter F. Morettini, of San Jose (D. T. Jenkins, of San Jose, of counsel), for respondent.

CURTIS, J. The plaintiff, with her son and granddaughter, on the evening of July 16, 1925, was traveling in a machine, in an easterly direction along the Pacheco Pass highway in Santa Clara county. The son, Donald Hughes, was driving, and plaintiff, the owner of the machine, was occupying the front seat of the automobile with him. The granddaughter was in the back seat. At about 9 o'clock in the evening, the machine in which plaintiff was riding had reached a point on said highway about 12½ miles easterly from the city of Gilroy, and while so traveling on said highway, a large truck, proceeding along the highway in the opposite direction, approached plaintiff's automobile and forced it off the highway, down a slight declivity or embankment and over and against a barbed wire fence, which, besides injuring plaintiff's car, tore and lacerated her forearm so severely that her son was compelled to make a tourniquet with his handkerchief and later reinforce this with a stringent application of his belt on the upper part of her forearm until a passing automobilist arrived upon the scene of the accident, removed plaintiff and her son to his automobile, and drove them back to Gilroy. Plaintiff instituted this action against the defendant, alleging that he was the owner and driver of the autotruck which forced her machine off the highway and down the declivity and against the wire fence. The action was tried before a jury, and a verdict rendered for the plaintiff in the sum of $15,000. From this judgment the defendant has appealed.

Defendant moved for a nonsuit and also for a directed verdict, each of which was denied by the court. Upon this appeal the defendant makes the following contentions: (1) The trial court erred in denying the motion for nonsuit and in refusing to direct a verdict for defendant because the evidence was insufficient to justify or sustain the verdict. (2) The trial court erred concerning the admission of and refused to strike evidence proferred by plaintiff. (3) The trial court in its instructions confused and misled the jury concerning the only issue upon which plaintiff relied for a verdict.

[1] 1. The first point made by defendant upon this appeal is in reality that the evidence is insufficient to justify or sustain the verdict. The evidence is practically undisputed that plaintiff's machine was crowded off the highway by a passing truck, and that plaintiff, by reason thereof, sustained serious injury. No question is made that the verdict is excessive. As before stated, the accident occurred about 9 o'clock at night. Neither the plaintiff, nor any of the occupants of the machine with her, could definitely identify the driver of the truck that crowded plaintiff's machine off the highway, nor could any of them identify the truck, nor did they or either of them at the time the truck passed them ascertain or learn the license number, or any number, carried by the truck. A wit-

⚿For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

ness, Francis A. Berry, however, testified that he met a truck on this highway as he was traveling easterly thereon; that after meeting said truck he proceeded easterly along the highway, a distance of about 200 yards, and found plaintiff's machine off the road and down the embankment. He was not able to identify this truck, nor its driver, nor did he observe or secure its license number at that time. Upon reaching the point where he found plaintiff's machine, he turned his own machine around, assisted plaintiff to a seat in it, and with the son of the plaintiff, started back to Gilroy for the purpose of securing for the plaintiff medical attention; that after he had gone about a mile he overtook a truck traveling westerly on the highway, and secured its license number, which number it was afterwards ascertained corresponded with the license number of defendant's truck; that he saw no truck on the highway after meeting the one about 200 yards from the scene of the accident until he met the truck bearing the license number of defendant's truck. The plaintiff, her son, and granddaughter all testified that they saw no machine pass them between the time their machine was forced off the highway and the time they began their return trip to Gilroy in Berry's machine. The evidence further shows that the country through which the Pacheco Pass highway was laid was mountainous in character, and that the only lateral road leading from this highway westerly from the point of the accident was the San Filippe road, which was 1.7 miles from the point of the accident. The defendant admitted that he passed over said highway the night of the accident and at the point on said highway where said accident occurred, but contended that it was earlier in the evening. He also testified that no such accident or any accident of any kind occurred to his truck during that trip. The license number of the truck, which was overtaken about 1 mile westerly from the scene of the accident, was also observed by the son of the plaintiff and later by the granddaughter who followed in another machine, and who also overtook the truck as it traveled toward Gilroy. The evidence was sufficient to justify the jury in believing that the truck which Berry overtook and passed about one mile from the scene of the accident was the truck of the defendant, as its license number corresponded with that of defendant's truck. The plaintiff, her son, and granddaughter all positively testified that no other truck passed them after the accident and before plaintiff began her return trip to Gilroy with Mr. Berry. The evidence further shows that there was no road leading away or from said highway between the point of the accident and the point where defendant's truck was overtaken and its license number ascertained and secured. This evidence was unquestionably sufficient to justify and warrant the jury in believing and finding that it was defendant's truck which met and crowded plaintiff's machine from the highway, and was, therefore, the cause of plaintiff's injury.

[2] Defendant has advanced a number of arguments tending to discredit the evidence in behalf of plaintiff and to show that it is not of that substantial and convincing character as would justify the jury in believing and relying upon it. All of these we have duly considered. They are directed exclusively to the weight of the evidence or to apparent contradictions therein. These were matters solely for the decision of the jury, and their findings thereon will not be disturbed by this court.

[3] 2. The first error in the admission of evidence assigned by the defendant relates to the evidence of the son of the plaintiff, Donald Hughes. This witness was asked whether the defendant, Hartman, was the man who was driving the truck on that particular night. On replying that Mr. Hartman had been pointed out as the driver, he was further asked whether Mr. Hartman was in the courtroom, to which question the witness replied that, "He is sitting at the side of counsel." This evidence was clearly hearsay, and it was error to permit the witness to give evidence of facts of which he had no personal knowledge. At the same time its admission could not have seriously prejudiced the defendant in making his defense. His own testimony was that he drove his truck on the night in question. If, therefore, the truck of defendant was sufficiently identified as the truck which caused the injury to plaintiff, and we think it was, then by the defendant's own admissions he must have been the driver of "the truck on that particular night."

[4] The claim is also made that the court erred in refusing to strike out the evidence of the witness Berry to the effect that he was nearly forced off the grade by the truck he met 200 yards westerly from the place where he found the plaintiff's machine off of the highway. This witness was asked how he came to hear plaintiff's cry for help, and replied, "I had slowed down because I had been nearly forced off the road by a truck." Thereupon the defendant asked to have stricken out the words, "I had been nearly forced off the road," which motion the court denied. Defendant contends that this evidence was incompetent, irrelevant, and immaterial, for the reason that this truck was not connected with the truck involved in the accident, and evidence that it was traveling along the center of the road when the witness Berry first passed it might be taken by the jury as some proof that the defendant at the time of the accident was also driving his truck along the center of the road. The difficulty with this argument is that it assumes that the truck mentioned by the witness Ber-

ry was not connected with the truck involved in the accident. As we have before observed there was sufficient evidence to justify the jury in believing that this truck was the one which crowded plaintiff's machine off the highway. If the jury so believed, then the evidence of the witness Berry, sought to be stricken out by defendant, might rightfully be considered by the jury as some proof that defendant was taking more than his share of the road as he passed the point on the highway where the accident happened.

[5] The further contention is made that the court erred in permitting the witness George Lorentzen to testify to certain tracks presumably made by plaintiff's machine as they appeared along the southerly edge of the highway and then "they got closer and closer until they got here (indicating) and then they dropped off and went down to the fence." This witness reached the scene of the accident about 11:30 that night, and defendant claims that, as the evidence showed that a large number of machines passed over the point in the highway where the accident happened, between the time of the accident and the time when the witness Lorentzen appeared upon the scene, the evidence of this witness as to the location of these automobile tracks was improperly admitted and prejudicially affected the rights of defendant. We think there is no merit in this condition. While there was evidence that many machines passed over this point on the highway during the time intervening between the accident and the arrival of the witness Lorentzen, there was no evidence that any machine other than plaintiff's went over the embankment at the point on the highway to which the evidence of this witness relates. The evidence of the witness Lorentzen was properly admitted.

[6, 7] Appellant complains that he was seriously prejudiced by a remark of the court, made during the trial, and when one of the respondent's counsel was interrogating the witness Donald Hughes as to whether any other truck passed the scene of the accident between the time the accident occurred and the time when they overtook defendant's machine and secured its number. The remark objected to was evidently made to counsel for respondent, and was as follows: "Well, you have got the man that did it." The court was no doubt referring to the defendant in this remark. Conceding this remark to have been improperly made, it appears from the record that no objection was taken to it at the time by defendant, nor was any request then or ever made of the court to instruct the jury to disregard the same. In other words, defendant remained silent, without objection or exception to the remark as thus made, and the complaint that he was injured and prejudiced thereby is now made for the first time in this court. An exception to an improper remark made by the trial judge during the trial of an action in order to avail the party claimed to have been injured thereby must have been taken by such party at the time the remark was made, or at some time thereafter and before the close of said trial. Compton-Gardena M. Co. v. McCartney, 69 Cal. App. 708, 231 P. 764; Franceschi v. Nardi, 77 Cal. App. 78, 246 P. 130. If thus taken, an opportunity is given to the trial judge by an instruction to the jury or otherwise to cure the injury occasioned by such remark. This rule might not apply where the remark was of such a character that its prejudicial effect could not be cured by any subsequent action by the trial court. The remark of the court in the present action, of which complaint is made, is not of such character. Defendant therefore must be held to have waived any right to except to the action of the court in making the remark attributed to it, and quoted above, by his failure to object to the same during the trial of the action.

[8] 3. The third ground upon which the defendant bases his appeal from the judgment herein concerns the instructions given by the court to the jury. It is claimed by appellant that the court confused and misled the jury concerning the only issue upon which plaintiff relied for a verdict. As already stated, the only act of negligence which the plaintiff charges against the defendant is that the latter drove his truck along said highway in such a careless and negligent manner as to force plaintiff's machine off the highway and down the declivity or embankment. There was no attempt made by plaintiff to prove any other act of negligence on the part of the defendant. The court properly instructed the jury upon the issue made by the pleadings involving this claim of negligence. The court further instructed the jury as follows:

"II. Plaintiff claims that the injuries were received and sustained by her as a result of the careless and negligent operation and driving of the truck by defendant A. H. Hartman."

"VII. I instruct you that the Motor Vehicle Act of this state [St. 1923, p. 553, § 113, subd. a] provides that 'any person driving a vehicle on the public highways of this State, shall drive the same at a careful and prudent speed, not greater than is reasonable and proper, having due regard for the traffic, surface and width of the highway, and no person shall drive any vehicle upon a public highway at such a speed as to endanger the life, limb or property of any person.'"

"X. The Motor Vehicle Act of this State [St. 1923, p. 562, § 139] also provides that the driver of a motor vehicle traversing defiles, canyons or mountain highways shall hold such motor vehicle under control and as near the right hand side of the highway as reasonably possible, and shall not permit such vehicle to coast, and upon approaching curves where the view is obstructed within a distance of two hundred feet along the highway shall give an audible warning with a horn or other warning device."

"XI. I instruct you that the violation of a statute or law of the State of California is negligence per se. By this is meant that that where one violates a statute or law regulating an action or course of conduct he is guilty of negligence, and if damage or injury is solely and proximately caused to another by reason of such violation of a statute or law then the violator of such statute or law is responsible for his act."

"XII. If, therefore, you find that defendant, A. H. Hartman, violated the statute of this State in relation to the operation of motor vehicles on public highways, then such violation of the statute is negligence per se, that is to say, negligence by and of itself."

"XIII. If you find the injury resulted directly and proximately to plaintiff as a result of such violation of the statute, the person violating such statute is liable for such injury as may arise from such violation of such statute, unless the person injured has been guilty of contributory negligence which was a proximate cause of such injury."

"XV. I instruct you that even if the provisions of the Motor Vehicle Act of the State of California were not violated, it is for you, under all the conditions and circumstances of the case, to say whether or not a party is negligent. But when a provision of the Motor Vehicle Act is violated, the law conclusively presumes negligence per se. It is therefore a question of fact for you to decide whether or not any provision of the Motor Vehicle Act of the State of California was violated, and if you so find that it was violated then you must find negligence as a matter of law."

It is defendant's contention that these instructions were not pertinent to any issue made by the pleadings, that it was error for the court to give them to the jury, and that by the giving of them the jury was confused and misled concerning the only issue upon which the plaintiff relied for a verdict. That the instructions as a whole were much broader than the issues embraced within the pleadings must be conceded. Plaintiff makes an attempt to show that, in addition to the specific charge of negligence, wherein it is alleged in the complaint that the defendant failed to give sufficient room on the highway for plaintiff's machine to pass, the complaint also contains a general allegation of negligence as to the manner in which the defendant drove his truck on said highway on the evening of the accident. We hardly think the complaint is susceptible of such a construction. It is quite evident that the case was tried upon the theory that the only negligence charged against the defendant was that he failed to properly give way and give one-half of the highway to the automobile approaching on his left, in which plaintiff was riding. All of the evidence tending to prove defendant's negligence was directed to this one specific charge of negligence. We must agree, therefore, with defendant in his contention that the instructions complained of were without the issues made by the pleadings, and that the court erred in giving them to the jury. We are not satisfied, however, that any material injury was sustained by the defendant by reason of the giving of these instructions. It is true that they referred to acts of negligence other than that alleged in the complaint. But the act of negligence alleged in the complaint—the failure of the driver of the truck to give to plaintiff one-half of the highway—was sustained by so clear and convincing proof that there could not have been any possible doubt in the minds of the jury as to the truth of such allegation. In fact, there was no dispute as to the claim of plaintiff that her machine was crowded off the highway by the driver of the truck. The only real controversy during the whole trial, so far as the facts of the case were concerned, was as to the identity of the driver of the truck. If the jury was satisfied that the defendant was such driver, then the only verdict it could have rendered under the evidence was one in favor of the plaintiff. The instructions complained of, therefore, could have had but little, if any, weight at all with the jury in determining any of the issues submitted to them. We do not think they could possibly have had the effect attributed to them by the defendant, that of confusing the jury concerning the specific charge of negligence made against him by the complaint, for the reason that the only element of this specific charge of negligence which was in serious controversy during the trial was whether it was defendant's truck that caused the injury to plaintiff, and these instructions did not in any manner refer to nor involve this element of the charge. They could not, therefore, have caused any confusion in the minds of the jury in determining whether or not the defendant was guilty of this specific charge of negligence made against him. The instructions, therefore, conceding the same to have been erroneously given, did not seriously or at all prejudice the rights of the defendant.

We find no error in the record that would justify a reversal of the judgment, and for that reason the judgment is affirmed.

We concur: SEAWELL, J.; PRESTON, J.

206 Cal. 143

SIMON NEWMAN CO. v. FINK et al.
(Sac. 4144.)

Supreme Court of California. Dec. 31, 1928.

1. Subrogation 🔑41(6)—As regards right of plaintiff to subrogation under first mortgage paid by him, evidence sustained finding that he did not know of second mortgage.

As regards right of plaintiff to revival of first mortgage and subrogation to rights of defendant bank thereunder because of payment thereof, evidence *held* to sustain finding that plaintiff did not know of second mortgage.

2. Subrogation 🔑23(3)—As regards subrogation, one paying off incumbrance with understanding that he is to have first lien as security is not "volunteer" (Civ. Code, § 2903).

Under Civ. Code, § 2903, one paying off an incumbrance, either at the request of the mortgagor or of the holder of the incumbrance, with the understanding that he is to have a first lien as security, is not "volunteer" as regards right to subrogation.

[Ed. Note.—For other definitions, see Words and Phrases, First, Second, and Third Series, Volunteer.]

3. Mortgages 🔑316—Equity can in proper case revive discharged mortgage.

Court of equity has power in proper case to revive a discharged mortgage, even when it has been released of record.

4. Subrogation 🔑38—Right of plaintiff to subrogation under first mortgage held not affected by failure to search records for second mortgage, in view of estoppel of holder thereof.

Right of plaintiff to be subrogated to first mortgage which he paid off as against second mortgage *held* not affected by fact that search of records would have disclosed second mortgage, where holder of second mortgage, by failing to disclose material facts when under duty to speak, misled plaintiff into changing from position which it would not have surrendered had it known all the facts.

5. Subrogation 🔑38—Depreciation of personalty did not affect plaintiff's right to subrogation under first mortgage as against second mortgage.

As regards right of plaintiff to subrogation under first mortgage on personal property as against second mortgage, fact that personal property had depreciated in value *held* immaterial.

Department 2.

Appeal from Superior Court, Stanislaus County; L. W. Fulkerth, Judge.

Action by the Simon Newman Company against Geo. W. Fink and others. Judgment for plaintiff, and defendants appeal. Affirmed.

J. M. Walthall, of Modesto, for appellants.

Whitehurst & Logan, of Patterson, for respondent.

SHENK, J. This is an appeal from a judgment in favor of plaintiff in an action to revive and foreclose a first mortgage on personal property.

The defendant Ora T. Medlin was the owner of the personal property, which consisted of a tractor, farming implements, a harvested crop of hay, and other personal property on his ranch in Stanislaus county. The mortgage referred to was executed on September 21, 1920, by the defendant Medlin to the defendant First National Bank of Crow's Landing to secure the payment of two promissory notes aggregating the principal sum of $2,400. The defendant George W. Fink was the secretary and cashier of the defendant bank and was handling for the defendant Medlin his loan transactions with the bank. On May 18, 1921, Medlin executed and delivered to the defendant Fink, personally, a note in the sum of $2,500 and a mortgage to secure the payment thereof covering the same personal property mentioned in the first mortgage. Both mortgages were recorded. Medlin also owed other sums to the defendant Fink which were unsecured by any lien on the personal property mentioned; and also owed a small unsecured balance of a little less than $200 to the plaintiff. Medlin was unable to meet his obligations and required further funds with which to carry on his farming operations.

It is unnecessary to enter into the detail of all the conversations and negotiations had among the parties. It is undisputed that Medlin finally arranged with the plaintiff for a loan, and, with the knowledge of the defendant Fink, it was agreed that with the funds so borrowed Medlin would pay off the note and mortgage to the First National Bank of Crow's Landing and would give the plaintiff a new mortgage on the same personal property. During the negotiations the plaintiff requested of the defendant Fink a report of how Medlin "stood." To this request the defendant Fink answered by letter to the plaintiff as follows: "In accordance with your request of last evening, we are enclosing copy of Medlin chattel mortgage, and statement of amount due this bank on said mortgage. Note $2400.00 at 8 per cent from April 21st to September 12–22, $75.73, $2475.73 amount due the bank to September 12th, 22. On the old crop mortgage due me personally, are two notes, as follows: Note $400.00 with interest at 8 per cent from March 24th, 1921, $48.00, $448.00. Note $325.00 with interest $34.67, $807.67, total due me personally on old crop mortgage which is now unsecured on account of warehouse receipt not having reached far enough." The plaintiff replied to Fink by letter requesting that a release of the chattel mortgage held by the defendant bank be prepared, and stating that it was not concerned with Medlin's indebt edness to Fink personally and would not abide by his request to pay it. The plaintiff paid Medlin's debt to the defendant bank, recorded the release of the first mortgage and also the mortgage given by Medlin to secure the total amount of his indebtedness to it.

There was additional testimony in the record that Fink had shown to Louis J. Newman, one of the officers of the plaintiff, Medlin's note to him for $2,500 which stated that it was secured by chattel mortgage on the personal property mentioned. This was denied by Mr. Newman, who testified that he saw only the note and mortgage to the bank. There was testimony also that Medlin did not know that he had given a note and mortgage to Fink personally, but believed that he was dealing with him as an officer of the bank and that the second note and mortgage was a renewal of the first.

On this state of the record the defendant-appellants contend that plaintiff is not entitled to a revival of the first mortgage and to be subrogated to the rights of the defendant bank thereunder, because: (1) There is evidence that the plaintiff knew of the second mortgage and the findings of the trial court are not sufficiently supported; (2) plaintiff was a mere volunteer and not, therefore, a person in whose favor the doctrine of subrogation may be invoked; (3) plaintiff was inexcusably negligent in not informing itself by a search of the records; and (4) the doctrine does not apply to liens on personal property.

[1] Indisputably the state of the record disposes of the appellants' first contention. Without repeating the findings which appellants assert are unsupported by the evidence, it is enough to note that there is evidence in the record, including the inferences which the trial court might deduce therefrom, sufficient to support all of the court's findings.

[2] The other contentions of the appellants are likewise without merit. The general rule respecting the rights of persons who advance money to pay off incumbrances is stated in 27 American & English Encl. of Law (2d Ed.) at page 247, as follows: "One who advances money to pay off an incumbrance on realty at the instance of either the owner of the property or the holder of the incumbrance, either on the express understanding, or under circumstances from which an understanding will be implied, that the advance made is to be secured by a first lien on the property, is not a mere volunteer; and in the event the new security is for any reason not a first lien on the property, the holder of such security, if not chargeable with culpable and inexcusable neglect, will be subrogated to the rights of the prior incumbrancer under the security held by him, unless the superior or equal equities of others would be prejudiced thereby, and to this end equity will set aside a cancellation of such security, and revive the same for his benefit." See, also, Swift v. Kraemer, 13 Cal. 526, 73 Am. Dec. 603; Civ. Code, § 2903.

In support of their contention that plaintiff is a volunteer, appellants quote in substance what is also a general rule, stated in 27 American & English Encl. of Law (2d Ed.) at page 255, to be: "One who advances money to pay the debt of another, in the absence of agreement, express or implied, for subrogation, will not be entitled to succeed to the rights and remedies of the creditor so paid unless there is some obligation, interest, or right, legal or equitable, on the part of such person in respect of the matter concerning which the advance is made, as otherwise he is a stranger, a volunteer, an intermeddler, to whom the equitable right of subrogation is never accorded."

There is no conflict in these two statements, and no quarrel with the correctness of either of them. What the appellants have failed to appreciate is that one who pays off an incumbrance at the request either of the mortgagor or of the holder of the incumbrance with the understanding that he is to have a first lien as security is not a volunteer. See, also, Campbell v. Foster Home Ass'n, 163 Pa. 609, 30 A. 222, 26 L. R. A. 117, 43 Am. St. Rep. 818.

The cases cited from this jurisdiction by the appellants do not dispute, but in fact recognize, the general principles stated. In Brown v. Rouse, 125 Cal. 645, 58 P. 267, and Guy v. Du Uprey, 16 Cal. 196, 76 Am. Dec. 518, cited by the appellants, it was held that the plaintiffs were volunteers because the substituted mortgages were executed by agents of the mortgagors without authority.

[3] That a court of equity has power in a proper case to revive a discharged mortgage, even one which has been released of record, is not questioned. See 23 Cal. Jur. pp. 938, 939.

[4] Whether a failure to make a search of the records would preclude the right to subrogation which the plaintiff otherwise might have had, it is unnecessary to determine. That such a right would not be so affected in the absence of actual knowledge is intimated in the case of Darrough v. Herbert Kraft Co. Bank, 125 Cal. 272, 57 P. 983. In the present case the trial court was clearly justified in finding the equities in favor of the plaintiff in spite of plaintiff's failure to inform itself from the records. The defendant Fink should not be heard to say that plaintiff was negligent because it did not search the records, when by his own conduct in failing to disclose material facts when he was under a duty to speak he impliedly represented that no other facts existed, and thereby misled the plaintiff into changing from a position which it would not have surrendered had it known all the facts.

[5] Appellants' last contention is answered

by the case of Bumiller v. Bumiller, 179 Cal. 119, 175 P. 897, where the court applied the doctrine of equitable subrogation to facts involving interests in corporate stock. The fact that the personal property has depreciated in value does not change the equities. That is a probability that the lender must be deemed to have taken into consideration at the time he took the mortgage security, and that fact alone cannot change the position in which Fink should expect to be and in which he would have been had the lien of the first mortgage continued alive.

Other points made do not require specific notice. No rights of third persons who might be injured by the revival of the first mortgage are involved; and no prejudice to the creditor under the first mortgage, who has been paid in full, is shown.

The judgment is therefore affirmed.

We concur: RICHARDS, J.; LANGDON, J.

OATMAN v. NIEMEYER. (Sac. 4110.)★

Supreme Court of California. Dec. 27, 1928.

Hearing Granted in Bank Jan. 24, 1929.

1. Deeds ⚷50—Deed executed in blank is void.

Deed executed in blank is void.

2. Reformation of instruments ⚷1—Reformation which would amount to making of new contract will not be granted.

Where instrument is void for some fundamental reason, reformation would amount to making of a new contract, and will not therefore be granted.

3. Reformation of instruments ⚷7—Plaintiff held not entitled to reformation of deed wherein description of property was omitted.

Plaintiff *held* not entitled to reformation of deed wherein her name was improperly spelled and description of property omitted, since deed was void, notwithstanding conveyance was in consideration of plaintiff's services to deceased grantor; she having other adequate remedies.

Department 2.

Appeal from Superior Court, Yuba County; K. S. Mahon, Judge.

Action by Alice Lee Oatman against H. A. Niemeyer, as administrator of the estate of A. N. Garrison, deceased. Judgment for plaintiff, and defendant appeals. Reversed.

W. P. Rich, of Marysville, for appellant.

Lawrence Schillig, of Yuba City, for respondent.

LANGDON, J. This is an appeal from the judgment of the trial court in favor of the plaintiff granting reformation of an instrument purporting to be a deed, by inserting therein a description of certain real property which was owned by deceased, but which, it was claimed, was omitted by mistake from said instrument, and also quieting plaintiff's title to the real property after said purported deed had been reformed. The appeal was taken on the judgment roll alone.

The facts found by the court show: That on the 4th day of June, 1922, in the city of Wheatland, county of Yuba, state of California, one A. N. Garrison employed plaintiff to care for him, nurse him, and keep house for him at his residence in said city of Wheatland, county of Yuba, state of California, which service was to be continuous to the date of his death; that said A. N. Garrison was of the age of 80 years or thereabouts, at said time. In consideration of such service, said Garrison promised and agreed to and with plaintiff that he would give her all his property, both real and personal, on hand at the time of his death. In pursuance of such agreement, plaintiff, on said 4th day of June, 1922, began such service, and continued to and did render all of such service to be given by her to said A. N. Garrison to the date of his death, to wit, on the 18th day of October, 1926. On the 4th day of October, 1926, the said A. N. Garrison informed plaintiff that he wished to comply with his said agreement and execute the necessary papers giving her his property, and sent for one S. D. Hicks, who was then and there and for some time previous had been a justice of the peace of the territory in which the said city of Wheatland was situated; that thereupon the said S. D. Hicks went to the residence of said A. N. Garrison in said city of Wheatland, and the said A. N. Garrison then and there instructed the said S. D. Hicks to draw the necessary papers which would invest plaintiff with all of his property, and thereupon the said S. D. Hicks prepared a deed, and the same was signed and executed by the said A. N. Garrison, and the said A. N. Garrison requested said S. D. Hicks and one Ira Rowland to sign as witnesses thereto; that after the signing and witnessing of said deed, the same was then and there by the said A. N. Garrison delivered to said plaintiff, Alice Lee Oatman. The deed so signed and witnessed is set out in the findings. It purports to grant, bargain, and sell to the plaintiff, her heirs and assigns forever, "all the certain lot, piece or parcel of land situate, lying and being in the city of Wheatland, County of Yuba, State of California, and bounded and particularly described as follows, to-wit." No description of the property sought to be conveyed appears in the deed. The trial court found that the real property intended to be conveyed was the only real property owned by said A. N. Garrison, and the same constituted one compact piece or tract of land which was fenced and on which

---

★Superseded by opinion 278 P. 1043.

was a dwelling house where the said A. N. Garrison resided and where the plaintiff rendered such services. The description of the property is inserted in the findings of the court.

It was also found that through the mistake of the scrivener, the plaintiff's name was improperly spelled, and the description of the property intended to be conveyed was omitted, and that such mistake and omission was not brought to the attention of the plaintiff until after the death of A. N. Garrison on the 18th of October, 1926. It was further found that the plaintiff had not been paid by the said A. N. Garrison for her services aforesaid, nor has she been paid since his death therefor, except by the conveyance of said real property hereinbefore described and which was intended by the said A. N. Garrison to convey to said plaintiff the real property described in the findings in payment for such services. The plaintiff is now, and ever since the date of the delivery of said deed or instrument to her she has been, in the actual possession of said real property hereinbefore described, together with the dwelling house thereon and all things therein.

The trial court entered a decree reforming and correcting the said deed so that plaintiff's name would appear therein properly, and inserted the description of the property which had been omitted, and quieted plaintiff's title against the administrator of the estate of A. N. Garrison, deceased, to the property so described.

[1] Appellant contends that the lack of any description of any kind in the instrument before the court, or of any reference to the property by which it could be located, constituted a patent ambiguity, and that it was error in the trial court to hear extrinsic evidence concerning this; that the purported deed was wholly inoperative and void because of the want of any description or designation of subject-matter; and that, being void, it cannot be reformed. A deed executed in blank is, according to the great weight of authority, void. 18 C. J. 188, § 77; Boyd Lumber Co. v. Mills, 146 Ga. 794, 92 S. E. 534, L. R. A. 1918A, 1154; Robinson v. Yetter, 238 Ill. 320, 87 N. E. 363; Cooper v. Page, 62 Me. 192; Perminter v. McDaniel, 1 Hill (S. C.) 267, 26 Am. Dec. 179; Vermont Acc. Ins. Co. v. Fletcher, 87 Vt. 394, 89 A. 480; Barras v. Barras, 191 Mich. 473, 158 N. W. 192; Burns v. Lynde, 6 Allen (Mass.) 305; Daneri v. Gazzola, 2 Cal. App. 351, 83 P. 455; Scott v. Woodworth, 34 Cal. App. 400, 409, 167 P. 543; Redemeyer v. Cunningham, 61 Cal. App. 423, 429, 215 P. 83.

[2] Where an instrument is void for some fundamental reason, reformation would amount to the making of a new contract, and is therefore never granted. 34 Cyc. 926, 927.

[3] It would seem, therefore, that the trial court unduly extended the equitable principle of reformation in inserting in this deed a complete description of the property. The circumstances of the case appeal strongly to a court of equity, and this, doubtless, influenced the decision of the case. However, the plaintiff was not without remedy; indeed, she had several remedies at her command. She was entitled to bring an action against the estate for the value of her services to the deceased, or she had an action for the failure of the decedent to perform his contract and convey to her the property in controversy, in which equity would hold the heirs at law as trustees of the property for the plaintiff; but the court should not adopt a remedy which is not sanctioned by law because the plaintiff has misconceived her remedy.

The judgment is reversed.

We concur: SHENK, J.; RICHARDS, J.

---

206 Cal. 29

PEOPLE v. GORDON. (Cr. 3123.)

Supreme Court of California. Dec. 27, 1928.

1. Criminal law 🔑706—Conviction for embezzling client's funds held justified notwithstanding state counsel's opening statement that relation had terminated.

Conviction of attorney for embezzlement of moneys received for client *held* justified, under evidence that there was no substitution of attorneys, and that defendant continued to act as attorney, though deputy district attorney in his opening statement remarked that the relation of attorney and client had terminated by client's introduction to another attorney.

2. Criminal law 🔑703—In prosecution for attorney's embezzlement, it was immaterial whether client believed defendant had ceased to act as his attorney, and opening remarks of prosecutor as to cessation of relationship were not prejudicial.

In prosecution of attorney for embezzlement of client's funds, it was immaterial whether client considered that defendant had ceased to act as his attorney, and opening remarks of prosecuting attorney that the relationship of attorney and client had ceased *held* not prejudicial.

3. Embezzlement 🔑10—Attorney's fraudulent appropriation of moneys received for client constituted "embezzlement," even if attorney and client relationship had ceased (Pen. Code, § 503).

Attorney's fraudulent appropriation to his own use of moneys received in behalf of client constituted embezzlement, under Pen. Code, § 503, and not larceny, even if defendant had been discharged as attorney, since he acted as constructive agent in handling another's property.

[Ed. Note.—For other definitions, see Words and Phrases, First, Second, and Third Series, Embezzle; Embezzlement.]

4. Witnesses ⚷337(1)—Defendant, accused of crime, who testifies, subjects himself to impeachment as to credibility like other witnesses.

Defendant in criminal prosecution, who takes witness stand, puts in issue his character for truth, and subjects himself as a witness to the same rules for testing his credibility by impeachment as any other witness.

5. Witnesses ⚷337(3)—Admission of testimony of witnesses, familiar with defendant's character, that his reputation for truth was bad, held not abuse of discretion, where defendant took stand, in that evidence was too remote.

Where defendant, accused of embezzlement, took witness stand in his own behalf, admission of testimony of witnesses who knew of his character up to within a few years prior to the trial, and during the time of the negotiations complained of, to the effect that his reputation for truth was bad, was not an abuse of discretion, in that evidence was too remote.

6. Embezzlement ⚷44(2)—Fraudulent intent held sufficiently established in prosecution for embezzlement.

In prosecution for embezzlement by attorney of client's funds, evidence *held* sufficient to establish fraudulent intent necessary for conviction.

In Bank.

Appeal from Superior Court, Los Angeles County; Elliot Craig, Judge.

M. M. Gordon was convicted of embezzlement, and he appeals. Affirmed.

See, also (Cal. Sup.) 269 P. 529.

Burke & Catlin, Laird L. Neal, and W. Maxwell Burke, all of Los Angeles, for appellant.

U. S. Webb, Atty. Gen., and James S. Howie, Deputy Atty. Gen., for the People.

PRESTON, J. This is an appeal by defendant from a judgment of conviction for the crime of embezzlement. Persuasive testimony offered by the prosecution in support of the charges filed against him showed the facts to be substantially as follows:

In December, 1919, one James E. Fisher bought from Robert Marsh & Co. of Los Angeles four $1,000 bonds. In October, 1921, he made an unsuccessful attempt to collect the amount due upon them. Immediately thereafter, answering an advertisement, he called at the office of a collection agency in San Diego, where he met one Hinckley, by whom he was introduced to defendant Gordon, an occupant of the same office, who handled the legal end of the business. It was thereupon agreed that these parties should endeavor to collect the amount due upon the bonds, and that Fisher should pay court costs in any action brought against Marsh & Co., and also 10 per cent. of any sum recovered. A contract providing for said 10 per cent. fee was signed by said Fisher. About 10 days later Fisher delivered the bonds to Hinckley and Gordon, accepting in return their receipt therefor. In all five bonds were so delivered, as Fisher had theretofore accepted an additional $500 bond from Marsh & Co. in consideration of the dismissal of a prior suit against it and allowance to said company of an extension of time within which to pay the sum due.

About December, 1921, Fisher went to San Diego, where he and defendant signed a complaint prepared by defendant, as attorney, in an action filed by him in the superior court of San Diego county for the purpose of recovering upon said bonds as aforesaid. About this time Fisher paid defendant $100 on account for expenses of litigation. Thereafter, and upon motion of defendant, a change of venue was granted in said action to Los Angeles county, and on February 25, 1922, defendant furnished said Fisher with a letter of introduction to Mr. O. B. Willson of the law firm of Verge & Willson in Los Angeles. The letter requested that Willson do everything possible for Fisher looking toward a settlement of the matter, and added that, if it could not be settled, "Mr. Fisher will want you to assist me in the case." At this time, also, defendant returned the bonds to Mr. Fisher, who in turn delivered them to said law firm of Verge & Willson. Thereafter, and about November, 1923, while the action was still pending, defendant, on behalf of said Fisher, but without his knowledge and consent, entered into an agreement with Marsh & Co. for the settlement of said claim, which agreement he signed, "Joseph E. Fisher, by M. M. Gordon, his attorney."

By said contract Marsh & Co., in consideration of the dismissal of said suit, agreed to pay the sum of $250 each month upon the Fisher account until the principal indebtedness, with accrued interest, amounting in all to some $5,500, was canceled. The bonds were placed in escrow and were returned to Marsh & Co. at the time they made the final payment under said contract. The total indebtedness was paid in installments as stipulated therein, the entire transaction being conducted by Marsh & Co. through defendant, as attorney for said Fisher, and all payments were received by defendant. Eleven canceled checks were admitted in evidence, each for $250, issued by Marsh & Co., payable to said Fisher and indorsed in the handwriting of defendant, "J. E. Fisher, by M. M. Gordon, His Attorney." Memoranda were also introduced bearing notations in the handwriting of defendant, acknowledging the various payments received from said company. There was likewise admitted in evidence a twelfth check for $589.11, similarly indorsed. It appears that Fisher never received any of the money represented by said eleven checks, but that Gordon turned over to Attorney Will-

---

⚷For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

son, for transfer to Fisher, the greater portion of the sum represented by said twelfth check, and a new trial was granted upon the count which had for its basis the transaction surrounding said payment. Upon the other seven counts, each charging defendant with having embezzled on different dates the sum of $250, the personal property of said Fisher, a new trial was denied. Nine other checks were also admitted in evidence, each representing a $250 monthly payment, and these checks were identified as having been received from defendant by Attorney Willson, who in turn forwarded them to said Fisher, by whom they were cashed. Said Fisher then returned 10 per cent. of each remittance to Willson as his agreed fee.

Summarizing the facts as above set forth, the record shows that, of some $5,589.11 collected from Marsh & Co., said Fisher received about $2,026, or less than half thereof. The remainder was retained by defendant Gordon, in addition to the $100 paid him for costs, with the exception of the small sums remitted by Fisher to Attorney Willson. Of said sum so retained by defendant, it is claimed that $24 went to Attorney Verge and $1,739.11 to Attorney Willson. The remaining sum of about $1,800 defendant kept as his fee. Attorney Willson admitted receiving certain sums from defendant, but claimed that they were sent him in payment of his services for defendant in another case, and he so believed when he accepted the 10 per cent. fee sent him by Mr. Fisher. At any rate, it is plain that of the sum collected more than 50 per cent. went into the hands of defendant, and that said Fisher received no part thereof. When Fisher called upon defendant in 1925, not having seen him since 1922, defendant claimed that their contract was on a fifty-fifty basis; that he was not a party to the 10 per cent. agreement between Fisher and said collection agency; that he had the right to retain one-half of the sum recovered. Such claim is the basis of his defense. Fisher testified, however, that this was the first time any one had ever mentioned a fifty-fifty basis of collection to him, and that he had never discharged defendant as his attorney or rescinded said contract for a 10 per cent. collection fee.

[1-3] Appellant's first claim is that the case was not tried on the theory presented by the people, and that the confusion arising therefrom caused his conviction. In support thereof he relies upon certain testimony and a remark made during the course of the opening statement by the deputy district attorney to the effect that, at the time he gave Fisher the letter of introduction to Attorney Willson, the relation between defendant and Fisher of attorney and client was thereby terminated; that, therefore, if he was not thereafter the attorney for Fisher, and if he was without authority as such attorney to make said collections, then the crime, if any, committed by him was larceny. and not embezzlement, for embezzlement consists only of the fraudulent appropriation of property by a person to whom it has been intrusted. Pen. Code, § 503. In other words, appellant claims that the opening statement announced a theory of the trial, which would prove facts constituting larceny and not embezzlement, and his counsel accepted the issue, relying upon the technical differences between the two crimes, and was thereby led into consenting to the admission of much incriminating evidence which could otherwise have been prevented from reaching the jury.

This claim is untenable. The defendant was charged with the crime of embezzlement; the prosecution undertook to present facts which would prove the commission of said crime by him, and the jury was guided by proper instructions in its consideration of the evidence. Whether or not said Fisher considered that defendant had ceased to act as his attorney is immaterial, and the opening remarks to the jury on this subject could not have prejudiced defendant. If defendant continued as Fisher's attorney, the crime, if any, was clearly embezzlement. There is ample evidence to support this view. There was never any substitution of attorneys in the action brought by defendant; in his letter to Verge Willson, defendant spoke of their assisting him with the case; defendant signed the agreement on Fisher's behalf as his attorney, and likewise indorsed said checks as his attorney. Furthermore, Fisher testified that he never definitely discharged defendant as his attorney, although defendant had apparently ceased to be interested in the matter. On the other hand, even if Fisher did in fact discharge defendant in 1922, or if defendant in effect discharged himself, yet, in the later transactions, he acted as the constructive agent of Fisher in the handling of said property intrusted to him as such agent, in which event his crime, if any, was likewise embezzlement and not larceny. See 10 Cal. Juris. p. 252, § 15; People v. Treadwell, 69 Cal. 226, 10 P. 502; People v. Steffner, 67 Cal. App. 23, 28, 227 P. 699; People v. Main, 75 Cal. App. 471, 242 P. 1078, and cases there cited.

[4, 5] Defendant was a witness in his own behalf, and he contends that it was error for the court to admit the testimony of certain character witnesses, who stated on behalf of the prosecution that his reputation for truth, honesty, and veracity was bad, especially in view of the fact that these witnesses were residents of San Diego, and not of Los Angeles, and had not known the reputation of defendant subsequent to the year 1923. Defendant, in taking the witness stand, put in issue his character for truth, honesty, and integrity, and thereby subjected himself as a witness to the same rules for testing his credibility by impeachment as any other witness. People v. Hickman, 113 Cal. 80, 45 P.

175; People v. Arnold, 116 Cal. 687, 48 P. 803; People v. Bannon, 59 Cal. App. 50, 61, 209 P. 1029. Furthermore, the knowledge of these witnesses, who knew of defendant's character up to within a few years prior to the trial, and during the time of his negotiations with said Fisher, was clearly not knowledge so remote as to make its admission an abuse of discretion by the court.

[6] Defendant claims there is no showing of fraudulent intent on his part, as his actions were unconcealed and were based upon his understanding that he was to receive half of the sum collected. In our opinion, however, the evidence was amply sufficient to establish the fraud. Defendant's testimony at most raised a conflict, which was resolved by the verdict of the jury in favor of the people. The jury was properly instructed on the subject of the element of specific intent, and its determination of the matter is final.

We have carefully examined all points raised by appellant and find no merit in them. Judgment affirmed.

We concur: WASTE, C. J.; CURTIS, J.; LANGDON, J.; RICHARDS, J.; SHENK, J.; SEAWELL, J.

---

206 Cal. 128

JACOBS et ux. v. C. H. SMITH LUMBER CO. (L. A. 9494.)

Supreme Court of California. Dec. 31, 1928.

Venue 🔑5(3)—Action to reform note secured by trust deed held triable in county where defendant had principal place of business, notwithstanding realty was in another county; "for the recovery of real property or an interest therein" (Const. art. 12, § 16; Code Civ. Proc. § 392).

Where note sought to be reformed was executed and made payable at principal place of business of defendant corporation, and deed of trust securing note was also executed there, but real property described in trust deed was situated in another county, proper county within which to commence action was county where corporation had principal place of business, under Const. art. 12, § 16, since action was not "for the recovery of real property or an interest therein," within Code Civ. Proc. § 392, requiring such action to be tried in county wherein property or portion thereof is situated.

[Ed. Note.—For other definitions, see Words and Phrases, First, Second, and Third Series, Action for the Recovery of Real Estate.]

In Bank.

Appeal from Superior Court, Riverside County; Wm. H. Ellis, Judge.

Action by Henry R. Jacobs and wife against the C. H. Smith Lumber Company. From an order denying a motion for change of venue, defendant appeals. Reversed.

C. Roy Smith, of Long Beach, for appellant.

A. Heber Winder, of Riverside, for respondents.

PER CURIAM. This appeal was submitted upon an order to show cause issued herein, no respondents' brief having been filed. The appeal is by the defendant from an order of the superior court in and for the county of Riverside denying the defendant's motion to change the place of trial of the action from the county of Riverside to the county of Los Angeles. The motion was based upon the notice, demand, and affidavits of the defendant filed at the time of presenting its answer herein, and based upon the ground that the residence of the defendant at the time of the commencement of the action and at all times thereafter was in Los Angeles county. The action was one wherein the plaintiffs, as the makers of a certain promissory note, secured by a deed of trust, alleged that said promissory note was usurious, and prayed for equitable relief and for the reform of the note, so as to purge therefrom all usurious contents. The note in question was executed and was made payable at Long Beach, in the county of Los Angeles, the residence and principal place of business of the defendant corporation. The deed of trust securing said note was also executed there; the real property described in said deed of trust, however, being situate in the county of Riverside. The trustee named in the deed of trust was the California National Bank of Long Beach, a corporation having at all times its residence and place of business at Long Beach.

It would thus appear that the proper county within which this action should have been commenced was the county of Los Angeles, under the provisions of section 16 of article 12 of the state Constitution, unless it can be held that this action is one "for the recovery of real property, or of an estate or interest therein, or for the determination in any form, of such right or interest, and for injuries to real property," which actions, under the provisions of section 392 of the Code of Civil Procedure, are to be commenced and tried in the county in which such real property, or some portion thereof, is situated. It would seem clear, both by reason and authority, that this is not one of the actions provided for in the aforesaid section of the Code of Civil Procedure, but, on the contrary, it is solely and simply an action brought for the reformation of a personal obligation wherein the question as to the title or possession of the real property described in the deed of trust which secures the payment of said personal obligation is in no wise involved. The cases of Bailey v. Cox, 102 Cal. 333, 36 P. 650, Woodbury v. Nevada, etc., 120 Cal. 463, 52 P. 730, and Smith v. Smith, 88 Cal. 572, 26 P. 356, fully deal with and dispose of the question presented upon this appeal, and upon their authority, as well as upon the plain language of the provisions of the Constitution itself, above referred to, it is obvious that the trial court was in error in denying the defendant's motion for a change of place of trial to the county of its residence and principal place of business.

The order is reversed.

206 Cal. 134

EDSON et al. v. INDUSTRIAL ACCIDENT COMMISSION et al. (S. F. 12987.)

Supreme Court of California. Dec. 31, 1928.

Master and servant 🔑385(11¼)—Percentage of permanent disability attributable to nonindustrial disease with which employee was afflicted was erroneously included in award for injury to eye (St. 1917, p. 831, §§ 3, 9(b) 2(7, 10), 11(f).

In determining percentage of permanent disability to employee by reason of injury to eye, the Industrial Commission erroneously included in the award a percentage of amount as compensation for disability attributed solely to a nonindustrial disease with which employee was theretofore afflicted, since the purpose of the Workmen's Compensation Act is to charge employer and through him industry as a whole with loss accruing to employee and resulting from his employment, in accordance with the provisions of St. 1917, p. 831, §§ 3, 9(b) 2(7, 10), 11(f).

In Bank.

Proceeding under the Workmen's Compensation Act by Julio Landlin, claimant, opposed by Frank Edson, employer, and the State Compensation Insurance Fund, as insurance carrier. To review an award of the Industrial Accident Commission, the employer and insurance carrier brings certiorari. Award annulled, and cause remanded.

B. E. Pemberton and Daniel W. Burbank, both of San Francisco, for petitioners.

G. C. Faulkner, of San Francisco, for respondents.

SHENK, J. This proceeding was brought by Frank Edson, as employer, and by state compensation insurance fund, as his insurance carrier, to review and annul an award of the Industrial Accident Commission.

Julio Landlin was a laborer and the employee in whose favor the award was made. On September 6, 1926, Landlin suffered an injury by being struck in his left eye by a flying nail. That the injury arose out of and in the course of the employment is not questioned. Prior to and at the time of the injury Landlin was afflicted with a nonindustrial disease by reason of which he had permanently lost 30/50 of the sight of each eye. On May 5, 1927, he filed an application for an adjustment of his claim with the respondent commission. On October 31, 1927, the commission made its finding wherein it was found that the applicant had sustained an injury "when he was struck in the left eye by a flying nail, the vision of the left eye having been previously impaired." It was further found in paragraph 2 as follows: "2. Said injury caused permanent disability consisting of reduction of vision of left eye to counting fingers at one foot, correctible to 10/200 with moderate blurring; loss of near vision, correction being impractical due to loss of lens, pre-existing vision of eye being assumed to be 20/50, which for applicant's age and occupation constitutes a permanent disability of nine per cent. entitling him to $9.26 a week for 36 weeks, in the total sum of $333.36, which has been paid, based upon weekly wages of $15.00."

On November 18, 1927, this court pronounced its judgment in the case of Ford Motor Co. v. Industrial Acc. Com., 202 Cal. 459, 261 P. 466, wherein certain provisions of the Workmen's Compensation Act (St. 1917, p. 831) involved in the present proceeding were commented upon. Prior thereto this court had, on rehearing, decided the case of Liptak v. Industrial Acc. Com., 200 Cal. 39, 251 P. 635. Three days after the decision in the Ford Motor Co. Case the applicant herein filed with the commission a petition for a rehearing on the ground that the prior award was inadequate. The rehearing was granted, and on January 23, 1918, the commission made its second finding and award wherein it amended paragraph 2 of its prior award to read as follows: "2. Said injury caused permanent disability consisting of reduction of vision of left eye to counting fingers at one foot, correctible to 10/200, with moderate blurring; loss of near vision, correction being impractical due to loss of lens; reduction of vision of right eye to 20/50, which disability, for the applicant's age and occupation is equal to 59¼ % of total disability, entitling him to a weekly payment of $9.26 for 237 weeks, amounting to the total sum of $2,194.62, on account of which the applicant has been paid the sum of $333.36. Said payments are based upon a weekly wage of $15.00."

On February 21, 1928, the petitioners filed in the District Court of Appeal their application for a writ to review and annul the second award. The petition was denied by the District Court of Appeal without opinion. An application for a hearing in this court was granted on May 21, 1928. Prior to the order granting the hearing the respondent commission filed a supplemental answer confessing its uncertainty as to the correctness of the conclusions reached in the award now under review, and expressed a desire that this court definitely construe the powers of the commission under the facts presented.

The facts are undisputed. Prior to the injury of September 6, 1926, Landlin had permanently lost 30/50 of the sight of each of his eyes due to a nonindustrial disease. By the industrial injury he was caused to lose an additional 17½/50 of the sight in his left eye. The injury did not affect his right eye. The additional loss of vision caused by the injury to the left eye was rated originally at 9 per cent., and the award was made for $333.36. After rehearing the commission found in effect that the injury caused permanent disability consisting of all of the reduction of vision in the left eye and all of the reduction of vision in the right eye and found that these losses equaled 59¼ per cent. of total disability. Upon these findings the commission made an award for the payment "of compensation for permanent disability in the total sum of $2,194.62." It will thus be seen that approximately five-sixths of the permanent disability for which the award was made was for a permanent loss pre-existing the industrial injury and resulting from a nonindustrial disease.

The question for determination may fairly be stated as follows: Does any provision of the Workmen's Compensation Act require or permit the respondent commission to award compensation for that portion of permanent disability which existed prior to the industrial injury and was wholly caused by nonindustrial disease?

Generally, the purpose of the Workmen's Compensation Act is to provide and require industrial responsibility for industrial injury. In other words, it was enacted to impose a charge on industry for losses caused by industry. This court said in Union Iron Works v. Industrial Acc. Com., 190 Cal. 33, at page 39, 210 P. 410, 413: "The underlying principle upon which the Workmen's Compensation Act rests is, as its title indicates, the providing of compensation to an employee for injuries resulting from his employment. It emanates from the economic thought that personal injury losses incident to an industry is a part of the costs of production to be borne, just as the depreciation and replacement of a machine is borne, by the industry itself, which compensation will be included in the cost of the product of the industry. Western Indemnity Co. v. Pillsbury, 170 Cal. 686, 151 P. 398."

The portions of the act pertinent to the case in hand will be noted.

Section 3 of the act defines the terms used in the act "unless a different meaning is plainly required by the context." Subdivision (4) of that section provides: "The term 'injury,' as used in this act, shall include any injury or disease arising out of the employment. * * *" No question of aggravation of any disease existing prior to the injury involved herein arises in this case. Consequently the remainder of the subdivision is inapplicable to the facts. Section 9(b) 2(7) provides: "In determining the percentages of permanent disability, account shall be taken of the nature of the physical injury or disfigurement, the occupation of the injured employee, and his age at the time of such injury, consideration being given to the diminished ability of such injured employee to compete in an open labor market."

Section 9 (b) 2 (10) provides: "The percentage of permanent disability caused by any injury shall be so computed as to cover the permanent disability caused by that particular injury without reference to any injury previously suffered or any permanent disability caused thereby."

Section 11 (f) provides: "The fact that an employee has suffered a previous disability, or receives compensation therefor, shall not preclude him from compensation for a later injury, * * * but in determining compensation for the later injury, * * * his average annual earnings shall be fixed at such sum as will reasonably represent his annual earning capacity at the time of the later injury."

From the foregoing the purpose of the act with reference to the effect of prior injury or disease is obvious. Industry takes the employee as it finds him at the time of the employment. He may have suffered a prior injury, either industrial or nonindustrial. His capacity to serve may have been reduced by an industrial or a nonindustrial disease. It may safely be said that a small proportion of humans are perfect physically and mentally. Disease and accident during childhood and the diseases and habits of adults having no relation to any particular employment result in disability or impaired capacity to work in the sphere of both physical and mental labor. For such disability or impaired capacity the Workmen's Compensation Act was not intended to provide compensation. The plain intent of the act as framed was to charge the employer, and through him industry as a whole, with the loss accruing to the employee and resulting from his employment—i. e., arising out of and in the course of his employment. If the employee has suffered permanent disability by injury or disease prior to the injury for which compensation is sought, the statute requires that the percentage of disability on account of the latter injury be computed without reference to any injury previously suffered or any permanent disability caused thereby, except that in the case of aggravation of a pre-existing disease such proportion of the disability due to the aggravation of the prior disease as may be reasonably attributed to the later injury may be considered. And this is true as to pre-existing injury or disease, either industrial or nonindustrial. If the pre-existing injury or disease be nonindustrial, the employment has no relation to the disability caused thereby and the employer or the industry is not chargeable with compensation therefor, excepting, as above noted, in the case of aggravation of a pre-existing disease. If the prior injury or disease be industrial, the terms of the act import a presumption that it has theretofore been compensated for. Therefore, when the term "injury" was defined in section 3(4) of the act to "include any injury or disease arising out of the employment," the Legislature had in mind the injury or disease for which compensation was provided in the act. But where the term "injury" was used in section 9(b) 2 (10), in the phrase "without reference to any injury previously suffered," the context plainly requires that the term apply to a pre-existing nonindustrial as well as to a pre-existing industrial injury or disease. Any other construction of the language of the act would result in a palpable absurdity. If the word "injury" in section 3(4) of the act be given the same meaning when last employed in section 9 (b) 2(10) and without regard to the context, the result would be that in computing the percentage of permanent disability caused by the particular industrial injury under consideration the commission must exclude the effect of a prior industrial injury, but by inference might include disability on account of a prior nonindustrial injury or disease. Such was not the intention of the statute.

When, therefore, the commission, in computing the percentage of permanent disability of Landlin caused by the industrial injury, included any percentage of such disability attributable to the prior injury or disease, it proceeded in a way unauthorized by the statute. Likewise, there was no justification for the inclusion in the award of nearly five-sixths or any amount as compensation for the disability attributable solely to the prior injury or disease and for which the employment was in no wise responsible.

The action of the commission, as indicated by the dates of its particular orders hereinbefore noted, together with the dates of the judgments of this court in the Liptak and the Ford Motor Co. Cases, and the attitude of counsel for the commission in the present matter, all point to the conclusion that in making its second award the commission was guided by what it conceived to be the compelling force of our decisions in the two cases mentioned. It is due to the commission to say that prior to the decision in the Liptak Case the commission had consistently applied a method of computation in permanent disability cases consistent with the views herein expressed and likewise, prior to said decision, consistently contended that the general rule of computation should apply to Liptak's Case. It was not until after the decision in the Ford Motor Co. Case that it revised its method of computation to conform to what it believed to be the effect of those two cases on the proper method to be applied in the present case. And it is now frankly conceded by counsel for the commission that the application of the statute to the present case is an amplification and extension of the doctrine of the Liptak Case.

We are of the view that the doctrine of the Liptak Case is not applicable to the case in hand. That case involved compensation for total loss of the sight enjoyed by the applicant immediately prior to the time of the injury for which compensation was sought. Section 9 (b) 2 (9) of the act, relating to total loss of sight, played an important part in the determination of that case, and it was definitely stated in the opinion that because of an apparent ambiguity in the language of the statute relating to cases of complete loss of sight, the point involved could be decided either way. Applying the provisions of section 69(a) of the act, requiring a liberal interpretation of the act in favor of the employee, the court resolved the ambiguity in favor of the applicant for compensation. The doctrine of the Liptak Case may not, therefore, reasonably be extended to cases which do not involve total loss of sight.

Nor does the Ford Motor Co. Case have the effect of which the commission was apprehensive. The conclusions arrived at in that case are entirely consistent with our present conclusions. In that case the applicant had suffered a prior industrial injury. He was compensated for that injury and was re-employed by the same employer. He suffered another injury arising out of and in the course of his employment. It was decided in that case that the percentage of the total disability caused by the second injury must be computed without reference to the prior injury. The award in that case was annulled for other reasons. Our conclusions in this case are entirely in line with the reasoning and the result attained in that case.

From what has been said it follows that the award under review was and is unjustifiable on the undisputed facts. The award is therefore annulled, and the cause is remanded to the respondent commission for further proceedings not inconsistent with the views herein expressed.

We concur: WASTE, C. J.; RICHARDS, J.; SEAWELL, J.; CURTIS, J.; PRESTON, J.; LANGDON, J.

206 Cal. 81

PEOPLE v. ESTORGA. (Cr. 3151.)

Supreme Court of California. Dec. 27, 1928.

1. Jury ⚷131(13)—Collective examination by court of panel, in such manner that neither people nor defense could observe jurors as they answered, disapproved (Pen. Code, § 1078, as amended by St. 1927, p. 1039).

Collective examination by court, under Pen. Code, § 1078, of entire panel in body of courtroom by series of questions, which might, for the greater part, be answered by silence, and in manner that neither people nor the defense had any opportunity to observe the jurors as they answered, *held* disapproved, in view of St. 1927, p. 1039, amending said section and authorizing reasonable examination of prospective jurors by counsel and people.

2. Criminal law ⚷1162—Reversal will not be ordered if it appears to reviewing court that result would have been reached if error had not been committed.

If it appears to satisfaction of Supreme Court that result reached in criminal trial was just, and that it would have been reached if the error complained of had not been committed, reversal or new trial will not be ordered.

3. Criminal law ⚷1186(4)—Improper collective examination of panel by court did not require reversal under circumstances (Const. art. 6, § 4½).

Collective examination by court of entire panel in body of courtroom, in such manner that neither people nor defense could observe jurors as they answered, *held* not to require reversal of conviction for rape, under Const. art. 6, § 4½, where it did not appear that defendant did not have a fair and impartial trial by jury selected, and defendant's testimony showed that he was notoriously guilty of some serious offense.

Preston, J., dissenting.

In Bank.

Appeal from Superior Court, San Bernardino County; Chas. L. Allison, Judge.

Charles Estorga was convicted of rape, and he appeals. Affirmed.

Superseding opinion of District Court of Appeal, 267 P. 589.

H. E. Thompson, of San Bernardino, for appellant.

U. S. Webb, Atty. Gen., James S. Howie, Deputy Atty. Gen., and George H. Johnson, of San Bernardino, for the People.

WASTE, C. J. The defendant was convicted on three counts of an information charging the crime of rape. The sufficiency of the evidence to sustain the verdict is not questioned. In fact, it could not be, for, as defendant in the court below, appellant voluntarily took the stand and admitted, without equivocation, the commission of each of the acts charged. The only point we deem it necessary to consider on this appeal is the contention that the court committed prejudicial error in its method of conducting the examination of the jurors called to try the cause; the question for consideration being whether or not the court refused to allow counsel for the defense to make a reasonable examination of the prospective jurors for purposes related to the right of challenge for cause.

At the outset, this court must register its strong disapproval of the method followed by the trial court in selecting the jury in this case. From the record it appears that, when the case was answered "Ready for trial," the clerk called the roll of the jurors constituting the panel, apparently for the purpose of ascertaining who were present. Without any names being taken from the box containing the list of jurors, and before any jurors were called to take their places in the jury box, the court propounded to the jurors present, collectively, a large number of questions, which he termed "the usual questions touching your qualifications to act as jurors in this case." Before doing so, he stated who the parties were, and explained the nature of the charges as set out in the several counts of the information. The record is silent as to any answers returned by the jurors. Many of the questions, which extend through several pages of the transcript, appear to have been of such nature as to call for a negative reply, and it may be assumed that the silence of the jurors under the questions was equivalent, in the majority of cases, to a negative answer.

With the exception of a counter interrogatory addressed to the court by one of the jurors, who sought information as to her status on the jury because she was a member of the county probation committee, but one response was made by any juror. Some of the questions asked by the court dealt with possible knowledge by the jurors of the alleged offense, and the relationship, if any, of the parties. By other questions, the court sought to ascertain the attitude of the jurors toward the particular offense with which the defendant was charged, and whether, if the jurors were facing a similar charge, they would be willing to be tried by jurors who had the same attitude toward the charge and the defendant as they had at the present time. By other questions, the court sought to ascertain if the jurors would give the defendant the benefit of the presumption of innocence, and whether or not they would accept the instructions of the court as to the law in the case; the interrogatories concluding with several questions as to whether or not the jurors would give a fair, impartial, and unbiased consideration to the case.

After such examination by the court, the names of 12 jurors were drawn; the court announced that, in the opinion of the court, the examination for cause was sufficient, and directed counsel to exercise their peremptory challenges. The people passed the challenge. Thereupon the following took place:

"Mr. H. E. Thompson (counsel for the defense): If the court please, in the answers the veniremen made I was not able to find out how they answered. I was not able to see a nod of the head. There was a large number here standing up. I am not able from the examination to intelligently challenge on behalf of this defendant, and I would like to have the privilege of asking each individual juror a few questions.

"The Court: What questions would you like to ask?

"Mr. Thompson: I would like to know if they are married men, and if they have children, and whether they are young men or young women, and if they would have any prejudice by reason of those facts, and whether they have had any trouble of the kind in their family, or their near families, or near relations, and I don't know, any questions—all being examined in a body, I don't know how many of them answered any questions, and I would not know, without I individually asked them separately how each one feels.

"The Court: None of the questions you have suggested would tend to develop a ground for challenge for cause, and therefore would be immaterial."

The defendant thereupon excepted to the ruling, and peremptorily challenged two of the jurors, but declined to make any further challenges; counsel stating that he "was not sufficiently informed." On being directed to either exercise further challenges or pass the jury, the defense passed, and the jury was sworn to try the cause. Appellant contends that by reason of the method followed by the trial court in selecting the jury, and the trial court's limitation of examination by his counsel, he was denied the right to test by reasonable inquiry the qualifications of the prospective jurors.

[1] This court cannot approve the manner of selecting the jury in this case. While the Legislature, at its most recent session, provided, in section 1078 of the Penal Code, that "it shall be the duty of the trial court to examine the prospective jurors to select a fair and impartial jury," it further provided, in the same section, that the court "shall permit reasonable examination of prospective jurors by counsel for the people and for the defendant." Stats. 1927, p. 1039. We have noted a tendency on the part of trial judges throughout the state to place too literal an interpretation upon what is the "duty of the trial court to examine prospective jurors," and to pay too little attention to the right of a "reasonable examination of prospective jurors by counsel" for the people, and particularly counsel for the defendant. The section is one of those passed by the Legislature on the recommendation of the commission for the reform of criminal procedure created by the Legislature in 1925; the purpose of the enactment, of course, being to expedite the trial of criminal causes, and to correct the abuse, which has grown up in this jurisdiction, through tedious and unnecessary examination of prospective jurors in criminal cases. It has become a matter of common knowledge in this state that the efforts on the part of counsel for defendants in criminal cases have developed into attempts to disqualify jurors, rather than to seek to ascertain their qualifications.

The purpose of the statute, however, was not to bring about expedition by depriving either the people, or defendants charged with the commission of offenses, of the right of a reasonable examination of prospective jurors, and the Legislature was particular to provide for that right. The collective examination of the entire panel in the body of the courtroom, and by a series of questions which may, for the greater part, be answered by silence on the part of the jurors, and under circumstances like those in the case at bar, in which neither the people nor the defense had any opportunity to observe the jurors as they answered, is, in our opinion, such a wide departure from the due course and conduct of an examination as to call for the unqualified disapproval of this court. See, also, People v. Edenburg (Cal. App.) 263 P. 857; People v. Riordan, 79 Cal. App. 488, 496, 250 P. 190. In those cases the jurors who were examined collectively by the court appear to have been those who had been drawn and seated in the jury box in the customary manner, were thus reduced to 12 in number, and had thereby become more definitely prospective jurors for the case on trial. This court, however, is not prepared to criticize a collective examination by the trial court of jurors drawn and seated in the jury box, provided the examination be of such nature, and conducted in such manner, as to sufficiently disclose the state of mind and attitude of the jurors toward the cause and the parties involved, and that opportunity for a "reasonable examination" of the prospective jurors be accorded the people and the defense, on it being made to appear to the satisfaction of the court that such further examination is both "reasonable" and proper. We commend to the trial courts, however, a consideration of some of the observations made by the District Courts of Appeal on this subject.

[2, 3] A first impression of the situation presented in this case would seem to require a reversal of the judgment of conviction, upon the ground that the defendant had not been accorded an opportunity to select a fair and impartial jury. But where, as in this case, the jury has found the defendant guilty, we must, upon a review of the entire record, decide whether, in our judgment, any error committed has led to the verdict which was reached. If it appears to our satisfaction that the result was just, and that it would

have been reached if the error had not been committed, a reversal or a new trial is not to be ordered. People v. O'Bryan, 165 Cal. 55, 66, 130 P. 1042. While the Constitution of this state guarantees to one accused of crime all the rights and safeguards incident to a trial by jury, including the right to the selection of a fair and impartial jury, it also provides that no judgment shall be set aside, or a new trial granted, in any case for any error of procedure in the trial court, unless, after an examination of the entire cause, including the evidence, the appellate tribunal shall be of the opinion that the error complained of has resulted in a miscarriage of justice. Const. art. 6, § 4½.

In his "qualified concurrence" in the case of People v. Fleming, 166 Cal. 357, 384, 385, 136 P. 291, 303 (Ann. Cas. 1915B, 881), Mr. Chief Justice Beatty expressed the view that the term "miscarriage of justice," as used in the section of the Constitution, supra, may be said to mean "the conviction of a person who is probably innocent." It may therefore be accepted as the rule that, since the adoption of the amendment to the Constitution, supra, the mere fact of the assignment of error is not conclusive. "The final test is the opinion of the appellate court upon the result of the error. No doubt this view requires the court, to some extent, to weigh the evidence, and form conclusions upon its weight—a function which, heretofore [before the amendment to the Constitution], has been reserved for the jury. But it cannot be doubted that the legislators, in proposing the amendment, and the electors, in adopting it, intended to put upon the courts the performance of just that function. We are not substituted for the jury. We are not to determine, as an original inquiry, the question of the defendant's quilt or innocence. But, where the jury has found him guilty, we must, upon a review of the entire record, decide whether, in our judgment, any error committed has led to the verdict which was reached." People v. O'Bryan, supra.

It therefore follows that, where prejudicial error is predicated on any of the grounds specified in the Constitution, it is incumbent upon this court to determine the matter on the particular facts and circumstances appearing in the individual case in which the assignment of error is made. Applying that rule to the present case, there appear to be two sufficient reasons why the procedure followed by the trial court in the selection of the jury, improper though it was, should not result in a reversal. The first of these reasons is that it would seem that the desire of the defense to further question the prospective jurors, after they were called to the box, as indicated by the questions which counsel stated it was desired to ask, was not so much for the purpose of laying the basis of challenges for cause as to pave the way for possible peremptory challenges, and there is no statutory authority for the examination of jurors solely for that purpose. People v. Edwards, 163 Cal. 752, 754, 127 P. 58. Furthermore, the defense did not exhaust its peremptory challenges, excusing only 2 jurors when accorded that opportunity. The defense has made no affirmative showing, and does not offer to show, that any of the 12 jurors who were actually sworn and served in the trial of the cause were biased, prejudiced, or in any way unfit to serve as trial jurors; nor does it appear that by reason of the manner in which the jury was selected the defendant did not have a fair and impartial trial.

The other, and to our minds the more potent, reason for holding that the judgment should not be reversed, is found in the fact that, although the defendant on arraignment entered a plea of not guilty to the charges of the information, he voluntarily took the stand at the trial, as a witness in his own behalf, and, without equivocation or qualification, admitted the commission of the acts charged. It appears from his own testimony that he met the prosecutrix—a girl of the age of 13 or 14 years—while the two were working in the orchards in Northern California. After a week of persuasion, and under a promise that the defendant would take the girl to Arkansas and marry her, the prosecutrix consented to the acts. In the meantime, they had traveled together from Sacramento in the defendant's automobile, spending their nights together, as far as San Bernardino county, where the acts specified in the information were committed. The defendant knew that the girl was under the age of 18 years. He, therefore, caused her to say that she was 17 years old, and his wife. On such a record, from which it appears from the testimony of the defendant that he has been notoriously guilty of some serious offense, it cannot be said that a miscarriage of justice has occurred by reason of the conviction.

While, as already indicated, we must strongly disapprove of the method by which the jury was selected in this case, we cannot bring ourselves to reverse the righteous judgment of conviction which followed.

The order overruling defendant's motion for a new trial, and the judgment and sentence of the court, are, and each is, affirmed.

We concur: RICHARDS, J.; SEAWELL, J.; CURTIS, J.; LANGDON, J.; SHENK, J.

PRESTON, J. I dissent. I think the prejudice to the rights of the defendant requires a reversal of the judgment.

206 Cal. 209

FILSON v. BALKINS. (L. A. 8183.)

Supreme Court of California. Jan. 8, 1929.

1. **Automobiles ⚷244(6)—Evidence supported jury's verdict that motorist striking pedestrian crossing highway was negligent.**

In action by pedestrian for injuries sustained when he was struck by automobile while crossing highway, evidence supported jury's verdict that motorist was negligent.

2. **Automobiles ⚷217(6)—Pedestrian crossing highway and seeing automobile approaching from south was not required to keep continual gaze to south after justifiable conclusion he could cross in safety.**

Where pedestrian crossing highway saw automobile approaching from south, he was not required to keep a continual gaze to south after examination and appraisal of situation and justifiable conclusion that he could cross in safety.

3. **Automobiles ⚷245(72)—Contributory negligence of pedestrian struck by automobile while crossing highway held for jury.**

In action for injuries sustained by pedestrian struck by automobile when crossing highway, contributory negligence of pedestrian *held* for jury.

In Bank.

Appeal from Superior Court, Los Angeles County; Charles Monroe, Judge.

Action by W. H. Filson against M. J. Balkins for damages for personal injuries. From a judgment for plaintiff, defendant appeals. Affirmed.

Superseding opinion of District Court of Appeal in 268 P. 445.

Haas & Dunnigan and C. H. Veale, all of Los Angeles, for appellant.

Jones, Wilson & Stephenson and Leonard Wilson, all of Los Angeles (Wm. Fleet Palmer, of Los Angeles, of counsel), for respondent.

PRESTON, J. [1] Action for personal injuries. Plaintiff had judgment for $1,500, and defendant has appealed.

On July 24, 1923, plaintiff was struck by an automobile driven by defendant, and was quite seriously injured. The place of the accident was 3 or 4 feet west of the center line of the highway running north and south and at a point about 2 miles south of the town of Newhall, in Los Angeles county. The traveled part of the roadway in this region was 21 feet. The automobile was coming from the south, traveling north. The proper side of the highway, according to the law of the road, was the east side thereof, but plaintiff was struck on the west side thereof, the machine being on that side.

Evidence was received that the road was clear of traffic; that defendant was traveling some 30 miles per hour, and that no warning of any kind was given; hence the verdict of the jury that defendant was negligent cannot be disturbed.

[2, 3] In fact, the only question made is that plaintiff, as a matter of law, was guilty of contributory negligence, but we confess a total inability to see any merit in this contention under the plaintiff's evidence.

For some 500 or 600 feet south of the point of the accident the road, though on an incline, was without any curve. On the day of the accident plaintiff was acting as the foreman of a crew of men repairing a pipe line of the Midway Gas Company, which traversed the west line of said highway. Near the point of the accident these employees were tunneling under the highway from the west side thereof a distance of 6 feet to effect a pipe connection. Warnings that men were at work on the highway were posted both north and south of this point at a distance of about one-half mile therefrom. Defendant admits that he saw the men at work when he approached within about 150 feet of them. Just prior to the accident plaintiff had been requested to go to the east side of the highway to secure two flags to be used in directing traffic away from this excavation. After securing the flags, he approached the highway, and, after waiting for two vehicles to pass, gazed to the north and to the south. He saw no traffic except defendant's car, which he judged to be some 400 or 500 feet distant. Believing that he had plenty of time to recross the highway in safety, he proceeded without further outlook at a moderate gait and at an angle of about 45 degrees. Upon reaching the center of the highway, he gazed to the north, the proper place to expect traffic. Seeing none, he proceeded, and, when he had reached a point 3 or 4 feet beyond the center, defendant, apparently endeavoring to swerve in front of and around him, struck him, plaintiff coming in contact with the front side of the car. Skid marks were found upon the ground indicating that defendant had skidded some 20 feet. The marks originated upon the east side, but ended wholly upon the west side of said highway. Plaintiff heard no warning or signal of any kind, and was struck without a realization that defendant was near him.

While admittedly it is the equal and reciprocal duty of the driver of the vehicle and the pedestrian to use ordinary care while upon the highway, it is usually a question of fact and not of law whether either has in fact done so. Plaintiff says that on investigation he saw defendant some 400 or 500 feet away and proceeded across the street with the belief that he would have ample time to cross, and that he relied upon the presumption that defendant would obey the law of the road and remain on the east side of the highway. Who can say, as a matter of law, that he was not warranted in this assumption? Who would expect to be struck by a north-bound car after reaching the west half of the road? We know of no rule of law that absolutely required the plaintiff to keep a continous gaze to the south after examination and appraisal of the situation and the justifiable conclusion that he could cross in safety. Henry v. Lingsweiler, 81 Cal. App. 142, 253 P. 357.

The whole situation is summed up in the thought that evidence exists which amply warranted the jury in finding that plaintiff exercised ordinary care for his safety in making the decision that it was safe to cross the highway. This conclusion makes it unnecessary to discuss the application of the doctrine of last clear chance. The same observation may be made as to the necessity of discussing the applicability of the more liberal rule of duty of a workman upon the street or highway. State Ins., etc., Fund v. Scamell, 73 Cal. App. 285, 238 P. 780. A similar case to the one at bar on the facts is Wortman v. Trott, 202 Ill. App. 528.

The judgment is affirmed.

We concur: WASTE, C. J.; CURTIS, J.; LANGDON, J.; SEAWELL, J.; RICHARDS, J.; SHENK, J.

---

206 Cal. 88

TOBIAS v. ADAMS et al. (L. A. No. 9868.)

Supreme Court of California. Dec. 27, 1928.

1. Continuance ⚿20(1)—Motion for continuance because plaintiff's counsel were busy elsewhere, made on morning of trial, held properly denied.

Court did not abuse discretion in denying continuance sought on morning of trial because members of firm of lawyers which represented plaintiff and who were familiar with the case were busy elsewhere.

2. Time ⚿10(5)—Notice of trial served six full days before date thereof held not affected because last day fell on Sunday (Code Civ. Proc. § 594).

Notice of trial under Code Civ. Proc. § 594, served on plaintiff's counsel at least six full days before date of trial, *held* not affected by fact that last of such days fell on Sunday.

In Bank.

Appeal from Superior Court, Los Angeles County; Charles S. Burnell, Judge.

Action by Frank I. Tobias, as special administrator of the estate of William E. Tobias, deceased, against Francis D. Adams and others. Judgment for defendant, and plaintiff appeals. Reversed.

Norcop & Cushing, Paul Friedman, Maurice R. Norcop, John J. Cushing, Wellborn, Wellborn & Wellborn, and Stephen Monteleone, all of Los Angeles, for appellant.

Francis D. Adams and Earl Curtis Peck, both of Los Angeles, for respondents.

PER CURIAM. This appeal was submitted upon an order to show cause, the respondents having failed to present or file a brief. The action was one to set aside certain conveyances of real property alleged to have been made by the defendant Francis D. Adams to his wife and codefendant Gertrude B. Adams, upon the ground that such conveyances were in fraud of the rights of the decedent, William E. Tobias, of whose estate the plaintiff is the special administrator. The trial court, upon the issues made by the complaint and answer denying the above allegations, made findings in favor of the defendants and entered its judgment accordingly that the plaintiff take nothing by his said complaint. The appeal is from such judgment.

[1, 2] The appellant makes two points upon this appeal. The first is that the trial court was in error in refusing to grant the plaintiff a continuance upon his motion therefor made on the morning of the trial. The grounds of his motion were two: First, that the members of the firm of lawyers which represented the plaintiff, and who were familiar with the facts and issues in the case, were busy elsewhere; and, second, that the plaintiff had not received the five days' notice of the date of said trial provided for in section 594 of the Code of Civil Procedure. As to the first of these contentions, the showing made thereon was quite insufficient to justify the trial court in granting the continuance sought, and it certainly committed no abuse of its discretion in denying the same. Canty v. Pierce, 173 Cal. 205, 159 P. 582; Sheldon v. Landwehr, 159 Cal. 778, 116 P. 44; Handy v. Handy, 31 Cal. App. 590, 161 P. 21. As to the second ground, it appears upon the face of the record to be without merit. The cause was set for hearing on December 20, 1926. The notice thereof was served upon plaintiff's counsel on December 14, 1926, at least six full days before the date of trial. The fact that the last of said days fell on Sunday in no wise affected the sufficiency of the notice.

The next and final contention upon which the appellant relies is that the evidence does not sustain the findings and conclusions of the trial court, to the effect that the defendant Gertrude B. Adams was the owner of the property in question as her sole and separate estate, and that said property was not subject to the claims of the decedent creditor of her husband. This question was quite fully inquired into by this court upon the respondent's motion to dismiss this appeal, and was decided adversely to the respondent's then contention. Tobias v. Adams, 201 Cal. 689, 258 P. 588. Notwithstanding the adverse views of the court therein expressed, the respondent has seen fit to present no brief in defense of the judgment therein criticized. A further examination of the record satisfies us as to the correctness of our former conclusions expressed in that opinion, and on the authority thereof the judgment herein is reversed.

206 Cal. 115

LEWIS et ux. v. YOUNG MEN'S CHRISTIAN ASS'N. (Sac. 4130.)★

Supreme Court of California. Dec. 29, 1928.

Hearing Denied in Bank Jan. 28, 1929.

1. Charities 🔑45(2)—Alleged religious, benevolent, and charitable association held not relieved from liability for personal injuries, absent showing of reasonable care in selecting employés.

Young Men's Christian Association *held* not relieved from liability for personal injuries to one swimming in swimming pool, under allegation that it was organized and conducted as religious, benevolent, and charitable corporation, where it did not allege and prove that it used reasonable care in selection of its agents and employés.

2. Negligence 🔑134(5)—Evidence sustained verdict for plaintiff suing for injuries received while swimming in defendant's swimming pool.

In action for injury sustained by one while swimming in swimming pool of Young Men's Christian Association, when her foot came in contact with jagged edges of pipe protruding into pool under surface of the water, evidence *held* sufficient to sustain verdict for plaintiff.

Department 2.

Appeal from Superior Court, Sacramento County; Malcolm C. Glenn, Judge.

Action by Walter F. Lewis and wife against the Young Men's Christian Association. Judgment for plaintiffs, and defendant appeals. Affirmed.

Busick & Leeper, of Sacramento, for appellant.

Martin I. Welsh and John C. March, both of Sacramento, for respondents.

LANGDON, J. [1] This is an appeal by the defendant from a judgment against it in an action brought by Walter F. Lewis and Claire Lewis, his wife, to recover damages suffered by them by reason of injuries to the wife, sustained while she was swimming in the swimming pool of the defendant. The answer of defendant denied negligence in the particulars alleged in the complaint, and alleged that defendant was organized and conducted as a religious, benevolent, and charitable corporation. It did not allege, however, nor prove, that it used reasonable care in the selection of its agents and employés. Admitting that defendant has proven that it is a charitable organization, it failed in its defense on that ground, in that it failed to plead and prove that it had used due care in selecting its servants, whose negligence caused the injury to plaintiff. That fact is an integral part of the defense, the rule being stated in Thomas v. German Benevolent Society, 168 Cal. 183, 141 P. 1186, as follows: "That where one accepts the benefit of a public or of a private charity he exempts by implied contract the benefactor from liability for the negligence of the servants in administering the charity, if the benefactor has used due care in the selection of those servants." In the case of Roberts v. Ohio Valley Gen. Hospital, 98 W. Va. 476, 127 S. E. 318, 42 A. L. R. 968, it was said: "Because of its failure to allege that the defendant used reasonable care in selecting the nurse of whose negligence the plaintiff complains, we hold that the plea as presented does not in terms state a defense to the action."

Defendant relies upon the case of Burdell v. St. Luke's Hospital, 37 Cal. App. 310, 173 P. 1008, and contends that it is therein assumed that the burden of proving that the charitable organization did not use reasonable care in the selection of its servants is upon the plaintiffs seeking to recover for their negligence; but an examination of the reporter's transcript in that case discloses that the defendant fully proved, as a part of its case, that it had exercised reasonable care in the selection of its agents and employés, which disposes of appellant's assumption with reference to this case.

[2] Because of defendant's failure to sustain the burden of proving an integral part of its defense as a charitable corporation, the judgment appealed from must be affirmed, provided the evidence establishes a causal connection between negligence chargeable to defendant and plaintiff's injury. This brings us to the further contention of the appellant that the evidence is insufficient to sustain the verdict. This contention is made because Claire Lewis was unable to state, positively, the cause of her injury. She testified: "I dove off the board into the water and swam around and then I was treading with my hands on that thing, I thought was for a hand rail, was balancing myself, when my foot hit something sharp, some material, I did not know what it was, I got out of the water, swam down to the other—the west—end of the tank and looked at my foot; it was bleeding and Mr. McLain put some mercurochrome on, and I went home." However, the other evidence in the record clearly established facts from which the jury was justified in concluding that she had been injured by reason of her foot coming in contact with jagged

---

★Hearing denied in bank.

edges of a pipe protruding into the pool under the surface of the water. Mrs. Lewis testified that the object which struck her foot was sharp; that the point where this occurred was just a little west of the end of the springboard; that she immediately left the tank and found her foot bleeding. It also appears that the injury was a ragged, jagged, lacerated wound. George Leads, superintendent of the defendant's building, testified that the springboard extended out over the water from 8 to 8½ feet; that the pipe in question was 9 feet 2 inches west of the east side of the tank; that it was 3 feet 9 inches from the floor of the tank and about 30 inches from the top of the plunge under the surface of the water. He testified that this pipe extended from one-eighth to a quarter of an inch beyond the surface of the wall of the tank; that the edges were rough and jagged; that the south wall is perfectly smooth excepting for this rough jagged pipe; that the end of the pipe was the only rough material on the south wall of the tank; that he knew from the time the pipe was installed until the time of the injury of the condition and existence of said pipe. We think the foregoing recital of the evidence answers the contention of appellant with reference thereto.

The judgment is affirmed.

We concur: RICHARDS, J.; SCHENK, J.

---

206 Cal. 125

HENDERSON et al. v. MIGLIETTA.
(L. A. 8641.)

Supreme Court of California. Dec. 31, 1928.

1. Forcible entry and detainer 🔑12(1)—Action for possession of realty held not simply unlawful detainer suit, precluding cross-complaint.

Action for possession of realty in defendant's possession *held* not simply an action in unlawful detainer, wherein cross-complaint is not proper, but action either in unlawful detainer, ejectment, or to quiet title; plaintiff, out of, but entitled to, possession, having election of either of such remedies.

2. Judgment 🔑585(4)—Judgment refusing to set aside sale under trust deed on issue raised in answer and cross-complaint in action for possession held res judicata in action to set aside sale (Code Civ. Proc. § 580).

Where answer and cross-complaint, setting up in detail almost identical facts and identical issue of fraud or deceit tendered by complaint in subsequent action to set aside sale of realty under trust deed, were considered as part of issue tendered, under Code Civ. Proc. § 580, in action for possession of property, judgment denying such relief was res judicata as to such issue.

3. Judgment 🔑713(2)—Judgment in prior action involving same issue is conclusive, irrespective of presence or absence of probative facts in either cause.

Where issue was same in former as in present action, presence or absence of probative facts in support thereof in either cause is immaterial as respects conclusiveness of prior judgment, so long as any such facts might have been introduced in evidence in former suit; not what was actually done, but what might have been done, being concluded by former judgment.

4. Judgment 🔑585(4)—Complaint to set aside sale under trust deed and have defendant adjudged trustee presented issue determined in former action on cross-complaint to declare deed a mortgage and set aside sale.

Complaint praying that sale of realty under trust deed be set aside, and defendant adjudged trustee, directed to convey legal title to plaintiffs and account for proceeds of crop on plaintiffs' payment of stated sum, with interest, costs, and expenses, *held* to present same issue as that determined in former action against plaintiffs, who filed cross-complaint to declare deed a mortgage, set aside sale thereunder, and instruct plaintiff to reconvey premises on payment of such sums, as against contention that no effort was made therein to declare grantee an involuntary trustee.

In Bank.

Appeal from Superior Court, San Bernardino County; Jesse Olney, Judge.

Action by Robert Walter Henderson and another against N. Miglietta. Judgment for plaintiffs, and defendant appeals. Reversed, with directions.

Superseding opinion in 266 P. 823.

Walter E. Byrne and Emery B. Tyler, both of San Bernardino, for appellant.

Albert Sidney Brown, of Los Angeles, and Isaac Jones, of Ontario, for respondents.

PRESTON, J. An extended opinion does not seem to be required in the determination of this appeal, as the plea of res adjudicata must be sustained and the action dismissed.

Plaintiffs, as the owners of certain real property, executed a note and deed of trust thereon to the defendant, who thereafter upon due and regular proceedings had caused the said trust to be foreclosed and the premises sold, defendant becoming the purchaser at such sale. Thereafter he brought an action against the present plaintiffs for possession of said property, then in the possession of plaintiffs. Plaintiffs here answered, denying the right of possession in the present defendant, and setting up certain points of misrepresentation alleged to have been the inducement for the execution of said deed of trust. In said action defendants (plaintiffs here) also filed an "amended answer" in the nature of a cross-complaint, setting up in detail almost the identical facts and certainly the identical issue tendered by the present complaint, to which plaintiff (defendant here) answered, putting the material allegations thereof in issue. Without objection a complete trial of all issues on the merits was had. Findings were made sustaining the allegations of the complaint in said former action and declaring untrue all the averments of fraud or deceit alleged by defendants (plaintiffs here) in their answer and cross-complaint, and judgment was given following the prayer of the complaint. This judgment became, ever since has been, and now is final. During the pendency of said former action, however, the present action was instituted, plaintiffs here setting up in substance and almost in identical language the same averments of fraud and misrepresentation found in said cross-complaint in said former action. Defendant here pleaded said former judgment as res adjudicata. The court below overruled this plea and sustained the allegations of plaintiffs, making findings of fact and conclusions of law in their favor, and giving judgment accordingly. Defendant has appealed.

[1-3] The complaint in the former action between the parties might properly have been styled a complaint either in unlawful detainer, ejectment, or to quiet title. Plaintiff there, being out of but entitled to possession, had an election of either of these remedies. Universal Milk Co. v. Wood (Cal. Sup.) 272 P. 745. No reason exists for characterizing the former action simply as an action in unlawful detainer, in which event a cross-complaint would not be proper. Without objection, the answer setting up affirmative matter and the cross-complaint filed in said former action were considered as a part of the issue tendered. Section 580, Code Civ. Proc.; Baar v. Smith, 201 Cal. 87, 255 P. 827. The court therefore had the fullest power in said former action to give the identical relief given by the court in this action, and expressly declined to do so, giving a contrary judgment instead. The former judgment is therefore res adjudicata as to such issue, and an extended citation of authority is unnecessary. See the recent case of Price v. Sixth District, 201 Cal. 502, 258 P. 387. As long as the issue was the same in both actions, the presence or absence of probative facts in support of it in the one cause or the other is immaterial, so long as any such facts might have been introduced in evidence. It is not what was actually done, but what might have been done, that is concluded by a former judgment. Price v. Sixth District, supra.

[4] As conclusive proof that the issue involved in the present action and determined in the former action is the same, we need but refer to the practical identity of two sets of allegations, and quote here the prayer of the complaint before us and compare it with the prayer of the cross-complaint in the former action. The prayer of the complaint in the instant case is as follows:

"That said sale of said property under said trust deed be set aside and annulled. That the defendant be adjudged to be a trustee of said property, and of the said crop growing and maturing thereon, holding the legal title thereto in trust for the plaintiffs herein. That the defendant be ordered and directed to reconvey the legal title to said property, and to account for the proceeds of said grape crop to the plaintiffs herein upon the payment by the plaintiffs to the defendant of the sum of two thousand seven hundred ($2,700.00) dollars, together with interest thereon at the rate of seven per cent. (7%) from the 25th day of April, 1921, together with such additional sum as will reimburse the defendant for the costs and expenses incurred by him in the sale of said property under the said deed of trust, and that in the failure of the defendant to make such reconveyance upon the payments described, the clerk of the court be authorized and directed to act as a commissioner for said purpose, and authorized and directed to execute a deed conveying said property to the plaintiffs herein. For the costs of suit herein, and for such other relief as may be equitable and just."

The prayer of the cross-complaint in said former action reads: "Wherefore defendants demand judgment that said purported deed of trust be declared a mortgage. Second, that said sale of said property under said purported trust deed, which occurred on the 6th day of May, 1922, be set aside and annulled, and that plaintiff be instructed to reconvey the said premises to the defendants herein upon payment by defendants to plaintiff of the said twenty-seven hundred ($2,700.00) dollars, together with interest thereon, and the costs expended in said sale under said purported trust deed, and for such other relief as may be equitable, and for the costs of this action."

The contention of respondent that in the former action no effort was made to declare the present defendant an involuntary trustee is not borne out by the record, for that is the effect of the prayer in the first action. This holding may entail unfortunate consequences upon plaintiffs in this action, but the stability of judgments establishing the rights of parties is of more importance than a single hardship.

The judgment of the court below is reversed, with directions to dismiss the action.

We concur: WASTE, C. J.; LANGDON, J.; RICHARDS, J.; SEAWELL, J.; SHENK, J.

Mr. Justice CURTIS, being disqualified, does not participate in the foregoing opinion.

95 Cal. App. 680

PEOPLE v. HEUSS. (Cr. 1708; 3210.)★

District Court of Appeal, Second District, Division 1, California. Dec. 21, 1928.

Rehearing Denied Jan. 2, 1929. Opinion of Supreme Court in Bank Denying Hearing Jan. 18, 1929.

1. Criminal law ⇨829(1)—Refusal of instructions contained in those given is not ground for reversal, though form was slightly different.

Failure of trial court to give certain instructions requested is not ground for reversal, where such instructions were contained in instructions given, though not in exact form requested.

2. Criminal law ⇨1035(3), 1186(4) — Trial court's remark, "It is a fact," held not reversible error, where no objection was made and court instructed jury to disregard his statements of opinion (Const. art. 6, § 4½).

Remark of trial court in course of forgery prosecution, "It is a fact," *held* not prejudicial error requiring reversal under Const. art. 6, § 4½, where no objection was made or instruction requested relative thereto, and court instructed jury to disregard any expressions of opinion which he may have made as to facts established.

On Hearing in Supreme Court.

3. Criminal law ⇨552(3)—Evidence must be inconsistent with innocence, as well as consistent with guilt, to warrant conviction.

Evidence to justify verdict of guilty must not only be consistent with guilt, but must be inconsistent with defendant's innocence.

4. Criminal law ⇨770(3)—Trial court, where practicable, should adopt instructions long approved by appellate courts.

As a general proposition, trial court should adopt, where practicable, instructions which have become standardized by long approval of appellate courts.

5. Criminal law ⇨1186(4)—Error in refusing instruction that evidence must be inconsistent with defendant's guilt held not to require reversal, where evidence was sufficient for conviction (Const. art. 6, § 4½).

Error of trial court in forgery prosecution, in refusing instruction that evidence of defendant's guilt must be inconsistent with innocence, *held* not ground for reversal, under Const. art. 6, § 4½, where evidence was sufficient in all respects to warrant verdict of guilty.

Appeal from Superior Court, San Diego County; Shelley J. Higgins, Judge.

F. H. Heuss was convicted of forgery, and he appeals. Affirmed.

Edgar B. Hervey, of San Diego, for appellant.

U. S. Webb, Atty. Gen., John W. Maltman, Deputy Atty. Gen., and Stephen Connell, Dist. Atty., Thomas Whelan, Deputy Dist. Atty., and T. D. McLean, Asst. Dist. Atty., all of San Diego, for the People.

YORK, J. This is an appeal from a judgment of conviction of the crime of forgery, and from an order denying a motion for a new trial. The defendant was convicted upon both direct and circumstantial evidence. There was undoubtedly sufficient evidence to justify the verdict of the jury.

Counsel for appellant insists that appellant was entitled to instruction to the effect that, in order to convict upon circumstantial evidence, it is necessary not only that all the circumstances concur to show that the defendant committed the crime charged, but it must also be shown that all of these circumstances are inconsistent with any other rational conclusion; that it is not sufficient that the circumstances proven coincide with, account for and, therefore, render probable the hypothesis sought to be established by the prosecution, but they must exclude to a moral certainty every other hypothesis, except the single one of guilt, or the jury must find the defendant "not guilty."

The court did instruct the jury as follows: "In order to warrant a conviction for crime on circumstantial evidence, the circumstances taken together should be of a nature and tendency leading on the whole to a satisfactory conclusion and producing in effect a reasonable and moral certainty that the accused and no one else committed the offense charged, and it is the invariable rule and law that to warrant a conviction upon circumstantial evidence alone, *such facts and circumstances must be shown as are consistent with the guilt of the party charged.*" But the appellant maintains that this is erroneous, for the reason that the words "*and inconsistent with his innocence*" are omitted.

In addition to the foregoing instruction to the jury, the court also quoted section 1096 of the Penal Code, as amended in 1927 (St. 1927, p. 1039), which provides that a defendant in a criminal action is presumed to be innocent until the contrary is proved and that in case of a reasonable doubt as to his guilt, he is entitled to acquittal. Section 1096a of the same Code (added by St. 1927, p. 1039) specifically provides that no other instruction on the presumption of innocence or defining reasonable doubt need be given. The "consistency with innocence" rule is but another mode of stating the rule of presumption of innocence and reasonable doubt. In the case of People v. Raentsch (Cal. App.) 263 P. 345, it was held that where the jury was fully instructed on the question of reasonable doubt, it was not error for the trial court to refuse to instruct that if two plausible and reasonable conclusions could be drawn from the evidence, one pointing to guilt and the

---

★Rehearing denied. Hearing denied by Supreme Court.

other to defendant's innocence, the jury must return a verdict of not guilty.

[1] The trial court gave voluminous instructions to the jury in this case, and the objection of appellant that certain instructions were not given is not well taken, for the reason that these instructions are contained in the instructions given, so far as proper, although not always in the form requested by the appellant.

The cases cited by appellant holding reversible error in instructions were all decided before section 4½ of article 6 of the Constitution was in force. This is true, at least, of all of the cases that were at all in point, and it will be noted in these cases, as in People v. O'Brien, 130 Cal. 1, at page 5, 62 P. 297, the statement was made that in the opinion of the court it was difficult to determine affirmatively from the record that the defendant was not prejudiced and, therefore, reversal was ordered. In other words, the old rule was that prejudicial error was always presumed, if any error at all crept into the record.

As to the question of the instructions given in the case of People v. O'Brien, supra, at page 7 of 130 Cal. (62 P. 299), the court quotes from People v. Douglass, 100 Cal. 1, at page 6, 34 P. 490, 492, citing, also, People v. Strassman, 112 Cal. 683, at page 687, 45 P. 3: "There cannot be two presumptions in a criminal case. The accused is presumed to be innocent until his guilt is established beyond any reasonable doubt."

[2] Another objection made by the appellant is to the remark of the trial court: "It is a fact." As to just what was referred to by the court, or what was meant, we cannot say. However, no objection was made by the defendant at the time of the trial or at the time the remark was made, and no instruction was asked by him either when the remark was made or when the instructions were given, for a definition or explanation by the court as to what it meant by such statement, or for an order that the jury disregard the remark of the court, if improper. However, the court gave a general instruction to the jury as follows: "I have not expressed, nor intended to express, nor have I intimated or intended to intimate any opinion as to what facts have been established; or what inferences should be drawn from the evidence adduced, and if any expression of mine seems to indicate an opinion relating to any of these matters, such opinion must be entirely disregarded."

In view of this, it would be immaterial what construction, if any, the jury may have placed upon this remark of the trial judge. When the entire record has been carefully examined, we cannot see that any prejudice to the defendant resulted by reason of this remark. Neither can we see that it could have led to any miscarriage of justice.

Judgment of conviction, and order denying motion affirmed.

We concur: CONREY, P. J.; HOUSER, J.

Opinion of Supreme Court in Bank, Denying Hearing.

PER CURIAM. [3] In denying the petition for a hearing herein, we withhold our approval of the action of the trial court refusing to give the instruction, or its equivalent, requested by defendant to the effect that circumstantial evidence, in order to justify a conviction, must not only be consistent with the guilt of the defendant, but "inconsistent with any other rational conclusion." The portion included in quotation marks, or its equivalent, was omitted from the instruction. Said instruction was legally sufficient in all respects as far as it went, but it fell short in not including the well-approved and frequently announced statement of the law that the evidence adduced must not only be consistent with guilt, but "inconsistent with innocence," in order to justify a verdict of guilty.

[4] We have not here attempted to name all of the elements that should be included in the court's charge on the subject of circumstantial evidence, but we have merely referred to the omitted portion, which furnishes the ground of appellant's complaint. As a general proposition, trial courts should adopt, where practicable, instructions which have become practically standardized by the long approval of appellate courts. The instruction now before us furnishes an apt example. Deviations are usually unnecessary, and are not infrequently productive of evil.

[5] In view of the state of the record, we do not feel that we would be justified in reversing the case for the error complained of, as the evidence is sufficient in all respects to have warranted the jury in returning its verdict of guilty. This being so, we would be compelled, under section 4½ of article 6 of the Constitution, to disregard the error assigned.

The petition is hereby denied.

95 Cal. App. 685

LITCHNER v. STAPLES. (Civ. 5032.)

District Court of Appeal, Second District, Division 2, California. Dec. 21, 1928.

1. Appeal and error 🔑1011(1)—Whether lessor consented to subletting entire premises held for trial court under conflicting evidence and finding for lessor seeking to cancel lease for unauthorized subletting was justified.

In action to cancel lease for unauthorized subletting of premises without lessor's consent, issue as to extent of lessor's consent to sublease *held* for final determination by trial court under conflicting evidence, and finding that lessor notified lessee of election to forfeit lease, and consented to subletting of portion only of premises, and that defendant caused part of description in sublease to be stricken without lessor's consent, was supported by evidence, and could not be held incorrect.

2. Estoppel 🔑52—Equitable estoppels in pais are applied to prevent injury from acts or declarations.

Equitable estoppels in pais are generally applied to prevent injury which would ensue to one from acts and declarations of another were he permitted to gainsay truth of such acts or declarations.

3. Estoppel 🔑121—Finding that lessor did not by silence or acts lead lessee to believe he could sublease showed no basis for estoppel.

In action to cancel lease for unauthorized subletting of premises, where trial court found that lessor did not by silence or acts lead lessee to believe that he had right to lease additional territory, there was no fraud or misrepresentation on which lessee relied to his injury as basis for equitable estoppel.

4. Novation 🔑12—Evidence of lessor's consent to have lessee and sublessee fix matter up, without intending to enlarge original sublease, held not to show novation sustaining enlarged sublease.

In action to cancel lease for unauthorized subletting of part of premises, evidence that lessor, after giving written consent to sublease of premises described in original sublease, told lessee and prospective sublessee to "fix it up to suit yourselves, that she wanted tenants to be satisfied," but not showing that lessor intended to enlarge any provisions of original lease to sublessee from another lessor, or waived restrictions, *held* not to show novation.

5. Landlord and tenant 🔑34(5)—Evidence concerning use of adjoining property, which may not have been communicated to lessor, held properly rejected in action to cancel lease.

In action to cancel lease for unauthorized subletting of portion of premises by lessee, evidence as to objection of one of lessees to use which neighbor might have made of adjoining property, or of conversations which may not have been communicated to lessor, would not be relevant and admissible, and was properly rejected.

Appeal from Superior Court, Los Angeles County; Charles S. Burnell, Judge.

Suit by Lucile Greenlaw Litchner against Roy Staples. Judgment for plaintiff, and defendant appeals. Affirmed.

John B. Haas and John D. Home, both of Los Angeles, for appellant.

M. D. Andrews, of Los Angeles, for respondent.

CRAIG, J. The respondent, owner of lot 9 of the Gardena tract, in Los Angeles county, instituted suit for cancellation of a lease to appellant of the northerly 125 feet of the easterly 100 feet thereof, alleging that her lessee had sublet a portion of said premises in violation of covenants, and without her knowledge or consent. It was contended by the defendant that there was a mutual mistake regarding the description of the property described in the sublease, but that he had previously obtained the consent of his lessor, and he further urged as defenses estoppel in pais, and novation. Judgment was rendered in favor of the plaintiff, and this is an appeal therefrom.

It appears that on December 1, 1922, the respondent executed a lease to appellant for the period of five years of one garage and filling station, "said building to be used only as a general garage and machine shop and filling station and for no other purpose." It was therein agreed: "That the lessee shall not assign this lease nor any rights thereunder nor sublet the premises or any part thereof (only for the purpose pertaining to and carrying on a general garage and machine shop) without the written consent of the owner, under penalty of forfeiture, this building and premises to be kept free of any nuisance in or around and adjacent thereto at the expense of lessee." At the time of the execution of said lease, a firm doing business under the name of Blanton & Young occupied a plot alleged and testified by respondent as being 25 feet long and 25 feet deep, in the southeasterly corner of the demised premises, under a sublease from a prior lessor, which they continued to occupy as lessees of the appellant. During the month of September, 1923, negotiations initiated by Blanton & Young for the sale of their leasehold interests to one D. J. Biesinger were communicated to Mrs. Litchner by a real estate agent who solicited her consent to such transfer and change of subtenants. It is conceded that respondent visited the premises with her husband on September 19, 1923, where she met Biesinger and several other persons, at which time the agent measured the entire depth of the 100-foot lot, to its westerly line, and that Biesinger indicated that he desired to place a garage on the rear 75 feet, but that respondent "refused to have anything to do with the transaction, stating that she wished to see her attorney." Thereafter she did, however, sign an instrument which read as follows:

"I or we, the undersigned, give our consent for R. V. Blanton, C. B. Young to transfer their lease to Douglas Biesinger.

"Dated Sept. 19, 1923.

"[Signed] Lucile M. Greenlaw Litchner."

On October 1, 1923, appellant herein and D. J. Biesinger entered into a lease which, with the deleted words indicated, appears in part as follows:

"That Roy Staples of the county of Los Angeles, state of California, lessor, does hereby lease, demise and let unto J. D. Biesinger of said county, lessee, O. K. Roy Staples ~~The east twenty-five (25) feet of~~ the south twenty-five (25) feet of the east one hundred (100) feet of the north one hundred twenty-five (125) feet of lot nine (9) of the Gardena Tract.

"This lease is subject to conditions and restrictions contained in a certain lease from Lucile M. Greenlaw-Litchner to Roy Staples, dated Dec. 1, 1922. * * *

"Written permission for this lease has been obtained by the lessor as required by this lease."

As opposed to Mrs. Litchner's contention that, although Blanton & Young may have used the rear of the lot for a garbage pit, toilet, oil tank, and storage of wood and coal, they did so without her consent, and that she at no time intended to sublet more than the front 25 feet, Staples testified that he had not seen their lease, and supposed that it conveyed the entire 100 feet; further, that he and Biesinger both believed that the latter was leasing the whole lot, and that, upon discovery of its narrow limitation, appellant personally, and out of the presence of respondent, struck out the words, "The east twenty-five (25) feet of"; also that he understood from numerous conversations with respondent that she intended leasing 100 feet; that at none of their conferences had she denied such to be the fact; and that he honestly entertained the impression that Mrs. Litchner believed the entire lot to have been included in the Blanton & Young lease.

[1] There is strong affirmative evidence tending to support the plaintiff's allegations and the findings and judgment below. Mrs. Litchner positively testified that, prior to signing the consent, she examined the lease to Blanton & Young, and that she observed, and told appellant, that the lot was 25 by 25 feet; that, when it was suggested that Biesinger contemplated erecting a building costing $3,000 or $3,500, she stated: "They can't, because the property is too little and the space is only 25 by 25." She testified further: "At no time did I consent to a sub-letting to the said Douglas J. Biesinger, or anybody else, the west 75 feet of the east 100 feet of lot 9," and that she did not know that this had been done until about December 4, 1923. Her husband testified that he was present during the negotiations, and that, while there was some discussion about leasing the small corner and property adjoining it to the south, "in the presence of Mr. Staples, Mrs. Litchner said to the Biesingers, 'You haven't got the 25 by 100 feet. All you have is 25 by 25 feet.'" The trial court found that respondent notified appellant in writing on December 5, 1923, of her election to forfeit the lease in controversy; that she had previously consented to the subletting of only 25 by 25 feet, but that Staples caused the words "the east 25 feet of" to be stricken from the description without her consent, and "that the property by mutual mistake was erroneously described" was untrue. There is considerable corroborative evidence which tends to support these findings. It is clearly a case where the trial court before whom the witnesses appeared in person, and to which all other evidence was presented, is invested with the duty and power of finally determining the issues.

Appellant attempts to substantiate his contention by the fact that the predecessors of his sublessee had used the rear of the premises for depositing rubbish and for other purposes without objection by the lessor, except that she had expressed the opinion that such use might infringe upon certain health laws, and asserts this as an admission of Mrs. Litchner's knowledge and consent to their use of additional land, and of appellant's intention to sublet the rear 75 feet of lot 9. Doubtless this circumstance was considered by the trial court, but apparently was not regarded of controlling weight, and it is not within our province to say that its conclusion was incorrect.

[2, 3] From the foregoing it becomes unnecessary to devote extensive discussion to appellant's remaining propositions. Equitable estoppels in pais "generally, if not universally, are applied to prevent injury which would ensue to one from the acts or declarations of another, were he permitted to gainsay the truth of such acts and declarations. The principle is invoked and applied for the prevention of fraud, or that which is tantamount thereto, on the one side, and injury on the other." Davis v. Davis, 26 Cal. 23, 39 (85 Am. Dec. 157); Pope v. J. K. Armsby Co., 111 Cal. 159, 43 P. 589. As already observed, the trial court found upon much substantial evidence that respondent did not by silence or by her acts lead the appellant to believe that he had a right to lease the additional territory, and from this we must conclude that there was no fraud or misrepresentation upon which appellant relied to his injury.

[4] The plea of novation is equally untenable. It is insisted that, after giving written consent to a sublease to Biesinger of the land described in the Blanton & Young sublease, respondent finally instructed the parties to "fix it up to suit themselves, that she wanted her tenants to be satisfied." Appel-

lant urges from this premise that he was justified in subletting more than the Blanton & Young property, and that the restriction against it was waived. However, there is no evidence that by this expression Mrs. Litchner intended to enlarge or forego any of the provisions of the original lease, and there is strong positive evidence to the contrary, from which the court found in favor of the plaintiff. True, appellant offered evidence tending to show that he so understood his lessor's intentions, but his allegations and testimony were apparently disbelieved, and we cannot as a matter of law, under the facts and circumstances, say that such conclusion was erroneous.

[5] Rulings of the trial court in sustaining objections to testimony offered by appellant are assigned as error. Respondent having admitted that Blanton at one time complained about Japanese who occupied land owned by her to the south of the 25 by 25 foot plot, saying there "was a talk," she was asked as to what the conversation was. Blanton testified that he had a conversation with Freeman concerning the amount of property he desired to sublet, and was asked to state that conversation. Objections were sustained, and it is argued that any evidence relating to knowledge of the lessor, or acknowledgment by her, that other lands were being used, would be admissible as tending to establish an estoppel; that Blanton could have maintained in an ejectment suit by Freeman; that by mutual mistake 25 by 25 feet was not the correct description. Upon the assumed facts stated, such testimony might have been admissible, but the Blanton lease specifically described the lot as being 25 by 25 feet, and there is no evidence in the record that Blanton claimed or understood otherwise. Evidence as to his objection to the use which a neighbor might have made of adjoining property, or of conversations which may not have been communicated to the respondent, would not be relevant or admissible.

The judgment is affirmed.

We concur: WORKS, P. J.; THOMPSON, J.

CALIFORNIA PACKING CORPORATION v. LOPEZ et al. (Civ. 3664.)★

District Court of Appeal, Third District, California. Dec. 22, 1928.

Rehearing Denied Jan. 19, 1929. Hearing Granted by Supreme Court Feb. 18, 1929.

1. Landlord and tenant 🔑116—On death of tenant of estate from year to year, estate still continues.

On death of tenant of an estate from year to year, the estate still continues, since tenancy from year to year is not terminated by death of either landlord or tenant.

2. Statutes 🔑181(1)—Statute must be given interpretation which will give effect to legislative intent if consistent with real object of statute.

Statute must be given interpretation which will give effect to legislative intent if consistent with real object and purpose of statute.

3. Statutes 🔑184—To arrive at legislative intent, original purpose and object of legislation must be considered.

To arrive at legislative intent in interpretation of statutes, original purpose and object of legislation must be considered.

4. Landlord and tenant 🔑325—Amendment to Alien Land Law, providing that cropping contracts constitute interest in real estate, is limited to Alien Land Law alone (Alien Land Law, § 8, as amended by St. 1923, p. 1023, § 7).

Amendment in 1923 (St. 1923, p. 1023, § 7) to section 8 of the Alien Land Law (St. 1921, p. lxxxv), providing that cropping contracts constitute an interest in real estate, is confined and limited to Alien Land Law alone.

5. Estoppel 🔑52—Person may, by contract, waive civil right and benefit of statute in respect to rights and obligations unless waiver is against public policy (Civ. Code, § 3513).

Under Civ. Code, § 3513, a person may, by contract, waive any civil right and benefit of any statute or Code provision in respect to his rights and obligations unless such waiver would be against public policy.

6. Estoppel 🔑78(3)—Provision of agreement regarding cropping, that company growing crops did not claim any interest in real estate, precluded such company or its assigns or successors from claiming such interest.

Provision of agreement regarding cropping, which provided that company growing crops did not claim any interest in real estate, precluded such company or its assigns or successors in interest from claiming such interest.

7. Vendor and purchaser 🔑232(1)—Possession necessary to put purchaser on notice must be open, notorious, and exclusive.

Possession necessary to put purchaser on notice must be open, notorious, and exclusive, and must be precise and complete enough to put purchaser on his guard.

8. Vendor and purchaser 🔑244—Evidence held not to show that purchaser had notice that persons growing crops had any interest in land or were in possession before purchase.

In action of ejectment, evidence *held* not to show that purchaser had any notice or knowledge that persons growing crops under agreement with vendor had any interest in land or were in possession of it prior to purchase.

9. Estoppel 🔑110—One having opportunity to plead estoppel, upon which defense depends, must do so.

Party who has an opportunity to plead an estoppel, upon which his defense depends, must do so.

★Superseded by opinion of Supreme Court 279 P. 664.

10. Estoppel ⚷110—Waiver is affirmative defense, and defendant desiring to take advantage of it must plead in answer facts on which he bases claim.

Waiver is an affirmative defense, and defendant desiring to take advantage of it must set up in his answer facts upon which he bases his claim.

Appeal from Superior Court, Solano County; W. T. O'Donnell, Judge.

Action for damages for ejectment by the California Packing Corporation against Manuel Lopez individually, and as administrator of the estate of John Lopez, deceased, in which defendants filed a cross-complaint. From the judgment, defendants appeal. Affirmed.

T. A. Farrell and George A. Work, both of Sacramento, and W. U. Goodman, of Fairfield, for appellants.

Rufus H. Kimball and Pillsbury, Madison & Sutro, all of San Francisco, and Joseph M. Raines, of Fairfield, for respondent.

JAMISON, Justice pro tem. This is an action of ejectment brought by respondent against appellants for 100 acres of land, known as lot 26 of Hastings Tract, and the pumphouse thereon or adjacent thereto.

Respondent claims to be the owner and entitled to the possession thereof and alleged that defendants had wrongfully and unlawfully entered into possession of the same and ejected respondent therefrom and wrongfully withholds such possession from respondent to his damage in the sum of $100.

Appellants answered, denying that they unlawfully entered into the possession of said property or unlawfully or wrongfully withheld the same from respondent or that plaintiff has been damaged as claimed.

Appellants also filed a cross-complaint, a demurrer to which was sustained, and thereupon, by stipulation, the cross-complaint was withdrawn.

Substantially, the facts of the case are about as follows: On February 15, 1924, the Wright Corporation, respondent's grantor, entered into an agreement with the John Souza Company, by the terms of which the said company was permitted to occupy and grow asparagus during the cropping seasons of 1924 to 1934, inclusive, on the said 100 acres, and to grow intercrops thereon, as approved by the said corporation. By the terms of said agreement, the said corporation was to furnish tools, teams, feed for horses, and all asparagus roots necessary for the planting of said 100 acres, and to allow the said John Souza Company $5.50 per acre for preparing the land and planting said asparagus roots, as approved by the said Wright Corporation. That as directed by the Wright Corporation, the John Souza Company was to harvest, gather, wash, pack, and deliver said crop free on board the nearest landing designated by said Wright Corporation, and said corporation was to sell said crop and pay to John Souza Company 55 per cent. of the net proceeds of all asparagus and 75 per cent. of all intercrops, deducting expenses of sale of said crops, John Souza Company to pay 75 per cent. of the cost of containers for intercrops. The John Souza Company was a partnership, consisting of John Souza and John Lopez.

On February 23, 1925, John Souza assigned his interest in said contract to John Lopez, which assignment was accepted by the Wright Corporation. On March 6, 1925, John Lopez was accidentally killed, and administration was granted upon his estate to defendant Manuel Lopez, a brother of deceased, on February 10, 1926. John Lopez was not married, and his next of kin and his heirs were his father and mother, who resided in Portugal. Defendant Manuel Lopez was a minor at the time of his brother's death and became of age November 17, 1925.

Manuel Lopez, immediately after his brother's death, took charge of the growing crops on said 100 acres and farmed said land during the cropping season of 1925, raising an intercrop of beans thereon, cultivating and harvesting the asparagus growing thereon, and during that period was trying to get the Wright Corporation to substitute him as a party to said agreement in the place and stead of his deceased brother. In the meantime, he was occupying the upper portion of said pumphouse as a place of abode. In August, 1925, and January, 1926, the Wright Corporation paid the amounts called for by said agreement, that is, the John Lopez portion thereof, from the sale of the 1925 bean and asparagus crops, by delivering checks drawn in favor of John Lopez to defendant Manuel Lopez. On December 31, 1926, the Wright Corporation deeded to respondent with several thousand additional acres the 100 acres in controversy in this action. Respondent took possession of the 100 acres of land in January, 1926, and appellants thereupon ceased to farm the same but still continued to occupy the pumphouse.

At the close of the testimony, the court directed the jury to return a verdict for the respondent. This was done, and thereupon judgment for respondent was entered. In the case of Perera v. Panama-Pacific Int. Exposition Co., 179 Cal. 63, 175 P. 454, the court said: "It is now settled that the right of a court to direct a verdict is, with regard to the condition of the evidence, absolutely the same as the right of a court to grant a nonsuit; and also that a court may grant a nonsuit only when, disregarding conflicting evidence and giving to plaintiff's evidence all the value to which it is legally entitled, herein indulging in every legitimate inference which may be drawn from that evidence, the result is a determination that there is no evidence of sufficient substantiality to support a verdict in favor of plaintiff if such a verdict were given. (Estate of Caspar, 172 Cal. 147, 155 P. 631.)"

There is nothing in the record indicative of the grounds upon which the trial court acted in directing the verdict.

[1] However, it appears that one of the vital propositions that it was necessary for defendant to establish was that the agreement was a chattel real, that is to say, was a lease upon the premises in controversy. It is well settled that a tenancy from year to year is not terminated by the death of either the landlord or the tenant. Upon the death of the tenant of an estate from year to year, the estate still continues. Underhill on Landlord and Tenant, vol. 1—136.

In a long line of decisions, the courts of this state, beginning with Bernal v. Hovious, 17 Cal. 541, 79 Am. Dec. 147, up to In re Okahara, 191 Cal. 353, 216 P. 614, have uniformly held that agreements similar in character to the one involved in this case are merely cropping contracts and create no interest in the land. In re Okahara, supra, was a proceeding on habeas corpus to secure the release of Okahara for the alleged violation of the Alien Land Law. The agreement under which Okahara occupied and cultivated the land was in many respects similar to the agreement in the instant case. Under and by virtue of the conclusions reached by the Supreme Court in that case, that the agreement did not create an interest in the land, but that it was, in effect, nothing more than a cropping contract, it ordered the discharge of Okahara from custody. Shortly after this decision was rendered the Legislature at its biennial session in 1923 (St. 1923, p. 1023, § 7) amended section 8 of the Alien Land Law (St. 1921, p. lxxxv) by adding after the word "fee" the following: "Including cropping contracts which are hereby declared to constitute an interest in real property less than the fee," so that said section 8, as amended, reads as follows: "Any leasehold or other interest in real property less than the fee, including cropping contracts which are hereby declared to constitute an interest in real property less than the fee, * * * by any alien mentioned in section 2 of this act, * * * shall escheat to the State of California."

Appellants contend that as a result of this amendment all cropping contracts and agreements, whether made between citizens of this state or between a citizen and an ineligible alien, create an interest in the land, thus setting aside and casting into the discard the law of this state applying to cropping contracts between citizens thereof, as it has existed for more than 65 years. So far, this amendment, otherwise than as it affects ineligible aliens, has not been passed upon either by the Supreme or Appellate Courts of this state.

In the case of In re Nose, 195 Cal. 91, 231 P. 561, which was a proceeding on habeas corpus to discharge petitioner, a Japanese and ineligible alien, from custody upon a charge of violating the Alien Land Law, the court denied the writ, basing its reason for so doing upon the decision of the Supreme Court of the United States as given in the case of Porterfield et al. v. Webb et al., 263 U. S. 225, 44 S. Ct. 21, 68 L. Ed. 278, where that court held that the treaty between the United States and Japan gave no permission to the subjects of Japan to enjoy, use or have the benefits of land for agricultural purposes, and in the course of its opinion in the case of In re Nose, supra, the Supreme Court of this state said: "It is not necessary to decide whether or not the Legislature had the authority to provide that a 'cropping contract' in this class of cases shall impress lands affected thereby with an interest therein in favor of the cropper. For the purposes of this decision the effect of the contract upon real property may be regarded as surplusage." And, in the case of In re Dudley et al. v. Lowell et al. (Cal.) 257 P. 57, the court, in holding that a cropper contract entered into by an ineligible alien was a violation of the Alien Land Law, entirely ignored this last amendment of section 8 of said law, which provides that a cropping contract shall create an interest in land.

It is apparent that the sole intention of the Legislature in adding this amendment was for the purpose of using all the means at its command to prevent the agricultural lands of the state from passing into the occupancy and possession of ineligible aliens. For as was said by the Supreme Court in the case of Porterfield v. Webb, 195 Cal. at page 81, 231 P. 558: "Conceivably, by the use of such contract [a cropper contract], the population living on and cultivating the farm lands might come to be made up largely of ineligible aliens. The allegiance of the farmers to the state directly affects its strength and safety."

[2, 3] The cardinal rules of statutory construction require an interpretation of a statute which will give effect to the legislative intent, if consistent with the real object and purpose of the statute. Coulter v. Pool, 187 Cal. 181, 201 P. 120. To arrive at the legislative intent in the interpretation of statutes, the original purpose and object of the legislation must be considered. Mackey v. Mott, 25 Cal. App. 110, 142 P. 1082; Johnstone v. Baker, 167 Cal. 260, 139 P. 86.

[4] We are of the opinion that in amending section 8 of the Alien Land Law, by adding thereto the provision that cropping contracts constituted an interest in real estate, the intention of the Legislature was to confine and limit that provision to the Alien Land Law alone, and that it did not thereby intend to, nor did it, annul or repeal the law as it now

stands and as it has stood since the organization of the state that a cropping contract, except where an ineligible alien is a party to it, creates any interest in real estate.

[5] The contract or agreement entered into between the Wright Corporation and the John Souza Company provided that the said company did not claim any interest in the real estate set forth therein. It is well established that a person may waive any civil right, and the benefit of any statute or Code provision in respect to his rights and obligations, unless such waiver would be against public policy. Civ. Code, § 3513; Cal. Juris. vol. 25, p. 929.

[6] Regardless of the question as to whether or not the said agreement created an interest in the land, it is evident that this provision would preclude John Souza Company or their assigns or successors in interest from claiming such interest.

The undisputed evidence in this case also shows that the respondent purchased the land for value without notice of appellants' claim that the John Lopez estate or Manuel Lopez had any interest in said land.

[7] Appellants contend that Manuel Lopez was in possession of the premises in controversy at the time the Wright Corporation sold the same to the respondent and that such possession was notice to respondent. The authorities are uniform in holding that the possession necessary to put a purchaser on notice must be open, notorious, and exclusive. Campbell v. Grennan, 13 Cal. App. 481, 110 P. 156. Notice to be effectual must be precise and complete enough to put the purchaser on his guard. Kowalsky v. Kimberlin et al., 173 Cal. 506, 160 P. 673. There is practically no evidence that tends in any degree to show notice on the part of respondent.

[8] Witness Tonnengen, superintendent of respondent, who, on behalf of respondent, made the examination of the property in controversy before its purchase by respondent, stated that in making that examination he was accompanied by Wm. G. Wright, the president of the Wright Corporation, and that Wright informed him that there were no incumbrances against the land, that Wright made no mention of the fact that appellants or either of them were in possession of said land or claimed any interest therein by lease or otherwise; nor did Tonnengen see Manuel Lopez on the land, nor anything indicating such possession. There is an entire lack of evidence showing that respondent had any notice or knowledge that appellants claimed any interest in the said 100 acres or were in possession of the same prior to its purchase thereof.

[9, 10] In their brief, appellants rely to some extent upon the doctrine of waiver and also estoppel in pais as a defense to this action. No such defense was set up in the answer. It appears to be well settled that a party who has an opportunity to plead an estoppel, upon which his cause of action or defense depends, must do so. 10 Cal. Juris. p. 654. Waiver is an affirmative defense, and a defendant desiring to take advantage of it must set up in his answer the facts upon which he bases his claim. Wienke v. Smith, 179 Cal. 220, 176 P. 42.

The judgment is affirmed.

We concur: HART, Acting P. J.; PLUMMER, J.

---

96 Cal. App. 66

HILTSCHER v. WAGNER et ux. (Civ. 3639.)

District Court of Appeal, Third District. California. Dec. 28, 1928.

1. Appeal and error ⚷1011(1)—Trial court's finding on conflicting evidence as to location of boundary line cannot be disturbed by appellate court.

Trial court's finding as to location of boundary line, based on conflicting evidence consisting of surveyors' locations of corners, cannot be disturbed by appellate court.

2. Boundaries ⚷4—It was duty of trial court in boundary dispute to endeavor to re-establish corners with reference to original government surveys and monuments.

In action to quiet title and to establish boundary line, it was trial court's duty to ascertain as near as possible where the original monuments set by government surveyors were located and to re-establish corners with reference to such monuments and original field notes.

3. Appeal and error ⚷761—Probable effect of judgment on third parties is not legitimate argument to trial court, and much less to appellate tribunal.

The probable effect of a judgment on third parties is not a legitimate basis for an argument addressed to a trial court, and much less so to an appellate tribunal.

Appeal from Superior Court, San Bernardino County; Benjamin F. Warmer, Judge.

Action by Fred Hiltscher against Charles Cecil Wagner and wife. Judgment for defendants, and plaintiff appeals. Affirmed.

H. V. Weisel, of Carlotta, and Thomas L. McFadden and McFadden, Holden & Friis, all of Anaheim, for appellant.

Head, Rutan & Scovel, of Santa Ana, and Swing & Wilson, of San Bernardino, for respondents.

TUTTLE, Justice pro tem. This is an action to quiet title and to establish the boundary line between the lands of appellant and respondents. The appeal is prosecuted from a judgment rendered in favor of defendants. The complaint is in the ordinary form to quiet title to the north half of the southwest quarter of section 36, township 2 south, range 9 west, S. B. B. & M.; said property being shown on map of Hiltscher tract, which is recorded in San Bernardino county. The answer denies any interest in said land except as to the east 384 feet of the property described in the complaint, and sets up additional defenses of agreed boundary line and adverse possession.

At the commencement of the trial, it was stipulated that plaintiff was the record owner of the north half of the southwest quarter of said section as shown by government survey, and that defendants were the owners of the southeast quarter of said section, and that each party had, for some 20 years past, paid all taxes due on his respective parcel. It was further agreed that defendants, in approximately 1906, erected a dividing fence between said tracks, and have maintained it ever since, and claim everything east of it, and have so claimed for the past 15 or 20 years. The land in dispute is a strip some 1,300 feet long and 384 feet in width, and located between the legal subdivisions mentioned. The evidence shows that this strip was fenced in by defendants some 20 years ago, and has been in their possession ever since. They have erected valuable improvements thereon, and have cultivated a large portion of the same.

[1, 2] The case of the plaintiff rests entirely upon a survey made by his engineers. It is, so far as he is concerned, an engineering proposition. His testimony establishes the corners of said legal subdivisions in such a manner as to include said strip within his tract, which is the north half of the southwest quarter of the section. On the other hand, defendants' engineers locate the corner of said legal subdivisions in such a manner as to place the said strip within the southeast quarter of said section. In other words, it is a clear case of conflicting evidence in the matter of the establishment of the said corners, and it would be a palpable invasion of the fact-finding province of the trial court were we to interpose with our views upon the weight of the evidence adduced. It is contended by appellant that the trial court resorted to the wrong method in fixing said corners; that this is not a case where the original monuments were lost, and hence the court was bound to fix the same in accordance with the testimony of his engineers, who claimed to have found some of the original monuments set by the government surveyor. But here, again, we are met with a conflict in the evidence. Defendants' engineers testified they could not find or see such monuments, and the trial court found with them upon that issue, and we are bound by that finding. The corners were fixed by defendants' engineers, by re-establishing them in accordance with the natural objects described in the field notes and found to exist upon the ground, and which were least inconsistent with the distances mentioned in said notes and the plat of the government survey. Weaver v. Howatt, 171 Cal. 307, 152 P. 925; Weaver v. Howatt, 161 Cal. 86, 118 P. 519. "It was the duty of the trial court to ascertain, as near as might be, where the monuments were set by the government surveyors, and from records of the official survey and the evidence as to the present conditions and positions of natural objects to locate the lines and corners of the sections and the boundary lines of the property in controversy at points where they will best accord with the natural objects described in the field notes as being about the monuments found to exist on the ground, and in a manner least inconsistent with the government surveys, notes, and plats." Wilmon v. Aros, 191 Cal. 80, 214 P. 962.

[3] The trial court found that the said fence was upon the line dividing the legal subdivisions which it was stipulated each of the parties owned. In other words, the trial court left the parties in the same position that they had maintained for some 20 years, so far as fence lines and actual possession were concerned. It is contended by appellant that, if the corners established by the court are allowed to stand, it will change the boundary lines of San Bernardino, Orange, and Los Angeles counties. The probable effect of a judgment, upon third parties, is not a legitimate basis for an argument addressed to a trial court, and much less so to an appellate tribunal. It is a practice not to be commended, and which we believe should not be indulged in.

Appellant construes the judgment as depriving him of a strip of land 768 feet in width. This is not the effect of the judgment, as we construe it. The judgment specifies that the fence line is the west boundary of the lands of the defendants. This gives defendants title to the disputed strip 384 feet in width, and no more. It leaves the boundary line between the parties just as it has been for the past 20 years. If there be any ambiguity about the judgment, a reference to the pleadings would show without question that the only issue was as to the ownership of a strip of land 384 feet in width. The point is without merit.

Findings upon the question of adverse possession and an agreed boundary line, are attacked, but we do not deem it necessary to pass upon these matters. The judgment is amply supported by the findings upon the question of the location of the section lines which we have discussed.

We are satisfied that the trial court reached a conclusion which resulted in a just disposition of the matters presented, and, accordingly, the judgment is affirmed.

We concur: FINCH, P. J.; HART, J.

95 Cal. App. 720

SCATENA v. LAWSON et al. (Civ. 6512.)

District Court of Appeal, First District, Division 1, California. Dec. 22, 1928.

1. Evidence ⚷444(6)—When note and mortgage were payable at definite date, oral agreement making payment contingent upon sale of certain property held not provable (Civ. Code, § 1698).

Where note and mortgage given retiring partner for interest in real estate and certain personal property contained definite provision for payment on certain date, evidence of parol agreement making payment contingent upon sale of other assets of the old partnership was not admissible, in view of Civ. Code, § 1698.

2. Evidence ⚷444(6)—When written agreement between partners did not provide that retiring partner should be paid only from sale of assets, this could not be proved by parol.

Where written contract between retiring and continuing partners recited that retiring partner had conveyed certain property on agreement that assets of partnership should be promptly liquidated, and provided that the partnership should be liquidated and dissolved as early as it could be practically accomplished without loss, and contained no agreement that note and mortgages for the property conveyed was to be paid only from sale of other assets or that the object of the desired quick sale was to pay such note, such facts could not be shown by parol.

3. Partnership ⚷282—Any partner could dispose of assets after dissolution, in absence of agreement (Civ. Code, §§ 2459, 2460).

If written agreement between retiring and continuing partners reciting conveyance of certain property by retiring partner on agreement for prompt liquidation of the partnership did not make the continuing partners the liquidating partners, then any of the partners could dispose of the remaining assets under Civ. Code, §§ 2459, 2460.

Appeal from Superior Court, Sonoma County; R. L. Thompson, Judge.

Action by Sylvestro Scatena against William H. Lawson and others to foreclose mortgages. From an order and judgment in favor of plaintiff, defendants appeal. Affirmed.

Athearn, Chandler & Farmer, and Walter Hoffman, all of San Francisco, for appellants William H. and Agnes May Lawson.

Edwin V. McKenzie and Harry A. McKenzie, both of San Francisco, and W. F. Cowan, of Santa Rosa, for appellants Charles and Jeanne Perelli-Minetti.

Barrett & McConnell, of Santa Rosa, for respondent.

BARNARD, Justice pro tem. This is an appeal from a judgment on the pleadings, the trial court having held that the answers failed to set up a defense. The action is one brought to foreclose a real estate mortgage and a chattel mortgage, both made by William H. Lawson and Agnes May Lawson, his wife, and A. G. Perelli-Minetti and Jeanne Perelli-Minetti, his wife, to the plaintiff, securing the payment of one promissory note for $41,000, dated June 9, 1921, and due five years after date. The complaint, filed June 16, 1926, is in the usual form. It alleges, among other things, the payment of interest to June 9, 1925, the nonpayment of the subsequent interest and the principal, the death of A. G. Perelli-Minetti, and the appointment of defendants Charles Perelli-Minetti and Jeanne Perelli-Minetti as executor and executrix, respectively, of his last will. An answer was filed by defendants Lawson, and a separate answer by defendants Perelli-Minetti. They have also filed separate appeals.

All of the defendants admit the material allegations of plaintiff's complaint, but as a defense claim the breach of an express promise made by plaintiff, in consideration of the execution by the defendants of the note and mortgages sued on and as a part of the same transaction, which breach is asserted to amount to a failure of consideration. In this behalf, the answers allege that prior to June 9, 1921, Sylvestro Scatena, William H. Lawson, and A. G. Perelli-Minetti were copartners in the wine business under the firm name of Scatena, Lawson & Perelli. The copartnership owned the real and personal property covered by the mortgages involved in this action, and in addition thereto owned large quantities of wine and shipping barrels. Scatena desiring to withdraw from the business, and, the other two partners desiring to continue therein, it is alleged: That on June 9, 1921, the date of the note and mortgages, it was agreed between the parties that William H. Lawson and A. G. Perelli-Minetti should form a new partnership under the firm name of Lawson & Perelli, and that this new partnership should take over from the old partnership all of the real and personal property covered by these mortgages. But the wine and shipping barrels, above referred to, were to be retained by the old partnership. That it was agreed that Scatena should be secured for the purchase price of his interest in the real and personal property, so to be turned over to the new partnership, by mortgages on the whole of said properties. It is alleged that it was further agreed that the wine and shipping barrels should be sold without delay, and the affairs of the old partnership liquidated, "so that by the proceeds derived from such sale" the mortgagors might pay off and extinguish the mortgages so to be given on the other properties. It is then alleged that in pursuance of this agreement, and all on June 9, 1921, the interest of Scatena in the real and personal property covered by the two mortgages was conveyed to the above mortgagors, the mortgages were given for the purchase price, the new copartnership above referred to was formed, and as a part of the same transaction and in consideration of the other parts thereof, another written agreement was executed by the parties as follows:

"Exhibit C.

"Agreement made this the 9th day of June, 1921, by and between Sylvestro Scatena of the City of Healdsburg, Sonoma County, California, party of the first part, and William H. Lawson and A. G. Perelli-Minetti of the same place, parties of the second part, witnesseth:

"That whereas, the parties to this agreement have heretofore conducted a copartnership under the firm name and style of Scatena, Lawson and Perelli and

"Whereas, the said Sylvestro Scatena is desirous of withdrawing from said copartnership and all the parties thereto have agreed and do agree that said copartnership shall be dissolved and terminated, and

"Whereas, the party of the first part has this day conveyed to the parties of the second part all of his interest in the real estate and certain of the personal property heretofore owned by said copartnership upon the understanding and agreement that the assets of said copartnership shall be promptly liquidated and said copartnership terminated and closed,

"Now, therefore, it is mutually agreed that the partnership heretofore existent between the parties to this agreement, shall be liquidated and dissolved at as early a date as the same can be practically accomplished without loss to the parties in interest and the net assets realized, after paying all debts and expenses of liquidating the assets and caring for the property of the partnership shall be divided in the proportion of an equal one-third each.

"Executed in triplicate this the day and year first above written.

"Sylvestro Scatena.
"[Signed] William H. Lawson.
"A. G. Perelli Minetti."

Further, it is alleged that the plaintiff willfully and fraudulently broke his express promises, as set forth in Exhibit C above, and in violation of his agreement has refused and still refuses to wind up the affairs of the old partnership; that he has refused to consent to the sale of the wine and barrels at market prices, or at any prices; that he never intended to perform his agreement, but did intend, by failing to perform and by preventing a sale of the other assets, to acquire for himself the whole of the mortgaged property; that the interest of the mortgagors in the said wine and barrels is greater in value than the amount of the mortgage indebtedness; that the United States government has a lien for taxes on the wine, and the same cannot be sold until a bond for $10,000 guaranteeing the payment of the tax has been executed by said Scatena and said Lawson; that said plaintiff, in violation of his agreement and for the purpose of preventing the mortgagors from getting funds with which to pay the note, has refused to sign such a bond; that as a part of the said agreement of June 9, 1921, it was agreed that these mortgagors should care for said wine, advancing the costs thereof, which was to be repaid by the old partnership, and that they have expended in this regard the sum of $14,000, which has not been repaid. And they pray that plaintiff be compelled to liquidate the affairs of the old partnership, or that the defendants be empowered to dispose of the partnership assets; that an accounting be had and the amounts found due to defendants be offset against the amount of the note; and that, pending the accounting, plaintiff be enjoined from proceeding with this action.

Appellants' main contention is that this case falls within the rule that in a suit to foreclose a mortgage the defendant may allege, as a valid defense thereto, a breach of an express promise made by the plaintiff to the defendant, in consideration of the execution of the mortgage and as a part of the same transaction. To this end they state that they rely on the breach of the written promises contained in Exhibit C, above set forth, but their answers conclusively show they are also and mainly relying on the various oral promises of June 9, 1921, above mentioned. Among other cases cited in support of the above rule, the case of Snow v. Holmes, 71 Cal. 142, 11 P. 856, is cited as being a parallel case and as compelling a reversal in the instant case. It may be conceded that the rule of law contended for is correct, without solving the problem in this case, other considerations being presented by the facts here.

In Snow v. Holmes, supra, the breach of the agreement was the destruction of the very property (namely, the good will) paid for by the mortgage. Here, it is not claimed appellants did not receive all the property they bought, or that there was any misrepresentation as to it. The express promises claimed here related to another matter, to disposing of and accounting for the proceeds of other properties belonging to the same parties. It is not even claimed that plaintiff owes any money to defendants, but merely that there are other assets the proceeds of which might have been used to pay the note, if the agreements had been kept. To say the least, the application of the rule in Snow v. Holmes to such a case as this would be an extension of that rule requiring grave and careful consideration, and appellants' claim of a parallel set of facts is unfounded.

[1] A further consideration is that the express promises, the breach of which is claimed, not only relate to what is really, if true, another cause of action between the parties, arising out of agreements and assets, other than the mortgages and mortgaged property,

but, in addition, they are largely if not entirely oral. Assuming that the breach of these agreements would be a defense, if they were in writing, we are met by the fact that the written agreement does not contain the promises and agreements alleged to have been broken. Parol evidence would have to be relied upon to prove the vital portions of the defense claimed. While want of consideration for a note may be shown by parol evidence, the making and breaking of a contemporaneous oral agreement, entirely at variance with the terms of a written agreement, may not be so shown. Carver v. San Joaquin Cigar Co., 16 Cal. App. 761, 118 P. 92. In this case the obvious intent of the allegations of the answer is to change the terms of payment of a promissory note by testimony of an oral agreement. To permit this, the court would have to modify the absolute terms of a note and mortgages, with a definite provision for the payment of a certain sum on a certain date, by permitting testimony to show that the payment of the money was contingent upon the sale of other assets. This cannot be done. Lindemann v. Coryell, 59 Cal. App. 788, 212 P. 47; Civ. Code, § 1698.

[2, 3] Again, even if it be assumed that the alleged broken promises were sufficiently a part of the mortgage transaction to permit them to be set up in defense to the mortgage, and if it be further assumed that testimony could be admitted, under the circumstances alleged, to show that in spite of the absolute terms of the note, it had been agreed that payment should be made only after certain other assets were sold, it having been agreed that these should be sold for this express purpose, we must then face another fact, namely, that is this case these parties did not rely on any such oral agreement but went further. After alleging in their answer that an agreement had been reached, setting forth the terms thereof, which agreements and promises are the very ones alleged in the answer to have been broken by the plaintiff, they then allege the acts done "pursuant to said agreement," which includes the execution of the note and mortgages and the execution of the written agreement above quoted in full. This written agreement falls far short of containing the agreements contended for by the appellants as having been theretofore made and relied upon by them as a defense to the note. On its face it would indicate that it was not interdependent with the note and mortgages. It does not mention the latter or the payment thereof in any manner; it contains nothing to show the object of the desired quick sale of the partnership assets was to pay the note; there is no agreement therein that the plaintiff is to be paid the amount of the note from the sale of the assets, that he is to wait until the assets are sold before being paid, or even that any cash received from the sale of the assets is to be applied on the note. Neither does the plaintiff agree to sign any bond to cover the payment of any taxes on the wine. The written agreement indicates that the mortgagors were to be the liquidating partners, as it recites that the property was conveyed upon the agreement that the assets were to be promptly liquidated. That this was true is affimatively alleged by defendants Perelli-Minetti. If this be not the effect of the agreement, then any one of the partners could have disposed of the assets. Hawn v. Land & Water Co., 74 Cal. 418, 16 P. 196; Civ. Code, §§ 2459, 2460. The agreements, the breach of which is relied on by appellants, are missing from the written agreement. They cannot be supplied by parol. Under the circumstances pleaded, it must be assumed that all of the previous agreement was merged in the written documents. To admit parol evidence, not only to change the definite payments of a note into contingent payments, but, in addition, to add to and change the terms of written instruments entered into after and in pursuance of a full agreement previously worked out and agreed to, would be to set aside all established rules of law and let down the bars entirely. The writing (Exhibit C) is not ambiguous, at least, as to the terms appellants want to explain. It leaves no doubt as to what is to be done with the proceeds of the sale of the assets, which are to be divided between the partners.

That the parties themselves did not consider the note and mortgages and the agreement as interrelated, and that they were not expecting to rely only on the proceeds of the sale of the assets to pay the note, is indicated by the fact that, in spite of the continuing neglect of the plaintiff to keep his promises, as alleged, they paid all interest due for four years, retained the property, and apparently nothing was done until after the note became due, five years after its execution. While the record is silent on the point, it is possible that the delay in disposing of the stock of wine may have been partly caused by certain well-known laws and existing conditions, and not entirely by the broken promises of the plaintiff. While appellants have alleged that the breach of agreement, with which respondent is charged, occurred with fraudulent intent, the answers contain no allegations of fact, showing fraud, and the facts alleged do not warrant the setting aside of the written contracts on that ground.

An additional point urged by appellants Perelli-Minetti is that the respondent, by executing a grant deed to the real property involved, warranted the property to be free from all liens, and an attempt is made to set up a breach of this warranty. Aside from any other considerations, however, the answer contains no sufficient allegation of the existence of the lien, and no allegation whatever of any damage sustained thereby. Thurgood v. Spring, 139 Cal. 596, 73 P. 456.

The consideration of other points raised is rendered unnecessary by the views herein expressed. A promissory note is not to be lightly set aside. Though well-defined exceptions to the rule that testimony is not admissible to add to, contradict, or vary the terms of a written instrument necessarily exist to meet special circumstances, no facts are here alleged to bring this case within any such exception. No defense having been set up by the answers, judgment for the plaintiff, on the pleadings, was properly entered.

The order and judgment appealed from are affirmed.

We concur: TYLER, P. J.; KNIGHT, J.

96 Cal. App. 42

TODD v. TEMPLE HOSPITAL ASS'N, INC., et al. (Civ. 6514.)★

District Court of Appeal, First District, Division 1, California. Dec. 28, 1928.

Rehearing Denied Jan. 26, 1929.

1. Evidence 🔑157(5)—In action against corporation by officer on claims assigned for collection, parol evidence held admissible to show claims were transferred before plaintiff became officer.

In action against corporation, brought by officer thereof, on claims assigned to him for collection, parol evidence was admissible to show that claims were transferred before plaintiff became officer of corporation; there being no statutory requirement that indebtedness represented by notes and book account should be assigned in writing after maturity.

2. Corporations 🔑313—Transactions in which corporate officers have interest adverse to corporation are subject to rigid scrutiny and voidable for fraud or violation of duty (Civ. Code, § 2230).

Under Civ. Code, § 2230, transaction in which corporation's officers or directors take part and in which they or those for whom they act have interest adverse to corporation are not ipso facto void, but are subject to rigid scrutiny, and are voidable for fraud or violation of duty.

3. Corporations 🔑309(3)—Corporate officers may purchase and enforce corporation's indebtedness if not inequitable.

Officers of corporation are not trustees of property of corporation in such sense as to disable them from purchasing and enforcing corporation's indebtedness, unless circumstances of transaction make it inequitable for them to do so.

4. Corporations 🔑309(2)—Assignee of claims against corporation held not disqualified from enforcing them by becoming director.

Plaintiff suing corporation on claims assigned for collection *held* not disqualified from enforcing them merely because he subsequently became director of corporation debtor.

5. Appeal and error 🔑878(3)—Respondents not appealing cannot attack finding of ultimate fact.

Respondents who have not appealed are in no position to attack finding of ultimate fact, since only objections to findings which can be reviewed are those urged by appellant.

6. Corporations 🔑171—In action against corporation on notes and account, corporation books held admissible to show names of stockholders or subscribers and amount of stock issued.

In action against corporation on notes and account, books of corporation, properly identified, were admissible to show names of stockholders or subscribers for stock and amount of stock issued.

7. Corporations 🔑519(1)—Person asserting that corporation is incapable of purchasing and holding stock of another has burden of proof.

Corporation is not presumed incapable of purchasing and holding stock of another, and burden of proof is on party who claims that such purchase and ownership were not within its powers.

8. Corporations 🔑519(1)—Corporation claiming contract void as ultra vires has burden of proof.

When corporation seeks to avoid contract on ground of want of power to contract, contract, if not on its face necessarily beyond scope of corporation's authority, will be presumed valid, and corporation must make good its defense by plea and proof.

9. Corporations 🔑519(3)—Evidence held prima facie sufficient to show defendant corporation authorized to own stock in another and that it had purchased stock of codefendant.

In action against corporation on notes and account, evidence, including books of corporation and testimony as to names of stockholders and stock owned by each, *held* prima facie sufficient to show defendant corporation was authorized to own stock in another corporation and had purchased stock in codefendant, ultra vires not having been pleaded and evidence supporting such defense not offered.

10. Corporations 🔑243(1)—Not only is corporation owning stock in another liable for proportion of debts, but stockholders of holding company are also liable; "liability;" "debt."

Not only is corporation which owns stock in another liable for proportion of its debts, but stockholders of holding company are also liable, liability of stockholders existing by reason of Constitution and statute and "liability" being more comprehensive word than "debt," and embracing also involuntary obligation of corporation.

[Ed. Note.—For other definitions, see Words and Phrases, First, Second, and Third Series, Debt; Liability.]

★Rehearing denied.

11. Corporations ⚷519(3)—Evidence supported finding that individual defendant was owner in severalty of but one share of stock in defendant corporation when indebtedness sued on was incurred.

In action against corporation on notes and account, evidence *held* sufficient to support finding that individual defendant was owner in severalty of but one share of stock in defendant corporation when indebtedness was incurred.

Appeal from Superior Court, Alameda County; J. D. Murphey, Judge.

Action by James H. Todd against the Temple Hospital Association, Inc., and others. Judgment for defendants, and plaintiff appeals. Reversed in part, and affirmed in part.

Clark, Nichols & Eltse, of Berkeley, for appellant.

Eugene D. Bennett, of San Francisco, for respondent Temple Hospital Ass'n, Inc.

Carl F. Wood, of Oakland, for respondent Herrick.

John H. Crabbe, Bradford Webster, Edward D. Knight, and Max Mayer, all of San Francisco (J. E. White, of San Francisco, of counsel), for respondents Temple Hospital Ass'n of California and others.

PER CURIAM. The above action was brought by an assignee for collection to recover upon three promissory notes and an account for work and labor. The trial court found that the three notes, which were set forth in the first, second, and fourth causes of action in the complaint and dated, respectively, the 1st and 23d days of June, 1922, were executed for value received by Temple Hospital Association, Incorporated, a corporation, the several amounts thereof with the names of the payees and the dates when payable being as follows: The first note was for $25,000, payable 60 days after date to the First National Bank of Emeryville; the second for $3,322.16, payable on December 23, 1922, to Bush Electric Corporation; and the third for $600, payable 90 days after date to the above-named bank. Each note carried interest and provided for the payment of an attorney's fee in the event of suit.

The court found, with respect to the third cause of action, that the above-named corporation defendant between July 31, 1921, and August 31, 1922, became indebted to Troy Laundry upon an open book account for laundry work in the sum of $950, no part of which had been paid. It was also found that no part of the principal sums of the notes had been paid, and the interest on the first note had been paid to March 31, 1923, but no findings with respect to interest payments on the other notes were made.

The plaintiff, in addition to a recovery against defendant Temple Hospital Association, Inc., sought to recover against defendants L. F. Herrick and Temple Hospital Association of California, a corporation, alleged to have been the owners of a majority of the stock of the first-named corporation defendant, and also against defendants Frye, Miller, Webster, Crabbe, and Mayer, alleged to have been the owners of certain shares of stock in defendant Temple Hospital Association of California.

As to the total number of shares of the capital stock of defendant Temple Hospital Association, Inc., subscribed and outstanding, and the number of such shares owned by defendants Herrick and Temple Hospital Association of California at the times when the above notes were executed and the indebtedness evidenced thereby and by the book account was incurred, the court found, with respect to the first cause of action, that the number of shares subscribed and outstanding was 2,477, the second, 2,077 shares, and the third and fourth, 2,477 shares, of which at all the times mentioned in the complaint defendant Herrick owned 400 shares and defendant Temple Hospital Association of California 1,567 shares. It was also found that during all of said times defendant Temple Hospital Association of California had subscribed and outstanding 2,285 shares of its capital stock, of which the remaining defendants owned the following shares: Richard L. Frye, 401 shares; L. C. Miller, 401 shares; Bradford Webster, one share; J. H. Crabbe, Bradford Webster and Max Mayer, as copartners, 200 shares. With regard to the assignments, the court found that the several claims were assigned for collection under an agreement whereby the plaintiff was to receive 25 per cent. of the amounts collected. It was also found that the plaintiff at the time the action was commenced was a director and the assistant secretary of the Temple Hospital Association, Inc. No finding as to whether the claims were assigned before or after the assignee became such officer was made; but it appears without contradiction that the same were orally assigned to him before his official connection with the corporation commenced, and that formal assignments thereof were made thereafter and before the action was filed.

It was the conclusion of the trial court that the plaintiff, by reason of the fact that he was an officer of the corporation, and that the assignments were made for collection only, was without capacity to sue the corporations mentioned or the stockholders thereof.

The court on its findings entered judgment against the plaintiff, who has appealed therefrom.

As grounds for reversal it is contended that the conclusion of the court that the plaintiff was without capacity to sue, and the finding that defendant Webster was the owner in severalty of but one share of stock in defendant Temple Hospital Association of California when the indebtedness was incurred, cannot be sustained.

[1-3] There is no statutory requirement that the indebtedness represented by the notes and book account, all of which had long since matured, should be assigned in writing, and parol evidence was admissible to show that the same were transferred to the plaintiff before he became an officer of the corporation debtor. Humboldt Milling Co. v. Northwestern Pacific Ry. Co., 166 Cal. 175, 135 P. 503; Ralph v. Anderson, 187 Cal. 45, 200 P. 940. Furthermore, it is not contended that the plaintiff sought in any way to take advantage of his position as an officer, or that the transaction had in it any element of fraud, and no claim is made that the corporation was not indebted as alleged or had a defense to the claims on the merits. The provisions of section 2230 of the Civil Code apply to directors and other officers of corporations, and they are forbidden to take part in any transaction concerning the trust in which they or those for whom they act have an interest adverse to the corporation; but it was not intended thereby to make a transaction between them and the corporation ipso facto void. Such transactions are subject to rigid scrutiny, and are voidable for fraud or any violation of the duties of the trust; but they will not be held void if shown to be in good faith and free from fraud. Schnittger v. Old Home Con. M. Co., 144 Cal. 603, 78 P. 9; Snediker v. Ayers, 146 Cal. 407, 80 P. 511; California & Arizona Land Co. v. Cuddeback, 27 Cal. App. 450, 150 P. 379. Nor are such officers trustees of the property of the corporation in such sense as to disable them from purchasing and enforcing corporation indebtedness, unless the circumstances of the transaction make it inequitable for them to do so. Sullivan v. Triunfo G. & S. Mining Co., 39 Cal. 459; Schnittger v. Old Home Con. M. Co., supra; Merrick v. Peru Coal Co., 61 Ill. 472; Harts v. Brown, 77 Ill. 226; Forest Glen Brick, etc., Co. v. Gade, 55 Ill. App. 181; St. Louis, etc., R. R. Co. v. Chenault, 36 Kan. 51, 12 P. 303; Camden Safe Dep. Co. v. Citizens' Ice, etc., Co., 69 N. J. Eq. 718, 61 A. 529; Seymour v. Spring Forest Cemetery Ass'n, 144 N. Y. 333, 39 N. E. 365, 26 L. R. A. 859; Inglehart v. Thousand Island Hotel Co., 32 Hun (N. Y.) 377; Glenwood Mfg. Co. v. Syme, 109 Wis. 355, 85 N. W. 432; Martin v. Chambers (C. C. A.) 214 F. 769.

[4] In the absence of fraud or inequitable circumstances, the rule that it is a violation of his trust for an officer to deal with the corporation applies only where his conduct is in the nature of an attempt to unite his personal and representative characters in the same transaction and where his official connection is an essential part of the corporate action. California & Arizona Land Co. v. Cuddeback, supra. Within the above rule he is not compelled by the fact alone that he is a director to forego any of his rights as a creditor; and in bringing an adversary action against the corporation he is not in any way taking advantage of his position as a director, the right sought to be asserted being entirely independent of his fiduciary status. Title Ins. & T. Co. v. California Development Co., 171 Cal. 173, 152 P. 542.

Respondent cites certain cases wherein the circumstances were such as to make it inequitable for an action to be maintained against the corporation defendant, either because fraud was shown, or an attempt by the officer to unite in the transaction his personal and representative capacity. In the present case, however, no such facts appear, and our attention has been called to no authority holding that one who has acquired in good faith a valid claim against a corporation, either for his sole benefit or for collection, is disqualified from enforcing the same by the mere fact that subsequently he became a director or assistant secretary of the corporation debtor.

[5-9] Respondents claim that the evidence was insufficient to show that the defendant Temple Hospital Association of California was authorized to own stock in another corporation, or that it had purchased stock in its codefendant. As stated above, the complaint alleged generally, and the court found, that the former owned 1,567 shares of the latter's stock. This was an allegation and a finding of ultimate fact (Sav. & Loan Soc. v. Burnett, 106 Cal. 514, 39 P. 922; Robinson v. City of Glendale, 182 Cal. 211, 187 P. 741; First Nat. Bank v. De Moulin, 56 Cal. App. 313, 205 P. 92), which the respondents, who have not appealed, are in no position to attack, the only objections to the findings which can be reviewed being those urged by appellant (Klauber v. San Diego Street Car Co., 98 Cal. 105, 32 P. 876; Trevaskis v. Peard, 111 Cal. 599, 44 P. 246; Garibaldi v. Grillo, 17 Cal. App. 540, 120 P. 425). Nevertheless, the above findings were sufficiently supported. At the trial of the action the stock ledger, journal and transfer book of defendant Temple Hospital Association, Inc., were produced, and its clerk, whose duty it was to keep the same, testified to the names of the stockholders and the stock owned by each. In addition, a list of its stockholders was furnished by defendant to the plaintiff. From the above it appeared that the number of shares as found by the court was held therein by defendant Temple Hospital Association of California. The books of the corporation, which were properly identified, were admissible to show the names of its stockholders or the subscribers for its stock and the amount of stock issued. Evans v. Bailey, 66 Cal. 112, 4 P. 1089; Kennedy v. California Bank, 101 Cal. 497, 35 P. 1039, 40 Am. St. Rep. 69; Brown v. Board, 103 Cal. 534, 37 P. 503; Zie-

rath v. Claggett, 46 Cal. App. 15, 188 P. 837; Lebens v. Nelson, 148 Minn. 240, 181 N. W. 350. A corporation is not presumed incapable of purchasing and holding the stock of another; and the burden of proof is upon the party who claims that such purchase and ownership were not within its powers. Evans v. Bailey, supra. When a corporation seeks to avoid its contract on the ground of its want of power to contract, where the contract is not upon its face necessarily beyond the scope of its authority, it will in the absence of proof be presumed to be valid, and the corporation must make good its defense of ultra vires by plea and proof. Brown v. Board of Education, 103 Cal. 531, 37 P. 503; Morgan v. Board of Education, 136 Cal. 245, 68 P. 703; Davis v. Pacific Studios Corporation (Cal. App.) 258 P. 440. In the present case ultra vires not having been pleaded, nor evidence supporting such defense offered by defendants, the above was sufficient prima facie to support the finding of the court.

[10] The liability of stockholders, which is distinct and separate from that of the corporation (Winona Wagon Co. v. Bull, 108 Cal. 1, 40 P. 1077), exists by reason of the Constitution and statute (Green v. Beckman, 59 Cal. 545; National City Bank v. Chubb, 52 Cal. App. 655, 199 P. 537), the word "liability" as used therein being more comprehensive than the word "debt" (Coulter Drygoods Co. v. Wentworth, 171 Cal. 500, 153 P. 939), and embracing also the involuntary obligations of the corporation (Lininger v. Botsford, 32 Cal. App. 386, 163 P. 63). As held in the following cases, not only is a corporation which owns stock in another liable for a proportion of its debts (Kiefhaber v. Newport Lumber Co., 15 Cal. App. 37, 113 P. 691; Kennedy v. California Savings Bank, 101 Cal. 495, 35 P. 1039, 40 Am. St. Rep. 69), but the stockholders of the holding company are also liable (Lininger v. Botsford, supra).

[11] We find no merit in appellant's contention that the finding with respect to the amount of stock in defendant Temple Hospital Association of California owned by defendant Webster individually cannot be sustained. The evidence shows that this defendant on or about July 28, 1921, acquired in severalty 200 shares therein; that by an arrangement with the officers of the corporation —who wished the stock of the same to be held in smaller lots by a larger number of persons—the certificate representing these shares was indorsed to the corporation and the shares subsequently sold by its officers to others. While the evidence shows that this defendant received the check of the corporation for the price of the shares, nevertheless it sufficiently appears that the purchase was not made nor intended to be made by it, but that the transaction was as stated above. During the period in which these sales were being made a part of the indebtedness to the Troy Laundry as shown by its account was incurred, but it appears therefrom that the amounts charged during that time were fully paid. The indebtedness alleged by the other causes of action was incurred after the above transaction was had.

We are satisfied that the conclusion of the trial court that the plaintiff was without capacity to sue is not sustained by the evidence, and the judgment as to respondents Temple Hospital Association, Inc., a corporation, Temple Hospital Association of California, a corporation, L. F. Herrick, Richard L. Frye, L. C. Miller, and J. H. Crabbe, Bradford Webster, and Max Mayer, as copartners, is accordingly reversed, and as to respondent Bradford Webster individually it is affirmed.

---

96 Cal. App. 130

ABBE et al. v. BERRY. (Civ. 6461.)

District Court of Appeal, First District, Division 2, California. Jan. 4, 1929.

1. Trial 🔑388(4)—Finding that plaintiffs were copartners complying with statute was unnecessary, where such matters were alleged, denial was based on want of information, and reply was sufficient (Civ. Code, §§ 2466, 2468).

Finding that plaintiffs were copartners and had complied with Civ. Code, §§ 2466, 2468, was not required, where such matters were alleged in complaint, and denial thereof in answer was based on want of information and belief, and reply was sufficient.

2. Trial 🔑395(5)—Finding that bill sued on was given in settlement of note supported judgment, without incorporating probative matter.

In action on bill of exchange, finding that the bill was given by defendant to plaintiffs in settlement of prior note and mortgage sufficiently supported judgment in plaintiff's favor, without necessity of reciting probative matter.

3. Bills and notes 🔑513—In suit on bill given in payment of secured note, evidence that mortgaged property was in plaintiff's possession held immaterial.

Where bill of exchange sued on was given in payment for note secured by mortgage, it was immaterial whether mortgaged property was in existence at date of trial, and evidence that plaintiff had it in his possession was properly excluded.

Appeal from Superior Court, Santa Clara County; P. F. Gosbey, Judge.

Action by Frank Abbe and George E. Abbe, copartners doing business under the firm name and style of the Abbe Company, against N. L. Berry. Judgment for plaintiffs, and defendant appeals. Affirmed.

Fitzgerald & Johnson, of Gilroy, for appellant.

L. F. Hobbs, of San Jose, for respondents.

STURTEVANT, J. The plaintiffs commenced an action against the defendant to recover the amount of an unpaid bill of exchange theretofore delivered by the defendant. The defendant appeared and answered, and a trial was had in the trial court before the court sitting without a jury. The trial court made findings in favor of the plaintiff, and from a judgment entered thereon the defendant has appealed.

[1] The first finding made by the trial court found the fact to be that at all times mentioned in the complaint of the plaintiffs they were copartners and had complied with sections 2466 and 2468 of the Civil Code. The finding was directly responsive to the first allegations contained in plaintiffs' complaint. However, the defendant contends that there was no evidence introduced on the subject. In reply to that contention the plaintiffs call to our attention that the denial contained in the answer of the defendant was based on want of information or belief, and that, therefore, the denial raised no issue. 21 Cal. Jur. 153. The reply is sufficient, and it follows that it was not necessary for the court to make any finding on the subject.

Prior to April 5, 1927, the date of the bill of exchange, the defendant executed and delivered to the plaintiffs his promissory note and executed and delivered a chattel mortgage to secure its payment. It was the theory of the plaintiffs that the bill of exchange sued upon was given and received in payment of the promissory note. It was the contention of the defendant in the trial court, and he also contends in this court, that there was no agreement between the parties that the bill of exchange was given and accepted in payment of the note. On this issue the trial court made a finding that the said bill of exchange was given by the defendant to plaintiffs in settlement of the promissory note and chattel mortgage, and that the transaction constituted a novation. However, the defendant claims that there is no evidence supporting the finding. That claim is too broad. It might be claimed that the evidence was conflicting, but there was some evidence which, if the trial court believed it, supported the finding as made.

The trial court made a finding that all of the allegations of the answer are untrue. The defendant claims that the finding as made is not supported by the evidence. Thereupon he proceeds to quote excerpts from the answer, to the effect that the bill of exchange was not given or accepted with any understanding that it would constitute absolute payment of any previous indebtedness. What has been said above in reply to the second point made by the defendant is a sufficient discussion on this point.

[2] In the next place the defendant claims that the findings do not support the judgment, As we understand his contention, it is to the effect that in drawing its findings the trial court was not warranted in stopping with the expression that said bill of exchange was given by defendant to plaintiffs in settlement of the note and mortgage, but should have gone further and should have used language to the effect that when the said bill of exchange was delivered to the plaintiffs that at said time and place the defendant said to the plaintiffs, "I give you this bill of exchange in full payment of my note and mortgage which you now hold," and that at said time and place the plaintiffs replied to the defendant, "We accept the said bill of exchange on said terms." In other words, that the trial court was bound to have inserted in its finding probative matters. We think there is no merit in the contention.

[3] If, as we have held above, the trial court was warranted in finding that the bill of exchange was given and accepted in payment of the note and mortgage, it follows that there is no merit in the last point made by the defendant. That point rests on the claim that the trial court erred in refusing to hear evidence to the effect that the mortgaged property was still in existence, was in the plaintiffs' possession, etc. If the mortgage had in fact been paid it was altogether immaterial whether the mortgaged property was or was not in existence at the date of the trial.

We find no error in the record. The judgment is affirmed.

We concur: KOFORD, P. J.; NOURSE, J.

96 Cal. App. 137

HODGINS v. DONAHUE. (Civ. 5348.)★

District Court of Appeal, Second District, Division 1, California. Jan. 4, 1929.

Rehearing Denied Jan. 24, 1929. Hearing Denied by Supreme Court March 4, 1929.

1. Brokers 🔑42—Licensed real estate salesman may recover commissions for services to another broker than his employer.

Holder of real estate salesman's license may recover commission for services rendered to another broker than one employing him in course of work from his employer's office.

2. Brokers 🔑60—Broker, selling to another than purchaser secured by salesman suing him for commission, cannot object that plaintiff did not produce purchaser ready, able, and willing to buy.

Broker, selling property to another than purchaser secured by salesman, thereby placing it beyond his power to make conveyance pursuant to agreement with such salesman, cannot object to recovery of commission by latter on ground that he did not produce purchaser ready, able, and willing to buy property.

Appeal from Superior Court, Los Angeles County; Ira F. Thompson, Judge.

Action by Fred H. Hodgins against James J. Donahue. Judgment for plaintiff, and defendant appeals. Affirmed.

Young & Young, Milton K. Young, Lyndol L. Young, William K. Young, and L. R. Brigham, all of Los Angeles, for appellant.

Joseph L. Lewinson, Benjamin F. Bledsoe, and Frank L. Kostlan, all of Los Angeles, for respondent.

YORK, J. [1] This is an appeal from a judgment rendered in favor of a real estate salesman for a commission against a broker other than his employer broker, the contention of the appellant being that the decision of Firpo v. Murphy, 72 Cal. App. 249, 236 P. 968, is controlling, and from that decision he inferred that the court meant that the particular service had to be rendered to the employer broker by the real estate salesman in order to enable the salesman to recover. That is not the way we construe the law as to the holder of a real estate salesman's license.

In case the real estate salesman should leave the employ of his employer broker and should do business at another place, that would raise a question, which is not before this court. So far as the evidence shows, the real estate salesman was still located with and doing business from the office of his employer broker; and in the course of such work, he rendered services for another broker, the defendant and appellant herein.

[2] The appellant further contends that the plaintiff did not produce a purchaser ready, able, and willing to buy the property in question. It does not lie in the mouth of the appellant to object in a case where he proceeded to and did sell the property to a third person, as he had placed it beyond his power to make the conveyance in accordance with his agreement with the real estate salesman, especially when, as in this case, there was sufficient evidence to support the findings of the trial court that the purchaser secured by the salesman was ready, willing, and able, and that the findings were sufficient to support the judgment.

The judgment is therefore affirmed.

We concur: HOUSER, Acting P. J.; CRAIL, Justice pro tem.

---

96 Cal. App. 23

DALBKERMEYER v. RADER. (Civ. 6277.)★

District Court of Appeal, First District, Division 1, California. Dec. 28, 1928.

Rehearing Denied Jan. 26, 1929. Hearing Denied by Supreme Court Feb. 25, 1929.

1. Trusts 🔑91—Housekeeper, terminating services without fraud, did not hold property under constructive trust after conveyance, based on valuable consideration, by plaintiff to himself and housekeeper jointly.

In quiet title action, defendant did not hold property under constructive trust, and plaintiff was therefore not entitled to take anything by action, where plaintiff conveyed property jointly to himself and defendant, who was his housekeeper, based on a valuable consideration of services, and defendant subsequently terminated services, without fraud and for good cause, since, if plaintiff desired to make termination of services condition subsequent to retention of title, he should have so inserted it in deed.

2. Appeal and error 🔑1009(1)—Whether it would be unconscientious for defendant to retain estate conveyed her in consideration of services held for trial court.

In action to quiet title, in which plaintiff contended that defendant held land under constructive trust, question, whether it would be unconscientious for defendant to retain estate conveyed to her by plaintiff, in consideration of services after defendant terminated services for good cause, must be left to determination of trial court.

Appeal from Superior Court, Los Angeles County; Elliot Craig, Judge.

Action by Charles H. Dalbkermeyer against Lula Z. Rader. Judgment for defendant, and plaintiff appeals. Affirmed.

Woodruff & Shoemaker and Clyde C. Shoemaker, all of Los Angeles, for appellant.

C. F. Cable and Lester R. Godward, both of Los Angeles, for respondent.

KNIGHT, J. Plaintiff brought suit to quiet title to certain real property, which had been conveyed to, and stood of record in the names of, plaintiff and defendant as joint tenants,

---

★Rehearing denied. Hearing denied by Supreme Court.

and subsequently he amended his complaint by adding a second cause of action thereto, whereby he sought to impress the property with a constructive trust and to compel a conveyance of defendant's title therein to him. Judgment was rendered in favor of defendant, and plaintiff appeals.

Plaintiff does not question the trial court's decision relating to the first cause of action, but as to the second he contends, in substance, that the trial court's affirmative findings upon certain probative facts alleged therein are sufficient to establish a constructive trust, and that, therefore, the decision with respect to the second cause of action is not supported by the findings, and is contrary to law.

[1] The main facts disclosed by the record are as follows: In November, 1914, plaintiff, being then 58 years of age, was living alone in Los Angeles, having been estranged from his wife for a number of years, although not divorced. He was the owner of property of the value of $45,000 or $50,000, and was engaged in a number of business enterprises, among them being the operation of the Santa Barbara Apartments in Los Angeles. Defendant, who was 35 years of age, had been married, but was living separate from her husband, and was dependent upon her labor for a livelihood. She applied for work at plaintiff's apartment house, which was at first refused; but after informing plaintiff of her necessitous condition, and that she was much in need of a home, plaintiff agreed that, if she would make herself generally useful about the apartment house by keeping the premises clean and orderly, and would cook and keep house for him, he would give her board and room, furnish her necessary clothing, medical aid when required, and some spending money. Defendant accepted the proposition, and, during the 5 years following, her services were not only satisfactory, but of much value to plaintiff, for during that period he disposed of the Santa Barbara Apartments, and afterwards acquired, operated, and disposed of two other apartment houses, namely, the Euclid and the Grace Apartments, all to his financial gain.

After selling the Grace Apartments in 1919, plaintiff decided to discontinue the apartment house business, and at that time, because of the long period of defendant's faithful services to him, and of the trust and confidence each had in the other, plaintiff informed defendant that, if she would continue to stay with him during his lifetime, and care for him as his housekeeper, and look after his welfare under the same general arrangement as theretofore existing, he would buy a piece of property and cause the same to be conveyed to them as joint tenants with the right of survivorship, so that in case of his death she would become the sole owner of the property. Defendant agreed, and pursuant to such agreement plaintiff purchased a piece of property on North Benton way, Los Angeles, and caused title thereto to be conveyed to himself and defendant as joint tenants. The entire consideration therefor was furnished by plaintiff, and after the deed had been recorded it remained in plaintiff's possession.

In February, 1920, plaintiff sold said property, defendant, at plaintiff's request, having joined in the deed; and thereafter, in January, 1921, plaintiff purchased a second piece of property on Sixty-Fourth street, Los Angeles, and likewise caused the same to be conveyed to himself and defendant in joint tenancy, upon the same understanding and for the same purposes as in the case of the purchase of the Benton way property. Part of the purchase price for the second piece of property consisted of a payment of $275 in cash, which amount was drawn by plaintiff from a joint bank account opened by him in June, 1920, in the names of himself and defendant, as part of the same arrangement, so he claims, under which the real property was acquired. With respect to this latter property, the trial court found that "at the time of such purchase the plaintiff informed the defendant that the property last mentioned was neither as desirable nor as valuable as the said property on Benton way, and that he expected to dispose of it in a short time, but in the meantime, and while acquiring some other property, he would cause defendant's name to be placed on the deed of purchase with that of plaintiff, as joint tenants, with the same understanding as aforesaid, all of which was understood and consented to by defendant." As will hereinafter appear, the parties continued to hold the property last mentioned until February, 1924, at which time it was sold and the proceeds deposited in said joint bank account.

In the meantime, however, to wit, in August, 1921, plaintiff purchased the property in question, situate on Vermont avenue, Los Angeles; and with reference thereto the court found as follows: That "plaintiff and defendant having confidence in each other, plaintiff caused the deed to said described property last mentioned to be taken in the names of the plaintiff and defendant as joint tenants, in accordance with and upon the same agreement" as theretofore existed between them; and, furthermore, that "in the matter of the purchase of said real property and in the matter of the taking of the title thereto and the placing of the name of the defendant as a joint tenant on the deed of purchase as hereinbefore alleged, each of said parties believed in the honesty and good faith of the other and relied upon their agreements as aforesaid; and that during all of said times a confidential relationship existed between the plaintiff and the defendant." The purchase price for the property was approximately $16,000, which was paid as follows: Execution and delivery of a joint note and mortgage for $5,000, signed by plaintiff and defendant, allowances for rebates, credits, in the sum of $160, and the delivery of six checks, aggregating $10,864, drawn by plaintiff on said joint bank account. The money deposited in said joint bank account to meet the payment of said checks was the proceeds from the sale of certain real and personal property, separately owned by plaintiff and not here involved. As stated, in February, 1924, plaintiff and defendant disposed of the property on Sixty-Fourth street, and, about this time, or soon thereafter, a disagreement arose between the parties, and approximately two months after such sale, and on May 7, 1924, defendant, for just cause as she claims, left the premises where she was residing with plaintiff and refused to return.

With reference to the Vermont avenue property, plaintiff alleged in his complaint that it was agreed "that defendant would not claim any ownership in said property prior to plaintiff's death; and that at all times it was understood between the plaintiff and the defendant that while plaintiff lived said described property should be owned absolutely by plaintiff"; also, that "the plaintiff did not intend to make any gift of said property or any part thereof to the defendant, or to vest the ownership of said property or any part thereof in the defendant." But the court found that said allegations were not true, and, on the other hand, found that, although it was understood that plaintiff should have the right to control and manage such property, and that plaintiff did actually manage and control same during all times since its purchase, the legal title to said property became vested in the plaintiff and defendant as joint tenants, with the right of survivorship at the time the same was purchased, to wit, on or about August 12, 1921; furthermore, the court found "that the defendant asserts and claims that she was and is the owner of a joint tenancy estate in said real property with the plaintiff and that it is not true that such assertion and claim by defendant was or is wrongful, fraudulent, or inequitable or contrary to the intention of the parties, and that it is not true that the defendant has no interest or estate whatever in or to said described property or any part thereof. * * *"

Plaintiff also alleged that the departure of defendant on May 7, 1924, was wrongful and "in violation of the trusts and confidences imposed in her by the plaintiff, as aforesaid, and contrary to and in violation of her promises and agreements. * * *" The trial court made no finding as to whether or not such departure was wrongful, but found that "the defendant deliberately left the plaintiff and departed from the premises where the plaintiff and defendant had theretofore resided, and packed her belongings and removed them from the premises, and thereafter failed and refused to return or in any manner thereafter to carry out or perform any of her said promises to act as plaintiff's housekeeper or to care for him or to look after his welfare; * * * that while it is true that defendant has violated her promises and agreements as hereinbefore found, it is not true that defendant is wrongfully and fraudulently endeavoring to gain an unconscionable advantage over plaintiff by virtue of said deed."

We are convinced that the foregoing facts and circumstances, and others incidental thereto, which are unnecessary to set forth herein, were, as the trial court held, legally insufficient to establish a constructive trust, and that, therefore, plaintiff was entitled to take nothing by his action. Nowhere in the complaint is it alleged, nor does the court find, nor the evidence prove, that defendant obtained the joint tenancy estates in the various properties through any misrepresentation, imposition, circumvention, abuse of confidential relations, or any other kind of actual or constructive fraud. Admittedly throughout the 10 years of their acquaintanceship, and particularly during the latter 5 years thereof, while they were acquiring said properties in joint tenancy, plaintiff's was the dominating mind, and the status of the properties and of the parties resulted alone from his affirmative, voluntary acts. Nor is there any proof whatever from which the inference could be drawn that defendant's agreement was made without intention of performing the same, or that it was terminated other than for good cause. On the other hand, the findings and the evidence affirmatively show that the various conveyances to defendant as a joint tenant where absolute in form, and were all based upon a valuable consideration, namely, the performance of future personal services, and that thereafter said services were faithfully performed for a period of 5 years, and until, as she claims and as the evidence in her behalf tends to show, plaintiff's treatment of her justified her in leaving. Therefore, the case on principle is the same as, and should be governed by the law declared in, Schott v. Schott, 168 Cal. 342, 143 P. 595, wherein the court said in part: "As to the property described in the first deed, defendant's remedy [here it is the plaintiff's] at most, in view of the pleadings and evidence, there being no actual fraud, was an action for damages. As was said in Lawrence v. Gayetty, 78 Cal. 132 [20 P. 385, 12 Am. St. Rep. 29], of a case somewhat similar in principle: 'The plaintiff saw proper to accept the verbal promise of the respondent to do certain things without any agreement or understanding that the failure to do the acts as promised should be a condition, or in any way affect the validity of the deed, or entitle him to a reconveyance.' Under such circumstances, in the absence of fraud, actual or constructive, defendant would have no right to rescind, or to have the deed set aside [citing cases]."

It may be conceded, as plaintiff contends, that, where confidential relations exist between two parties, and one of them accepts a conveyance of real estate upon a parol promise that he will hold it for the benefit of the grantor, or for the benefit of some third person in whom the grantor is interested, *and there is no other consideration for the conveyance*, a trust arises by operation of law in favor of the grantor, or in favor of the third person for whom the property is to be held; that it is the violation of the parol promise which constitutes the fraud and gives rise to the trust, and that, if it is made in good faith, and is of a continuing nature, the performance of it for a time does not prevent a trust from arising when it is broken and repudiated. Cooney v. Glynn, 157 Cal. 583, 108 P. 506, and cases cited; Smith v. Lombard, 201 Cal. 518, 258 P. 55; Taylor v. Bunnell, 77 Cal. App. 525, 247 P. 240; Logan v. Ryan, 68 Cal. App. 448, 229 P. 993. But the mere statement of the rule is sufficient to show its inapplication to the facts of the present case, because, as indicated by the above italics, the application of the rule depends upon the proposition that there is no consideration for the conveyance other than the mere promise of the grantor to hold the title for the benefit of the grantor or some third person; and here defendant's joint tenancy estates were not conveyed to her for the benefit of some one else, but, as pointed out, were conveyed to her absolutely in consideration of future personal services, which were performed for a period of 5 years, and also as a reward for faithful services rendered plaintiff without wages during the preceding 5 years. And, although no finding was made as to whether defendant was justified in discontinuing her services in 1924, the evidence, in our opinion, is amply sufficient to support the conclusion that, as she claims, she was warranted in so doing. But whether or not such justification existed would seem to be of little importance in this suit to declare a constructive trust, because, even assuming that such legal grounds did not exist, the termination of her services amounted to no more than a breach of contract, involving no fraud, either actual or constructive, and, there being a consideration for the conveyance, a constructive trust did not arise. Schott v. Schott, supra.

The case of Cole v. Manning, 79 Cal. App. 55, 248 P. 1065, which is emphasized by plaintiff, is not in point here, for there the defendant Mrs. Manning acquired an interest in Cole's property by entering into a meretricious relationship with him, under a fraudulent promise of marriage, which she knew could not be fulfilled, because she was already married. It is evident, therefore, that she obtained title through fraud.

Plaintiff also contends for the application of the rule stated in Pomeroy, Equity Jurisprudence, § 1053, and by other text-writers to the effect that, whenever the legal title to property is obtained through means or under circumstances which render it unconscientious for the holder of the legal title to retain and enjoy the beneficial interest, equity imposes a constructive trust in the property thus acquired. Here, however, the court found that, under all of the circumstances surrounding the acquisition of said property, defendant's claim of title was neither wrongful, fraudulent, inequitable, nor contrary to the intention of the parties; also that it was not true, as plaintiff alleged, that she was wrongfully and fraudulently endeavoring to gain an unconscionable advantage over plaintiff by virtue of said deed; and it is apparent that these conclusions of the trial court are fully supported by the evidence, for, in addition to the facts hereinabove referred to, the record shows that for 10 years she acted in the best of faith toward plaintiff; that during that period of time she not only looked after his personal welfare, but worked incessantly to promote his property interests; and that her industry, hard work, and devotion to his interests had much to do with increasing his financial worth during the 10 years she labored for him. And, irrespective of whether legal grounds existed for the termination of her agreement after 5 years' services, she was apparently honest in her belief that plaintiff's treatment of her in 1924 justified her in leaving him.

[2] Under such circumstances it would hardly seem to be in keeping with equitable principles, or in accordance with the evidence in the case, to declare it to be unconscientious for her to retain and enjoy the joint tenancy estate of which she is the legal and rightful owner, and thus deprive her of all of the fruits of her several years' labor. As stated, in substance, in Lawrence v. Gayetty, supra, if plaintiff desired to make the termination of the services a condition subsequent to the retention of the title, he should have so inserted it in the deed. In any event, the question of whether it would be unconscientious for defendant to retain the estate conveyed to her must necessarily be left to the determination of the trial court, and we fully agree to the conclusion it has reached thereon.

The judgment is affirmed.

We concur: TYLER, P. J.; CASHIN, J.

96 Cal. App. 128

AKOPOFF v. MESROPIAN et al.

(Civ. 5388.)

District Court of Appeal, Second District, Division 1, California. Jan. 3, 1929.

1. Evidence 🔑429—Evidence to show alteration of note held admissible (Code Civ. Proc. §§ 1855, 1856).

In action on note, testimony that note did not bear figures indicating amount at time it was signed and delivered *held* admissible, under Code Civ. Proc. § 1856, since section 1855 does not exclude evidence to show that alteration of writing has been made, where it is claimed that instrument in evidence fails to express true contract by reason thereof.

2. Bills and notes 🔑489(3)—In action on note, agreement acknowledging payment of all accounts between parties held admissible, under answer in which payment was pleaded.

In action on note, written agreement dissolving partnership between parties, and acknowledging settlement and payment of all accounts between them, *held* admissible under answer in which payment was pleaded, as against contention that exhibit was not pleaded in answer.

Appeal from Superior Court, Los Angeles County; Wm. D. Dehy, Judge.

Action by Mike Akopoff, also known as Mike Akopian, against Jacob Mesropian and another. Judgment for defendants, and plaintiff appeals. Affirmed.

Henry W. Mahan, of Los Angeles, for appellant.

Stanley Visel, of Los Angeles, for respondents.

CRAIL, Justice pro tem. This is an action on three counts for a money judgment. The third count is upon a promissory note. The answer denies the allegations of the complaint, and in addition sets up a separate defense that, since its execution, the note has been altered and is null and void, and also a defense "that the defendants have paid to the plaintiff the whole sum," etc. Judgment was entered in favor of the defendants, and plaintiff assigns three grounds of appeal.

He first contends that the evidence does not support the findings. We have read the reporter's transcript, and there is substantial evidence to sustain the findings of the trial court.

[1] Appellant next contends that the trial court committed error in admitting, over the objection of the plaintiff, testimony that the note did not bear the figures $606 at the time it was signed and delivered. Appellant contends that the writing speaks for itself, and that section 1855, Code of Civil Procedure, known as the best evidence rule, excludes such evidence. The above section has no application to the question involved. The true rule is expressed by section 1856, Code of Civil Procedure, and is called the extrinsic evidence rule. While ordinarily there can be, between the parties to a written agreement, no evidence of its terms other than the contents of the writing itself, yet exceptions are made by the statute, where imperfection of the writing is put in issue by the pleadings, or where the validity of the agreement is the fact in dispute.

The rule against parol evidence to vary or contradict a written instrument does not exclude evidence to show that an alteration of a writing has been made, and where it is claimed that an instrument in evidence fails to express the true contract of the parties by reason of alterations therein, extrinsic evidence thereof is admissible. 22 C. J. p. 1147, and cases cited under notes 83 and 85.

[2] Appellant's last contention is that the trial court erred in admitting defendants' Exhibit A, which was an agreement in writing dissolving the partnership between the parties, and acknowledging settlement and payment of all accounts between them. Plaintiff complains that the exhibit was not pleaded in the answer. However, payment was pleaded, and we know of no rule which would support the plaintiff's contention. Plaintiff refers us to none.

Judgment affirmed.

We concur: HOUSER, Acting P. J.; YORK, J.

---

96 Cal. App. 118

GARVER v. WILLIAMS, City Auditor.

(Civ. 6635.)

District Court of Appeal, First District, Division 2, California. Jan. 3, 1929.

Municipal corporations 🔑169—Deputy city clerks held not authorized to verify signatures on petition for charter amendments or recover compensation therefor, notwithstanding charter (Oakland City Charter, § 7, subd. 4; art. 21, §§ 163, 174; Const. art. 11, § 8).

Deputy city clerks of the city of Oakland *held* without authority to verify signatures of persons signing petition for proposed charter amendments, and not entitled to recover salary claims for such work, though city clerk is permitted to verify petition under charter of city of Oakland, § 7, subd. 4, and article 21, §§ 163, 174, since Const. art. 11, § 8, provides that signatures on such petition shall be verified by the authority having charge of the city registration records, which in case of the city of Oakland is the city clerk.

Application by Paul Garver for writ of mandate prayed to be directed to Harry G. Williams, as auditor of the City of Oakland. Writ denied.

Breed, Burpee & Robinson, of Oakland, for petitioner.

Preston Higgins, City Atty., and John W. Collier and Homer W. Buckley, Deputy City Attys., all of Oakland, for respondent.

KOFORD, P. J. This is an original proceeding for a writ of mandamus requiring the Oakland city auditor to approve the first week's salary claims of certain special deputy city clerks appointed and employed by the city clerk under authority of a resolution of the city council of the city of Oakland for the purpose of verifying the signatures and registrations of the signers of a petition filed with the city clerk proposing certain amendments to the charter of the city of Oakland. The refusal of the auditor to approve these claims resulted in stopping the proceedings looking to the calling of an election at which the people of the city could vote upon the proposed charter amendments. Owing to this condition, this court's original jurisdiction was invoked, notwithstanding that the dispute might otherwise appear to be a private one showing no reason to depart from the customary procedure of applying to the superior court for relief.

The first defense raised by the auditor is that the verification of the signatures on the petition must be done only by the county clerk, as specified by the provisions of the Constitution.

The Constitution, section 8, art. 11, states, among other things: "The signatures on such petition shall be verified by the authority having charge of the registration records of such city or city and county, and the expenses of such verification shall be provided by the legislative body thereof. If such petitions have a sufficient number of signatures the legislative body of the city or city and county shall so submit the amendment or amendments so proposed to the electors." In Alameda county the county clerk and not the city clerk has charge of the registration records of the city of Oakland. No provision of law has been called to our attention which gives the city clerk charge of the registration records of the city of Oakland. There is scarcely any room for interpretation of the constitutional provision just quoted unless some doubt is raised by the last sentence of section 8 of article 11 of the Constitution. It reads: "The election laws of such city or city and county shall, so far as applicable, govern all elections held under the authority of this section." The expressions "election laws" and "all elections" as here used cannot include all the proceedings leading up to the election. If it meant this, it would also mean that the city laws could change the constitutional requirement of a 15 per cent. petition to a 30 per cent. or a 60 per cent. petition. Such a broad delegation of authority is not to be assumed without a plain intention manifested so to do. However this sentence of the section of the Constitution should be interpreted, it should not receive an interpretation which would nullify the specially expressed requirements of the section, one of which designates the authority who shall verify the petition.

The city charter, contrary to the Constitution, specifies that the city clerk shall verify the petition. Section 7, subd. 4, clearly states that the city clerk shall verify a recall petition. Section 7, subd. 4, is by reference in section 163 incorporated into article 21 of the charter, and that article contains section 174, which expressly makes article 21 applicable to charter amendment proceedings unless prohibited by the Constitution. But the Constitution does prohibit the charter from empowering the city clerk to make the verification. The Constitution states that such verification shall be made by the authority having charge of the registration records of said city. This, in the county of Alameda, means the county clerk.

We conclude, therefore, that the city auditor properly has refused to audit and approve the claims described in the petition. The signatures on the petition should be verified by the county clerk under the constitutional provision and not by the city clerk as stated in the city charter. Under the constitutional provision requiring that "the expenses of the verification shall be provided by the legislative body thereof," the city will still pay for the expense of the verification, but it will be for expenses incurred by the county clerk and not by the city clerk.

The writ is denied, with costs to respondent.

We concur: STURTEVANT, J.; NOURSE, J.

96 Cal. App. 50

STEWART v. ATKINSON et al. (Civ. 6529.)

District Court of Appeal, First District, Division 1, California. Dec. 28, 1928.

1. Taxation 🔑421(1), 764(1)—Description in tax assessment and deed by reference to map held sufficient, though two maps were on record in every respect identical (Pol. Code, § 3650, subd. 2).

Description of property in tax assessment and in tax deeds by reference to map *held* sufficient, within Pol. Code, § 3650, subd. 2, though there were two maps of record in the office of the county recorder, which were in every respect identical, though only one contained a title, since, in absence of proof to the contrary, the court might assume that the map containing a title was the only map thereof, or that, as the two maps were identical, the tract and extent of boundaries were well known by name.

2. Taxation 🔑421(3), 764(2)—Description in assessment and tax deed as one-half of certain lot held void for uncertainty (Pol. Code, § 3650, subd. 2).

Description in assessment and tax deed as one-half of certain lot *held* void for uncertainty, under Pol. Code, § 3650, subd. 2, in that it could not be ascertained from the description what half of lot was attempted to be described.

3. Taxation 🔑734(2)—Tax deed, founded on invalid assessment, is void.

A tax deed, which is founded on an invalid assessment, is itself void.

Appeal from Superior Court, Monterey County; Fred A. Treat, Judge.

Action by Wade Stewart against S. C. Atkinson and others, wherein Maude M. Stewart was substituted for plaintiff after his death. Decree for plaintiff, and defendants appeal. Affirmed in part, and in part reversed.

William R. Biaggi, of San José, for appellants.

J. A. Bardin and Russell Scott, both of Salinas, for respondent.

CAMPBELL, Justice pro tem. This is an appeal from a decree adjudging plaintiff to be the owner of certain real property in Monterey county and quieting her title against the claims of defendants.

It is conceded that on and for a long time prior to June 24, 1912, Mary A. Wagner was the owner in fee simple and in the exclusive possession of lot 10 and the northerly one-half of lot 12, in block 132, of Carmel-by-the-Sea, Monterey county; also that she died on June 14, 1924, and that the defendant Anna S. Fisher is, and was at the time of the trial of the action, the duly appointed, qualified, and acting administratrix of the estate of Mary A. Wagner, deceased. It is also conceded that, on and for a long time prior to June 24, 1912, the defendant Nettie E. Wagner was the owner in fee simple and in the possession of the southerly one-half of lot 12, block 132, Carmel-by-the-Sea.

It is further conceded that the title and right of possession, which the plaintiff claims in and to the lands and premises involved in the action, is based upon a certain tax deed dated July 16, 1917, from J. E. Hunter, tax collector of Monterey county, to the state of California, recorded July 18, 1917, in volume 13 of Tax Deeds, page 190, Monterey County Records, conveying to the state of California for the sum of $1.42 that certain real property in the county of Monterey, state of California, and more particularly described as follows: "As per map of Carmel-by-the-Sea, lot 10, block 132;" also another tax deed, made by the same grantor to the same grantee dated July 16, 1917, and recorded July 18, 1917, and conveying for the sum of 96 cents that certain real property in the county of Monterey, state of California, and more particularly described as follows: "As per map of Carmel-by-the-Sea, lots, one-half of lot 12, block 132;" that by deed dated May 17, 1923, J. E. Hunter, tax collector of Monterey county, conveyed to Wade Stewart the real property in dispute, described as situate in the county of Monterey, state of California, and more particularly described as follows: "Property sold to the state June 24, 1912, for tax of 1911, as per map of Carmel-by-the-Sea, lot 10, block 132; as per map Carmel-by-the Sea, one-half of lot 12, block 132, which deed was recorded May 21, 1923, in Liber 17 of Official Records, folio 310, Monterey County Records."

It is further conceded that Wade Stewart died during the pendency of the action, and that on May 17, 1925, after due and regular proceedings had therefor in the matter of the estate of Wade Stewart, deceased, the superior court of Monterey county duly made and entered its order assigning the whole of the estate, including whatever interest the deceased had in and to the property in controversy, to the present plaintiff herein Maude M. Stewart, the widow of Wade Stewart, deceased.

[1] Appellants contend that the tax deeds through which plaintiff derived title are void; that, as held in Pretty v. Warden, 38 Cal. App. 708, 177 P. 490, "proceedings calculated to deprive an owner of his property under the taxing power are in invitum, and that all the requirements of the statute respecting the same must be strictly complied with." The reasons assigned by appellants as to why the tax sales and tax titles based thereon are invalid are that the descriptions of the property set forth in the assessment and in the tax deeds are void for uncertainty in the following particulars: "It is not stated in the descriptions that the property is located in any city or town. The property is merely described by reference to a map of Carmel-by-

the-Sea, and the evidence shows that there are two maps of Carmel-by-the-Sea of record in the office of the county recorder of Monterey county, each of said maps containing a lot 10, block 132, and also a lot 12, block 132, and it does not appear from the evidence which of said maps the assessment refers to or which map the assessor had in mind when he prepared the assessment roll," and as to the description of one-half of lot 12, block 132, it is further uncertain in that "it cannot be ascertained, either from the description of said lot, as set forth in the assessment roll, nor from the description contained in the tax deeds, what portion, or half, of lot 12, block 132, is attempted to be described therein, nor can it be ascertained therefrom whether it is the north, south, east, west or middle one-half of said lot, nor whether the said half is in the shape of a square, circle or rectangle." Appellants also urge in their opening brief that the auditor did not correctly compute the interest and penalties. This latter objection is waived by appellants in their closing brief in which they concede that both of the parcels of property in question were sold by the tax collector for the correct amounts, and that the taxes, penalties, and costs were correctly computed.

On the date when the assessor of Monterey county prepared the 1911 assessment roll Carmel-by-the-Sea was not an incorporated town, and did not become a town of the sixth class until October 31, 1916, and it is conceded that the lots in question were listed under subdivision 2 of section 3650 of the Political Code. This section provides: "The assessor must prepare an assessment book, with appropriate headings as directed by the state board of equalization, in which must be listed all property within the county, and which shall show under the appropriate head; * * * 2. Land, by township, range, section, or fractional section; and when such land is not a congressional division or subdivision, by metes and bounds, or other description sufficient to identify it; * * * city and town lots, naming the city or town and the number of lot and block, according to the system of numbering in said city or town," etc.

By stipulation of the parties it appears as a fact in the case that the map of "Carmel-by-the-Sea" is a map of record in the office of the county recorder of Monterey county and was of record in Map Book 1, at page 2, on March 7, 1902, and that in the same volume at page 52 there is another map showing the same property—that is, lots 10 and 12, block 132, appear on each of such maps in every respect identical. As to the map on page 2, the stipulated facts show it to be a "map of Carmel-by-the-Sea," while no title, so far as the stipulated facts show, appears on the map recorded on page 52.

Appellants rely on the case of Cadwalader v. Nash, 73 Cal. 43, 14 P. 385, quoting the following, which they claim is decisive of the first point urged here: That "a sheriff's deed * * * is void for uncertainty, when the reference contained therein is equally applicable to two different maps, and in an action founded thereon, parol evidence of the sheriff to identify the one referred to is inadmissible." In that case the two maps in evidence represent blocks and lots of corresponding numbers as being situated in different parts of Middletown, and consequently the court held the description void for uncertainty. Here, however, the same lots and blocks appear identically the same on two maps, only one of which, however, is entitled "Carmel-by-the-Sea." It is only where there is a difference between two maps so far as the assessed property is concerned that the question as to which map was intended can arise.

In Baird v. Monroe, 150 Cal. 571, 89 P. 356, this language is used: "If by such evidence it was made to appear that there was such a recorded map, and only one such map, or, if more than one, no difference therein so far as the assessed property was concerned, the evidence was sufficient to sustain a conclusion that the assessment sufficiently identified the property. The trial court had the right to assume, in the absence of a showing to the contrary by the person assailing the description, that there was but one Pellissier tract in the county of Los Angeles, and that this tract and the extent of its boundaries were well known by that name. People v. Leet, 23 Cal. 161."

And so in the present case the court had the right to assume—there being no proof to the contrary, and no evidence as to the designation of the map recorded in liber 1, page 52—that the "map of Carmel-by-the-Sea," recorded in liber 1, page 2, was the only map of "Carmel-by-the-Sea," or that, as the two maps were identical, so far as the assessed property was concerned, this tract and the extent of its boundaries were well known by that name.

If the language of the court in Baird v. Monroe, supra, announces the correct rule, it is decisive of the objection urged against the descriptions as being uncertain because of there being two maps. Appellants contend that as it appears from the evidence in the Baird Case that there was but one map of the Pellissier tract in the county of Los Angeles the language of the court above quoted is mere dicta. While it is true that this language was not indispensable to the conclusion reached in the decision, we think it states the correct rule and the descriptions here sufficiently comply with the provisions of section 3650, subdivision 2, of the Political Code as a "description sufficient to identify it," as against the first objection urged.

[2] As to the description contained in the assessment and tax deed with respect to the one-half of lot 12, block 132, assessed to de-

fendant Nettie E. Wagner, who it is conceded was the owner of the south one-half of such lot, and which was assessed and deeded as "one-half of lot 12, block 132," we think the description is void for uncertainty in that it cannot be ascertained from the description what half of the lot is attempted to be described. In Harvey v. Meyer, 117 Cal. 60, 48 P. 1014, the court lays down the rule in tax proceedings that no presumption of fact may be indulged in as to the size, location or extent of a lot, nor is parol evidence admissible to ascertain what particular tract or lot the assessor had in mind when making the assessment. An assessment so indefinite and uncertain as to render it impossible to determine what part of the land was intended to be assessed—what particular half of a lot—is invalid. People v. Flint, 39 Cal. 670; Ventriniglia v. Eichner, 155 App. Div. 236, 140 N. Y. S. 395. "Section 3650 of the Political Code of this state provides that property shall be listed by the assessor in accordance with the following method: Land, by township, range, section, or fractional section, and when such land is not a congressional division or subdivision, by metes and bounds, or other description sufficient to identify it. * * * Any assessment not in conformity with this section is wholly void." Smith v. City of Los Angeles, 158 Cal. 707, 112 P. 307; Palomares Land Co. v. Los Angeles Co., 146 Cal. 536, 80 P. 931.

[3] We have examined the cases cited by respondent to support her contention that the description "one-half of lot 12" means an undivided one-half, and that therefore respondent's tax deed makes her a tenant in common with appellant Nettie E. Wagner, who, it was conceded at the trial, was the owner of the south one-half of lot 12, and who paid the taxes levied and assessed against her property for the year 1911. The cases cited are not in point, as they all involve conveyances between private persons, while here we are concerned with a conveyance based upon tax proceedings, which are in invitum. "A description sufficiently certain to convey land between man and man, and which, if contained in an agreement to convey, would authorize the court of equity to decree specific execution, will not answer in the proceeding to enforce the collection of a tax." Commercial National Bank v. Schlitz, 6 Cal. App. 182, 91 P. 753; Miller v. Williams, 135 Cal. 185, 67 P. 788. "In the case of private transactions, the courts, in construing the document, endeavor to collect the intention of the parties, and give that intention effect. * * * But in these tax proceedings the owner of the estate has nothing to do; he intends nothing. The government is acting, through its agents, in hostility to him, and with the view of enforcing the collection of a tax from him." People v. Mahoney, 55 Cal. 288.

In tax proceedings "the description must be certain of itself, and not such as to require evidence aliunde to render it certain. * * * Certainty in the description is required to apprise the owner that his property is advertised for sale, and to enable him to prevent the sale by the payment of the taxes thereon, and to impart information to bidders of the actual extent and location of the premises to be sold. All subsequent proceedings depend upon this certainty. An inaccurate or an uncertain description defeats every step subsequently taken, and, as we have already said, the uncertainty cannot be cured by evidence aliunde." Keane v. Cannovan, 21 Cal. 302, 82 Am. Dec. 738. See, also, Roberts v. Chan Tin Pen, 23 Cal. 267; Mountain Club v. Pinney, 67 Cal. App. 251, 227 P. 630; Miller v. Williams and Smith v. City of Los Angeles, supra. A deed founded on an invalid assessment is itself void. Emeric v. Alvarado, 90 Cal. 444, 27 P. 356.

That part of the decree in which it is adjudged that plaintiff is the owner and entitled to the possession of lot 10 in block 132, as laid down and designated upon that certain map entitled "map of Carmel-by-the-Sea, Monterey county, state of California," and quieting her title against the claims of defendants, is affirmed, and that part of the decree adjudging plaintiff to be the owner of an undivided one-half interest in and to lot 12, block 132, as laid down and described on that certain map entitled "map of Carmel-by-the-Sea, Monterey county, state of California," and quieting her title thereto, is reversed. Each party to pay his and her own costs of appeal.

We concur: KNIGHT, Acting P. J.; CASHIN, J.

95 Cal. App. 757

KIRBY v. SAN FRANCISCO SAVINGS & LOAN SOC. (Civ. 6387.)★

District Court of Appeal, First District, Division 1, California. Dec. 26, 1928.

Rehearing Denied Jan. 25, 1929. Hearing Denied by Supreme Court Feb. 21, 1929.

1. Injunction ⟹228—There can be no disobedience of injunction by one not included in mandate and not aiding or abetting one so included.

There can be no disobedience of injunction by person not included in mandate of court, either by name or as member of classes of persons properly included, or who is not active as aider or abettor of one so included in assertion of his claims.

2. Injunction ⟹261—Court of law may take cognizance of violation of injunction in another action, though it was not perpetuated by final decree.

In action for damages for bank's payment of deposit, withdrawal of which had been enjoined, defendant's claim that court of law cannot take cognizance of violation of injunction in another action, unless such injunction be shown to have been perpetuated by final decree, *held* overruled.

3. Injunction ⟹261—Complaint for damages for bank's payment of deposit, withdrawal of which had been enjoined, held sufficient against general demurrer.

In action for damages for bank's payment of deposit, withdrawal of which had been enjoined, complaint, though open to criticism as containing conclusions of law, *held* sufficient as against general demurrer, notwithstanding that precise facts constituting defendant an aider or abettor, violating order and right of plaintiff, may have been left uncertain, since objection to such matter should have been presented by special demurrer.

4. Divorce ⟹206—Husband held unauthorized to withdraw bank deposit of community property, where order restraining such withdrawal had been entered in divorce action (Civ. Code, § 172).

Though husband could, under Civ. Code, § 172, withdraw from bank deposit of community property, he had not such right as against wife, where order restraining such withdrawal had been entered in divorce action.

Appeal from Superior Court, City and County of San Francisco; George H. Cabaniss, Judge.

Action by Sarah Kirby against the San Francisco Savings & Loan Society, now known and designated as the San Francisco Bank. Judgment for defendant, and plaintiff appeals. Reversed and remanded, with instructions.

J. J. Dunne and Harmon D. Skillin, both of San Francisco, for appellant.

Goodfellow, Eells & Orrick, of San Francisco (Bradford W. Bosley, of San Francisco, of counsel), for respondent.

PER CURIAM. This action was brought to recover the damage alleged to have been caused by the payment to plaintiff's husband of a deposit made by the spouses in defendant bank, and the withdrawal of which by the husband had been enjoined.

The complaint alleged that on March 14, 1924, the community property of the spouses consisted, among other things, of a bank account or deposit with defendant bank in the sum of $2,521.80; that the deposit was in the names of plaintiff and her husband, Michael J. Kirby, "and in form to be paid to either said plaintiff or said Michael J. Kirby or the survivor of them"; that on the above date the plaintiff commenced in the superior court of the city and county of San Francisco an action for divorce against her husband on the ground of extreme cruelty; that on the same day in that action the court issued its order restraining Michael J. Kirby, "his agents and servants, and each of them, from selling, assigning, withdrawing, or otherwise disposing of, or mortgaging or incumbering, the community property of the parties to the action for divorce, including the aforesaid bank account * * * with said defendant * * *"; that certified copies of the order were on the day of its issuance served upon the husband and defendant bank. It was further alleged that on March 15, 1924, in violation of the restraining order, defendant paid over and delivered to Michael J. Kirby the amount of the deposit, and the whole thereof was lost to plaintiff; that on March 27, 1924, Kirby having made default, the divorce action was tried, findings of fact were filed, and an interlocutory decree entered, by which a divorce was granted to the plaintiff on the ground alleged and the deposit awarded to her. According to the above findings, a copy of which was attached to the complaint, the deposit was the community property of the spouses.

The complaint further alleged that on March 27, 1924, a copy of the decree was served upon defendant bank, that no part of the deposit has been paid to plaintiff, and that by reason of the premises she was damaged in the amount thereof. A general demurrer to the complaint was sustained, with leave to amend. The plaintiff, however, declined to amend, and from the judgment entered upon the demurrer, plaintiff appealed.

[1] It is the rule that there can be no disobedience of an injunction by a person who is not included in the mandate of the court, either by name or as a member of the classes of persons properly included, or who is not active as an aider or abettor of one so included in the assertion of his claims. Berger v. Superior Ct., 175 Cal. 719, 167 P. 143, 15 A. L. R. 373. In some jurisdictions, where the disobedience of an injunction has resulted in pecuniary loss or injury to the plaintiff, the court, by reason of statute, may, in imposing punishment, award an amount suffi-

---

★Rehearing denied. Hearing denied by Supreme Court.

cient to indemnify him for his loss, while in others relief is given in an independent action. 32 Corp. Jur. "Injunctions," § 889, page 509, and cases cited. But, whatever the form of the proceeding for relief, the right to recover as against one who, in disobedience of the mandate of the court, violates a right sought to be protected thereby, to the damage of another, or who knowingly aids and abets such violation, is generally recognized. Lawton v. Herrick, 83 Conn. 417, 76 A. 986; White v. Wadhams, 211 Mich. 658, 179 N. W. 245; Webster v. Douglas County, 102 Wis. 181, 77 N. W. 885, 78 N. W. 451, 72 Am. St. Rep. 870; Main v. Field, 13 Ind. App. 401, 40 N. E. 1103; Springfield M. & F. Ins. Co. v. Peck, 102 Ill. 265.

[2] Defendant claims that a court of law cannot take cognizance of the violation of an injunction in another action, unless the injunction be shown to have been perpetuated by a final decree, relying upon a statement to that effect in High on Injunctions (4th Ed.) p. 1461, in support of which the case of Callan v. McDaniel, 72 Ala. 96, is cited. An examination of this case, however, shows that the decision was not contrary to the rule stated in the cases cited above. The action was one in ejectment, and in the course of the trial a writ of injunction, issued in an equity case between the same parties, enjoining the plaintiff from clearing the land involved in the action then being tried, was offered in evidence for the purpose of showing that the writ had been violated. The offer was rejected, and in affirming the ruling the court, after stating in substance that the offered evidence was not material to the issues in the ejectment action, and that the violation alleged could not be punished in that proceeding, said: "If the suit in equity has passed into a final decree, and the injunction been perpetuated, the court adjudging that the defendant was without right to clear the lands in controversy, the decree would be admissible evidence, and conclusive. That is not, however, the question now presented."

[3] In the present action it is not claimed that the defendant acted as the agent or servant of Kirby, and it was not named in the restraining order. Defendant contends, therefore, that this case is to be distinguished from cases where the depositary was so named in the order, as in Springfield M. & F. Ins. Co. v. Peck, supra, and that in the absence of an allegation that it was so named, or acted as an agent or servant of Kirby, the complaint was insufficient. Such allegations, however, in view of other facts pleaded, were not essential to the statement of a cause of action against the defendant within the above rule as to liability; it being sufficient that the complaint show that the defendant aided and abetted Kirby in doing the act which resulted in damage to the plaintiff. As stated, the complaint averred that the withdrawal of the deposit by Kirby was enjoined, and it sufficiently appears therefrom that the defendant knew the fact. It is also manifest from the situation disclosed by the pleading that without the defendant's aid and cooperation such withdrawal was impossible.

Taken in connection with these facts, the averment that "in violation and disregard of said restraining order and in prejudice to the rights of the plaintiff said defendant paid over and delivered to said Michael J. Kirby and said Michael J. Kirby received from said defendant the whole of said deposit, * * *" while open to the criticism that with allegations of fact it also contained conclusions of law, was nevertheless sufficient to meet the objection raised by the general demurrer; and if the precise facts claimed to have had the effect of constituting the defendant an aider and abettor in the violation of the order and the rights of the plaintiff were left uncertain by the pleading, the objection should have been presented by a special demurrer. City of Santa Barbara v. Eldred, 108 Cal. 294, 41 P. 410; Eva v. Andersen, 166 Cal. 420, 137 P. 16; San Christina, etc., Co. v. San Francisco, 167 Cal. 762, 141 P. 384, 52 L. R. A. (N. S.) 676.

[4] Defendant contends that, it having been determined in the divorce action that the property was the community property of the spouses, the husband had, under the provisions of section 172 of the Civil Code, full power to withdraw the same, at least until the deposit had by a judgment of the court been awarded to the wife. That the husband had such power may be conceded; but that, in the face of the restraining order, he had not the right to do so as against his wife is, we think, equally clear.

In view of the foregoing, it will be unnecessary to consider the further claims by plaintiff that the service of the copy of the restraining order upon the defendant was sufficient, under the provisions of section 15a of the Banking Act (Stats. 1925, pp. 510–512), as a notice in writing not to pay the deposit according to its terms, and was also a notice of an adverse claim thereon by the plaintiff.

The judgment is reversed, and the cause remanded, with instructions to the lower court to overrule the demurrer to the complaint.

95 Cal. App. 768

CONNOLLY v. LAKE COUNTY CANNING CO. et al. (Civ. 6389.)

District Court of Appeal, First District, Division 1, California. Dec. 27, 1928.

1. Specific performance 🔑92(1)—Tender of price within time fixed by option is not essential, where prevented or delayed by vendor's act (Civ. Code, § 1511).

Time is not of essence of option to purchase, so as to render it essential to judgment for specific performance that tender of purchase price be made within time limit fixed, where such offer is prevented or delayed by act of vendor, under Civ. Code, § 1511.

2. Specific performance 🔑121(11)—In suit for specific performance of option, evidence supported finding that owner of interest in land delayed exercise of option beyond time fixed.

In suit for specific performance, evidence *held* sufficient to support finding that plaintiff, owning interest in land on which defendants had option to purchase, made statements for purpose of delaying exercise of such option beyond period of time fixed therein, where plaintiff, who was abstractor and searcher of titles, was employed to obtain correct list of record owners of property, and failed to do so before time had expired.

3. Appeal and error 🔑1011(1)—Finding on conflicting evidence is controlling.

Trial court's finding on conflicting evidence is controlling on appeal.

4. Specific performance 🔑101—Owner of interest in land, having delayed exercise of option beyond stipulated time by statements while employed by purchaser, cannot complain of delay in tendering price.

Owner of interest in land on which another had option to purchase cannot complain of purchaser's delay in tendering price, where he had made statements, while employed by purchaser, to obtain correct list of record owners, for purpose of delaying exercise of option beyond period of time fixed therein.

Appeal from Superior Court, Mendocino County; H. L. Preston, Judge.

Action to quiet title and for an accounting brought by P. Connolly against the Lake County Canning Company and another, in which defendants filed a cross-complaint for specific performance. From an adverse judgment, plaintiff appeals. Affirmed.

W. D. L. Held, of Ukiah, for appellant.

Hale McCowen, Jr., of Ukiah, for respondents.

KNIGHT, J. Appellant, as the owner of an undivided one-fifteenth interest in an acre of land in Mendocino county, brought this suit to quiet title thereto, and to require respondents, who were occupying said land, to account for the proceeds derived from its use. Respondents filed a cross-complaint for specific performance, alleging, in substance, that during the year 1916 respondent Lake County Canning Company entered into possession of said land under a written lease granted by plaintiff and his co-owners, and by the same instrument was given an option to purchase the land at any time prior to April 1, 1919; that the exercise of the option was delayed by the acts of the appellant until April 10, 1919, at which time said canning company tendered appellant his share of the purchase price, amounting to $233.19, and demanded a deed; and that appellant refused to accept the money or to execute the deed. The trial court found generally in accordance with the facts alleged in the cross-complaint, and from the judgment entered on said findings this appeal is taken.

[1] Appellant devotes much space in his brief to the citation of authorities, holding generally that time is of the essence of an option to purchase, and that it is essential to a judgment in specific performance that a tender of the purchase price be made within the time limit fixed by the option. Section 1511 of the Civil Code provides, however, that the want of performance of an obligation, or of an offer of performance, in whole or in part, or any delay therein, is excused "when such performance or offer is prevented or delayed by the act of the creditor * * *"; and in the present action the trial court found that the delay of 10 days in exercising the option was caused by the acts of the appellant; consequently the only question presented for determination on the appeal is whether the evidence reasonably supports such finding.

[2] The facts are as follows: During the year 1910, the Ukiah Canning Company, a corporation, deeded the land in question to some 15 individuals, one of whom was the appellant. In 1916, a Mr. Poage, acting on behalf of the Lake County Canning Company (which for convenience will be referred to hereinafter as respondent), obtained from said individuals the written lease and option above mentioned, but the same was not recorded. During the subsequent occupation of the property by respondent, and with the expectation of buying the same, it expended several thousand dollars in erecting buildings thereon and otherwise improving the property. In February, 1919, respondent decided to exercise its option, but the written lease and option could not be found, the same apparently having been misplaced during a change which had taken place previously in the official personnel of the company. Mr. Cunningham, who became the manager and secretary of the respondent company, knew of the existence of said instrument and that appellant was one of the signers thereof, but he did not know the names of the numerous individuals holding the record title to the

property, nor the exact date of the expiration of the option. Therefore, in order to prepare a valid deed conveying complete title, Cunningham, on behalf of respondent, employed appellant, who was an abstractor and searcher of titles in Mendocino county, to obtain a correct list of the record owners of said property and to report the same to respondent. Appellant accepted the employment, and agreed to furnish such report, but when Cunningham called on him later, on three or four different occasions prior to April 1, 1919, for the report of the title, was told by appellant that he had not yet had time to secure the necessary information from the records; and finally, so Cunningham testified, about April 1, 1919, appellant informed him that the data he was seeking was not available from the records, because, as appellant stated, the deed from the Ukiah Canning Company to the 15 individuals who executed the lease and option was not of record. This latter statement was manifestly not true, because admittedly said deed had been on record in Mendocino county since 1910, and appellant had knowledge of such fact; and therefore the trial court was justified in finding, as it did, that appellant made said statements for the purpose of delaying the exercise of said option beyond the period of time fixed therein; and that such was the effect thereof. The evidence further shows that within several days after appellant made such statement respondent succeeded in obtaining the necessary information from the records to consummate the sale, and thereupon, and on April 10, 1919, it tendered appellant his share of the purchase price, and demanded the execution of a deed; but, as stated, appellant refused to accept the money or to execute the deed upon the ground that the tender had not been made within the time fixed in the option.

The foregoing facts and circumstances are amply sufficient in our opinion to support the conclusion reached by the trial court that the delay in exercising said option was due to the acts of the appellant, and that therefore he was estopped from taking any legal advantage of such delay.

[3, 4] Appellant does not deny having accepted employment from respondent to examine the records, but claims that such employment related to the lease and option, which, as stated, was not of record, and not to the recordation of the deed or the contents thereof. The trial court found otherwise, however, upon conflicting evidence; and consequently its finding is controlling. Appellant also claims that, in any event, it is immaterial whether or not he misrepresented the state of the record as to the recordation of the deed, because, as he asserts, Cunningham knew prior to April 1, 1919, that appellant was one of the owners of record, and that consequently nothing he may have said with reference to the recordation of said deed could have prevented respondent from exercising its option as to appellant's interest prior to April 1, 1919, had it desired to do so. This argument might have some force, were it not for the fact that it totally ignores the matter of said employment. After accepting the same, appellant was doubtless acting toward respondent in the dual capacity of vendor and employee, and as such employee he was bound to act in good faith toward his employer. The object of such employment, as he knew, was to obtain certain information disclosed by the recordation of the Ukiah Canning Company deed, so that respondent in closing the transaction might prepare a deed to convey complete title; and it is evident that, if he had furnished this information to respondent within a reasonable time, as could have been done easily, respondent would have been in a position to exercise the option long prior to the date of its expiration. But, as shown, owing to appellant's conduct, first in offering the excuse that he had not yet been able to attend to the matter, and then in misrepresenting the fact as to the recordation of the Ukiah Canning Company deed, the date fixed for the exercise of the option, which as stated was then unknown to respondent, was allowed to expire. Clearly, under such circumstances, the trial court was warranted in holding that appellant was not in a position to complain of the delay.

The judgment is affirmed.

We concur: TYLER, P. J.; CAMPBELL, Justice pro tem.

96 Cal. App. 57

In re DAVIES' ESTATE. ★

BAKER v. HALE et al. (Civ. 6192.)

District Court of Appeal, Second District, Division 1, California. Dec. 28, 1928.

Rehearing Denied Jan. 22, 1929. Hearing Denied by Supreme Court Feb. 25, 1929.

Appeal and error ⇐1011(1)—Conflict in evidence does not affect sufficiency thereof to support findings.

The fact that there is a sharp conflict in the evidence does not affect the sufficiency thereof to support findings made by the trial court.

Appeal from Superior Court, Los Angeles County; Chas. S. Crail, Judge.

Proceeding by Victoire L. Hale and others for the probate of the will of Louisa M. Davies, deceased. From a judgment for Adeline H. Baker, contestant, the proponents appeal. Affirmed.

Law & Overholt, of Los Angeles, for appellants.

Lucius K. Chase, of Los Angeles, and Edwin C. Dutton, of Washington, D. C., for respondent.

★Rehearing denied. Hearing denied by Supreme Court.

YORK, J. The appellants state that the grounds of appeal are that the evidence totally fails to support the findings of fact and judgment, and particularly findings Nos. 3 and 9, and that the decision of the trial court is against law.

There was in the record sufficient evidence to support the findings made by the trial court, especially those findings which declare that at the time of execution of the will, decedent was not mentally capable of making a will. It is true there was a sharp conflict in the evidence; nevertheless, there was evidence to support said findings.

The findings were sufficient to support the judgment.

The judgment is affirmed.

We concur: CONREY, P. J.; HOUSER, J.

---

95 Cal. App. 772

KUROKAWA et al. v. SAROYAN et al.
(Civ. 6392.)

District Court of Appeal, First District, Division 1. California. Dec. 27, 1928.

1. Pleading 🔑313—Bill of particulars is regarded as amplification of complaint.

Bill of particulars is regarded as amplification of complaint, and, in determining plaintiff's right of recovery or admissibility of evidence in support of claim, is considered as incorporated into complaint as originally filed.

2. Appeal and error 🔑197(1)—Point that findings were not within issues presented by pleadings could not be raised for first time on appeal.

Where it appears from record that case was tried on theory that pleadings were sufficient to raise certain issues, and no objection was made in lower court to introduction of evidence on such issues, point that findings are not within issues presented by pleadings cannot be raised on appeal.

3. Appeal and error 🔑1122(2)—Appellate court held authorized to make findings contrary or in addition to those made by trial court (Const. art. 6, § 4¾; Code Civ. Proc. § 956a, as added by St. 1927, p. 583).

Where trial court failed to make findings according to evidence which was not conflicting, appellate court is authorized to make findings contrary or in addition to those made by trial court, under Const. art. 6, § 4¾, and Code Civ. Proc. § 956a, as added by St. 1927, p. 583.

4. Trial 🔑398—In action for labor furnished and money advanced, finding against defendants' contention as to labor to be furnished under contract price held not conflicting.

In action for labor furnished and money advanced, in which defendants contended that more labor was to be rendered for stipulated sum than that alleged and testified to by plaintiffs, finding in effect that none of work other than as alleged by plaintiffs was included within terms of such contract price *held* not conflicting when read in connection with pleadings.

5. Appeal and error 🔑1011(1)—Under conflicting testimony, findings will not be held to be without support.

Findings on counterclaims will not be held to be without support, where record shows either conflict in testimony or circumstances tending to contradict testimony of defendants.

6. Evidence 🔑523—In action for labor furnished and money advanced, evidence of reasonable value of work held admissible to show improbability of defendants' claim that contract price was intended as compensation for all farming operations during year.

In action for labor furnished and money advanced, in which defendants contended that more labor was to be rendered for stipulated sum than that alleged and testified to by plaintiffs, testimony by experienced vineyardists as to reasonable value of work contracted to be done *held* admissible to show improbability of defendants' claim that agreement between parties was that contract price should be compensation for all farming operations during year.

7. Appeal and error 🔑704(2)—Record held not to support claim that court considered facts within its knowledge as individual in arriving at conclusions.

Record *held* not to support defendants' claim that court, in arriving at conclusions, considered facts within its knowledge as individual, not shown by evidence, notwithstanding court's statement that it had pretty good knowledge of matter as individual, after which plaintiffs' attorney said they were willing to stipulate that court would draw on his personal experience to full extent, where no such stipulation was made.

8. Appeal and error 🔑1008(1)—Trial court's conclusion, construing oral contract reasonably and consistent with parties' intent, will not be disturbed.

In action for labor furnished and money advanced, in which contract sued on was oral, and construction placed thereon by court was reasonable and consistent with true intent of parties, its conclusion will not be disturbed.

Appeal from Superior Court, Fresno County; S. L. Strother, Judge.

Action for labor furnished and money advanced, brought by K. Kurokawa and another against Aram Saroyan and another. Judgment for plaintiffs, and defendants appeal. Affirmed.

Conley, Conley & Conley, of Fresno, for appellants.

M. F. McCormick and Irvine P. Aten, both of Fresno, for respondents.

PER CURIAM. The above action arose out of certain farming operations carried on by the defendants in Fresno county in connection with which the plaintiffs were employed. The complaint by separate causes of action alleged claims for labor furnished and moneys advanced to the defendants, with a further claim for money had and received to the use of the plaintiffs. Defendants alleged in their answer among other defenses payments on account together with several counterclaims against the plaintiffs. The trial court—a trial by jury having been waived—found that the balance of plaintiffs' claims unpaid amounted with interest to $7,862.90, from which should be deducted the sum of $882.25, found to be due the defendants on their counterclaims, and entered judgment against the latter for $7,040.65.

Defendants appeal from the judgment, and contend that the trial court erroneously admitted certain testimony over objection, that its conclusion with respect to plaintiffs' first and second causes of action and to several items of the counterclaims are unsupported, and that the findings are conflicting.

It was alleged in the first cause of action, and the court found, that plaintiffs were employed to plow, cultivate, and irrigate land owned by defendants aggregating 250 acres, to prune and hoe the trees and vines thereon and to sulphur the vines; that the work was to be done during the season of 1925, was to continue to the date when the picking of the crops thereon commenced, namely, to July 22, 1925, and that the defendants agreed to pay therefor the sum of $6,000; that plaintiffs further agreed to furnish all necessary labor for picking and harvesting the crops produced thereon during the season, and also to harvest other crops of grapes which the defendants purchased during that year; and that the latter agreed to pay 40 cents per hour for labor furnished under the last-mentioned agreement, the total amount furnished thereunder by the plaintiffs, as found by the trial court, being 14,193¾ hours.

It was alleged, as a second cause of action, and the court found, that, during the time that the contract set forth in the first cause of action was being performed, plaintiffs, at the request of defendants, furnished the labor for additional work, which consisted of leveling, preparing, and planting 11 acres of land to Alicanti grapes, 3 acres to strawberries, farming and caring for the same, and picking and delivering portions of the crops thereon, and also in hauling tools and performing work in and about the packing house of defendants, and that plaintiffs completed the latter contract on July 22, 1925, and furnished pursuant thereto 5,277 hours of labor, for which the defendants agreed to pay 35 cents per hour.

The defendants contended that all farming work on the land described in the first cause of action, including the harvesting and marketing of the strawberries mentioned in the second cause of action during the whole season of 1925, was under their agreement with plaintiffs to be done for $6,000; it being further agreed that the defendants should pay to the plaintiffs the reasonable value of all services rendered in harvesting such crops other than the strawberry crop as might be produced thereon.

The plaintiffs upon demand served and filed a bill of particulars purporting to state the items of their claims for labor furnished, from which it appears that a portion of the services for which recovery is sought under their first cause of action, namely, 5,734½ hours, was not rendered in connection with the harvesting of the crops described therein, but was rendered between July 17, 1925, and about November 27, 1925, in irrigating and cultivating certain Mission and Thompson grapes, picking oranges, doing general ranch and packing house labor, and in the operation of two automobile trucks for defendants. Defendants therefore contend that neither the allegations of the first cause of action, nor the findings which, with respect to the character of the work done, follow these allegations, are supported by the evidence.

The complaint, however, as stated above, alleged a number of hours claimed under this cause of action, the same number being shown by the bill of particulars, which also showed the character of the work done. In addition, the plaintiffs testified without objection or contradiction in support of the facts shown by the bill of particulars, and that this labor was performed for the agreed price of 40 cents per hour.

[1, 2] A bill of particulars is to be regarded as an amplification of the complaint, and for the purpose of determining the plaintiffs' right of recovery or the admissibility of evidence in support of the claim is to be considered as incorporated into the complaint as originally filed (Millet v. Bradbury, 109 Cal. 170, 41 P. 865; Treadwell v. Nickel, 194 Cal. 243, 263, 228 P. 25; Ames v. Bell, 5 Cal. App. 1, 89 P. 619; Gage v. Billing, 12 Cal. App. 688, 108 P. 664); and, where it appears from the record that the case was tried upon the theory that the pleadings were sufficient to raise certain issues, and no objection was made in the court below to the introduction of evidence upon those issues, the point that the findings are not within the issues presented by the pleadings cannot be raised for the first time on appeal (Moore v. Campbell, 72 Cal. 251, 13 P. 689; Sprigg v. Barber, 122 Cal. 573, 55 P. 419; Silvers v. Grossman, 183 Cal. 696, 702, 192 P. 534).

[3] The trial court having found, according to the allegations of the complaint and the bill of particulars, the number of hours of labor furnished, and this finding being supported by the evidence, which also showed without conflict that the character of the work done was as stated in the bill of particulars, it only remained for the court to make findings accordingly. While in the above respect there was a failure to do so, the appellate court is authorized to make findings contrary

or in addition to those made by trial court (Const. art. 6, § 4¾; section 956a, Code Civ. Proc. [added by St. 1927, p. 583]; Kirk v. Culley, 202 Cal. 501, 261 P. 994), and the present is a case for the exercise of the power.

[4] Appellants also claim that the items of work alleged under the second cause of action to have been done for the defendants were but duplications of the items shown by the bill of particulars for which compensation was claimed and allowed under the first cause of action.

While certain work was similar in character, according to the bill of particulars and the evidence, the services under the second cause of action were fully rendered before those alleged in the first cause of action commenced.

The evidence fully supports the conclusion of the trial court as to the number of hours of labor furnished by plaintiffs, as it does likewise the finding against the contention of the defendants that more labor was to be rendered for the $6,000 than that alleged and testified to by the plaintiffs. The finding which is contended by defendants to be conflicting on its face and with others was based upon certain allegations in their answer to plaintiffs' first cause of action. As stated, defendants claimed by their answer that the sum last mentioned above covered all the farming work on the land described in that cause of action for the season of 1925, including the harvesting and marketing of the crop of strawberries; the finding in effect being that none of the work other than as alleged by plaintiffs was included within the terms of the contract price of $6,000, as alleged by defendants. When read in connection with the pleadings, no conflict on the face of the finding nor with the other findings, as claimed by defendants, appears.

[5, 6] We find no merit in the further contention that the findings against defendants on certain of their counterclaims are without support, as an examination of the record shows either a conflict in the testimony or circumstances tending to contradict the testimony of the defendants in those respects, where the conclusions of the court were adverse to their claims.

Three witnesses for the plaintiffs were permitted over objection to testify in rebuttal as to the reasonable cost of performing the work described in the first cause of action, which defendants claimed was covered by the contract price. This testimony was introduced for the purpose of showing that this amount was the reasonable value of the work contracted to be done to July 22, 1925, and to show the improbability of the defendants' claim that the agreement was that this amount should be compensation for all farming operations during that year. Defendants claim that no proper foundation for the testimony was laid; that it did not take into consideration the exact nature and quality of the work to be done or the location and character of their property.

One of the witnesses was an experienced vineyardist, engaged in farming land in the vicinity, and who was familiar with that owned bv defendants. Another for several years immediately preceding the trial had been the secretary of an organization of fruit growers in the San Joaquin Valley, known as the Valley Fruit Growers' Association, and whose duty it was to investigate and compile the costs of the various farming operations in connection with vineyards, and advise vineyardists in these respects; this information being gained among other sources from interviews with vineyardists and at meetings of the latter held at the various farm centers. A third was a Japanese, engaged in the growing of strawberries in Fresno county, who testified as to the cost per acre of planting and growing the same on lands similar in kind to that owned by defendants. This testimony was competent and relevant for the purpose offered and was properly admitted. Ellis v. Woodburn, 89 Cal. 129, 132, 26 P. 963; Whitton v. Sullivan, 96 Cal. 480, 482, 31 P. 1115; People v. Crane, 34 Cal. App. 760, 168 P. 1055; Swain v. Cheney, 41 N. H. 234; 13 Corp. Jur. p. 744, Contracts, § 975.

[7] Further it is claimed that the court, in arriving at its conclusions, took into consideration facts within its knowledge as an individual and which were not shown by the evidence adduced at the trial. This suggestion is wholly unwarranted by the record. During the course of the trial, the court, referring to a statement by defendant Bagdasarian, who went under examination as a witness, to the effect that plaintiffs were receiving commissions from their workmen, made the following remark: "The court has got a pretty good knowledge of those things, how those things are managed—not as a court but as an individual." Following the remark, the attorneys for the plaintiff said, "Well, we are willing to stipulate that the court will draw on his personal experience to the full extent." No such stipulation was made, nor was the matter again referred to by the court or by counsel, and nothing appears which supports defendants' claim.

[8] Lastly, it is urged that the conclusion of the trial court that the obligation of the plaintiffs to furnish labor under the first contract was to continue only to July 22, 1925, the date when they commenced to pick the first crop which matured on defendants' ranch, is erroneous; the defendants contending in this regard that by the agreement that such obligation should continue from the time of the commencement of the picking of the crops thereon the parties meant that all labor necessary for the farming of the premises should be furnished for the lump sum mentioned up to the date when the picking of the

last crop which matured thereon should begin.

The contract was oral; and, in view of the facts shown, the construction placed thereon by the trial court was reasonable and consistent with the true intent of the parties. Under such circumstances its conclusion will not be disturbed. Smyth v. Tennison, 24 Cal. App. 519, 141 P. 1059; Slama Tire Protector Co. v. Ritchie, 31 Cal. App. 555, 161 P. 25; Manley v. Pacific Mill & T. Co., 79 Cal. App. 641, 250 P. 710.

After an examination of the entire record including the evidence, we are satisfied that the conclusions of the trial court are fully sustained, and that no error is shown which would justify a reversal of the judgment. The court therefore makes the following findings in lieu of paragraphs 2, 4, and 5 of the findings made by the trial court under the first cause of action in plaintiffs' amended complaint, to wit:

"2. At the same time and as a part of said agreement plaintiffs agreed to do all the necessary work for the picking and harvesting of crops to be produced upon said premises during the season of 1925, and to harvest other crops of grapes that defendants intended to and should purchase during said season; that plaintiffs further agreed to perform and did perform between July 17 and November 27, 1925, for defendants at their request other work in picking oranges, irrigating and cultivating the same, irrigating and hoeing strawberries, cultivating and irrigating Mission and Thompson grapes and pomegranates, general ranch work on land owned by defendants and known as the new ranch, work in and about defendants' packing houses, together with services in hauling, by means of two automobile trucks owned by the latter; that the harvesting and other work mentioned in this paragraph was done under the supervision of defendants as had been agreed; that it was agreed that defendants should pay the rate of wages to be agreed upon at the time the above work commenced; that the payment of said wages should be made from time to time as demanded by plaintiffs, and should be fully paid upon completion of said work; and it was further agreed that plaintiffs should employ, hire and furnish all of the necessary labor for the carrying on of said operations."

"That in addition to the foregoing work the plaintiffs agreed to cure and did cure about twenty-five tons of raisins for defendants at the agreed price of ten dollars per ton, and about seven tons of figs at the agreed price of twelve dollars per ton."

"4. That on or about the 29th day of June, 1925, and before the commencement of the work described in paragraph 2 of these findings plaintiffs and defendants agreed that the price per hour for all labor furnished therefor by the plaintiffs should be forty cents per hour; that on the 22d day of July, 1925, plaintiffs commenced the harvesting of the crops upon the land described in paragraph 1 of these findings and completed the same; that they furnished for that purpose 8,459¼ hours of labor; that in addition thereto plaintiffs between July 17, 1925, and November 27, 1925, performed the work described in paragraph 2 of these findings as other work, and in so doing furnished 5,734½ hours of labor; that all of said work was completed prior to November 27, 1925, and that the total sum agreed to be paid therefor was the sum of $5,677.50."

"5. That the defendants paid on account of the contract for the farming of said lands prior to the time of the commencement of the harvesting of said crops the sum of $5,650.00 and no more, and that there remains now due and unpaid as a balance on said contract price the sum of $350.00, with interest thereon from the 27th day of November, 1925, at the rate of seven per cent.: that the defendants have paid on account of labor performed in the harvesting of said crops and other work furnished as aforesaid by the plaintiffs $3,838.60, and that there remains now due, owing and unpaid on account thereof the sum of $1,838.90, together with interest thereon at the rate of seven per cent. per annum from the 27th day of November, 1925; that by reason of the harvesting and curing of the said twenty-five tons of raisins at the agreed price of ten dollars per ton there became due from the defendants to the plaintiffs the sum of $250.00, and that by reason of the harvesting and curing of seven tons of figs at the agreed price of twelve dollars per ton there became due and owing to the plaintiffs the sum of $84.00, and that all of said work was completed on or before the 27th day of November, 1925, and said sums have not been paid, and that there remains now due, owing and unpaid on account thereof the sum of $334.00 with interest thereon at seven per cent. from the said 27th day of November, 1925."

The judgment is affirmed.

In re CATE. (Civ. 4702.)

District Court of Appeal, Second District, Division 2, California. Dec. 21, 1928.

1. Courts 🔑488(1)—District Court of Appeal may revise, correct, and modify opinion, to uphold judgment, after transfer of cause to Supreme Court.

District Court of Appeal's right to revise, correct, and modify its opinion until transcribed in official reports is not lost by transfer of cause to Supreme Court, if resorted to, not to alter, but to uphold, judgment.

2. Attorney and client 🔑14—Attorney does not hold office or public trust, within Constitution, but is court officer, exercising privilege or franchise.

An attorney does not hold an office or public trust, in the constitutional sense, but is an officer of the court, exercising a privilege or franchise.

3. Attorney and client 🔑3—Constitutional law 🔑56—Power to admit to bar is judicial, not legislative, and invested solely in courts, which may weigh and deliberate, as well as make orders of admission.

Power to admit applicants to practice law is judicial, not legislative, and invested in courts only, which means that they may weigh and deliberate, as well as make orders admitting to bar.

4. Constitutional law 🔑56—Legislature cannot prescribe rules and regulations for admission to bar in exercise of police power.

Legislature, in exercise of police power, cannot prescribe rules and regulations for admission to the bar, to which courts must conform, though authorized to pass laws designed to prevent improper persons from practicing law.

5. Constitutional law 🔑56—Court's inherent power over admissions to bar is derived from Constitution, and hence exclusive of Legislature's authority under police power to make regulations.

Court's inherent power over admissions to bar is derived from Constitution, and hence exclusive of Legislature's authority under police power to invade such field in disguise of regulation.

6. Constitutional law 🔑56—Legislature cannot take from court power which it does not give.

A power in a court which the Legislature does not give cannot be taken away by it.

7. Courts 🔑1—Court's inherent powers are derived from Constitution.

Since courts can possess no inherent powers prior to their existence, such powers are derived from the Constitution, to which they owe their existence.

8. Courts 🔑1—Courts have powers implied from general grants of jurisdiction.

Courts possess powers necessarily implied and resulting from general grants of jurisdiction.

9. Attorney and client 🔑3, 36(1)—Judicial department should control appointment, discipline, and removal of its officers, including attorneys.

The judicial department should control the appointment, discipline, and removal of its officers, including attorneys.

10. Constitutional law 🔑50—Legislature cannot destroy constitutional functions of other departments under guise of regulation.

The Legislature cannot destroy the constitutional functions of either the executive or judicial department of government under the guise of regulation.

11. Constitutional law 🔑56—Courts' past failure to dispute invasions of their constitutional province by Legislature cannot bar assertion of authority over admissions to bar.

That courts in the past have not disputed invasions of their constitutional province by the Legislature, or, by failure to act, have invited Legislature to take such action, cannot bar assertion of judiciary's authority over matter clearly and solely within its power, such as admissions to bar.

12. Attorney and client 🔑2, 36(1)—Courts have power by rule to regulate entire subject of attorneys' admission, discipline, and disbarment.

The courts have the power by rule to regulate the entire subject of admission of attorneys to the bar, and their discipline and disbarment.

13. Constitutional law 🔑55—Courts may receive such aid in production of evidence and proper presentation of law as exigencies of litigation demand, regardless of statute.

The courts are at liberty, regardless of statute, to receive such aid in production of evidence and proper consideration and presentation of law as exigencies of any litigation may demand, and any law attempting to limit such power is void, as attempted abridgment of inherent judicial powers.

14. Constitutional law 🔑56—Legislature cannot confer on state bar authority to determine qualifications and conditions for admission to bar, unethical conduct subjecting attorneys to discipline, or regeneration of character warranting readmission.

The people having vested their entire judicial power in the courts by the Constitution, the Legislature cannot confer on the state bar judicial authority to determine qualifications and conditions for admission to practice of law, nature of unethical conduct subjecting attorneys to discipline, or regeneration of character warranting readmission of disbarred attorneys.

15. Attorney and client 🔑14—Lawyer's paramount duty is to assist courts in administration of justice.

The paramount duty of every lawyer is to assist the courts in the administration of justice.

Supplemental opinions on rehearing.

For former opinions, see 270 P. 968, 271 P. 356.

Alfred E. Cate, of Los Angeles, for petitioner.

Hewitt, McCormick & Crump, of Los Angeles (Guy Richards Crump, of Los Angeles, of counsel), for respondent Los Angeles Bar Ass'n.

WORKS, P. J. A petition for a rehearing of this matter was filed for the consideration of this court and it was in due time denied. 271 P. 356. Thereafter a petition for hearing was presented to the Supreme Court and it has been granted. The petition filed with the latter court is much more full than the one presented to us. In addition to the petition itself, a comprehensive brief has been filed in support of it by friends of the court. The briefs which preceded our main opinion in the proceeding were meager, although doubtless containing all that counsel thought was necessary to a presentation of the case, in view of the strong expressions contained in California decisions, and the greater part of the opinion is the result of a research conducted by ourselves. The case has now been fully argued for the first time, in the petition and brief upon which the Supreme Court has acted in granting a hearing.

[1] Our faith in the correctness of the views expressed in our main opinion has been strengthened by a perusal of the petition and brief which lie in the Supreme Court files, but points are presented in them which make it advisable for us to amplify and elucidate some of the views stated in the opinion. Under the language of the Supreme Court in Houston v. Williams, 13 Cal. 24, 73 Am. Dec. 565, a notable declaration of the control which a court may exercise over its own opinions until they are officially published, we think it proper to present that amplification and elucidation in the form of a supplemental opinion. In the case cited, Justice Field, after drawing a distinction between an opinion proper and the judgment which is pronounced at its end, said that an opinion "is the property of the judges, subject to their revision, correction, and modification, in any particular deemed advisable, until, with the approbation of the writer, it is transcribed in the records"; evidently having in mind its "transcription" in the official reports. We cannot conceive that this right to revise, correct, and modify is lost to a District Court of Appeal because of the transfer of a cause to the Supreme Court, provided that the exercise of the right does not presume to alter, but is resorted to for the purpose of upholding, the judgment pronounced by the court.

We should perhaps say a little more as to the reasons which prompt us to the unusual but wholly proper procedure to which we resort. The petitioner in this proceeding has no particular interest in the questions presented by the petition for hearing and the brief. Indeed, if he can be said to have an interest in them at all, that interest probably lies with that of his formal opponents in the proceeding, for he himself asked the Supreme Court for a hearing, but upon grounds different from those presented by the other petition and by the brief filed in its support. Consequently, no written argument has been offered to the Supreme Court in opposition to the latter petition and to the brief. The matter is soon to come on for oral hearing before the higher tribunal, and it is greatly to be feared that the argument produced upon that occasion, and touching the important questions discussed in our main opinion, will be wholly unilateral. The able counsel who have contended for a hearing of these questions in the Supreme Court will doubtless then stand unopposed. It is these reflections which have impelled us to the preparation of this supplement. We have tried to free ourselves as completely as possible from that pride of opinion which in some degree will always be associated with literary authorship. We have endeavored to purge ourselves of all desire merely to combat the rather fervid assault which has been made upon our main opinion, to enter a plea of self-justification, to defend unduly an utterance which under ordinary circumstances would be left to shift for itself.

The situation is not an ordinary one. The questions to be discussed at the oral argument are of the utmost importance to the bench and bar of the state. We conceive the arguments advanced in the petition and brief to be unsound and dangerous. We think, no one else being appointed to the task, that we should expose, if we can, the fallacies which are advanced in opposition to our views. Our sole desire is that these important questions be decided correctly, and we dedicate this opinion to that desire.

It is said in the petition for hearing addressed to the Supreme Court by respondent Bar Association:

"The respective functions of the courts and of the Legislature are these:

"(1) An attorney does not hold an office or public trust, in the constitutional sense of that term, but is an officer of the court, exercising a privilege or franchise.

"(2) As attorneys are officials of the court, the power to admit applicants to practice law is judicial, and not legislative, and is invested in the courts only.

"(3) Notwithstanding the jurisdiction of the courts, the Legislature may, in the exercise of its police power, prescribe reasonable rules and regulations for admission to the bar, to which the courts will and must conform.

"(4) But the Legislature may not impose unreasonable rules, or deprive the courts of their inherent power to prescribe other rules and conditions of admission to practice."

Authorities are cited in support of the propositions stated in each of these paragraphs, to which we shall refer hereafter by the numbers given them by petitioner. In dealing with them we shall cover, so far as is necessary, the ground taken in the brief filed by friends of the court in aid of the petition.

[2, 3] As to the correctness of the propositions stated in paragraph (1) there can be no question. Paragraph (2) is also correct, but when its contents are considered in connection with the matters stated in paragraphs (3) and (4) it becomes patent that the grounds upon which the petition for hearing is based are not tenable. Paragraph (2) asserts that the power to admit applicants for admission to the bar is judicial, and is invested in the courts only. Counsel cannot mean by this statement that the mere perfunctory power to make orders admitting to the bar, and nothing more, is vested in the courts. If the Legislature may occupy the entire remaining field affecting admissions, that omnipotent body may take from the courts the power to make orders. If the courts cannot consider, weigh, deliberate, but must make such orders as the Legislature requires, the asserted power to make them is empty. It is no power. As asserted in our main opinion, the courts in making such orders would be but the agents of the Legislature, and the principal could terminate the agency, thereafter lodging it elsewhere, or itself exercising the power to make them. There must be some power in the courts beyond the mere power to make orders.

The only question is: Where is the line to be drawn? That counsel cannot intend paragraph (2) to stand with the limitation upon it which we have imagined is evident from an inspection of the single case which they cite in support of it. Ex parte Garland, 4 Wall. 333, 18 L. Ed. 366. The court there said: "[Attorneys] are officers of the court, admitted as such by its order, upon evidence of their possessing sufficient legal learning and fair private character. It has been the general practice in this country to obtain this evidence by an examination of the parties. * * * The order of admission is the judgment of the court that the parties possess the requisite qualifications. * * * Their admission * * * is not the exercise of a mere ministerial power. It is the exercise of judicial power."

[4] So much for paragraph (2) standing alone. Let us now proceed to consider it and paragraphs (3) and (4) together. Paragraph (3) is to the effect that, despite the jurisdiction of the courts which is mentioned in paragraph (2), the Legislature, in the exercise of the police power, may prescribe reasonable rules and regulations for admission to the bar, to which the courts must conform. This statement, we think, is erroneous. Several cases are cited in support of it, three of which are decisions of the Supreme Court of the state. The first two of these, Cohen v. Wright, 22 Cal. 293, and Ex parte Yale, 24 Cal. 241, 85 Am. Dec. 62, concede to the Legislature in the most positive terms—whether justly or unjustly it is not permitted to this court to inquire—the power to pass laws designed to prevent improper persons, traitors to the general government, from practicing law. To that doctrine the courts of California are at present committed, as we pointed out in our main opinion. The third case cited, In re Galusha, 184 Cal. 697, 195 P. 406, while quoting from Ex parte Yale, supra, decides only that a member of the legal profession may be made subject to the payment of an occupational tax provided for by a city ordinance.

It is true that there are decided cases which, in general terms, state a rule to the effect that the Legislature, under the police power, may pass reasonable laws *regulating* the matter of admissions to the bar. The reason for the existence of this rule has not been set down. The courts have been content to state that it *is*, not *why* or *how* it is. The broad question to be determined in this proceeding is whether the doctrine of Cohen v. Wright, supra, and Ex parte Yale, supra, is to be so extended as to allow to the Legislature sole and exclusive power over admissions and readmissions or reinstatements; for, while the proceeding is one for a reinstatement only, the power of the Legislature over admissions, if it enjoys such a power, necessarily must be as plenary as its power over reinstatements. This question of legislative power we endeavored to plumb to its depths in the opinion to which this is a supplement. Our endeavor was not successful, as it now appears, at least in so far as the question of the assumed rights of the Legislature under the police power are concerned. These rights are insisted upon, not only in the petition for hearing addressed to the Supreme Court, but in the brief filed in support of it.

[5, 6] Petitioner's paragraph (4), quoted above, is stated in a manner which we think was not intended. We shall assume that counsel meant to say that the Legislature may not impose unreasonable rules, and that the courts, in the exercise of an inherent power, may prescribe rules and conditions to operate over a field not already occupied, or perhaps afterward to be occupied, by legislative enactment. Counsel thus assent to a rule which the courts, in a practically universal concord, have settled at least in the terms in which counsel have stated it. The rule as thus stated cannot, under the authorities, be denied. We followed in our main opinion those courts which have gone further, and which have held that this inherent power is exclusive, although those cases make the exception that the Legislature

may pass laws denying admission to the bar, or the right to continue in practice, to unworthy persons. It appears to us that in stating the contents of paragraph (4) counsel have conceded the ground we then took and to which we now adhere. We shall here attempt to show that the inherent power of the courts over admissions is derived from the Constitution, and is for that reason exclusive of the power of the Legislature, under the police power and in the thin disguise of "regulation," to invade the field. "A power [in a court] which the Legislature does not give, it cannot take away. If power, distinguished from jurisdiction, exists independently of legislation, it will continue to exist notwithstanding legislation." Hale v. State, 55 Ohio St. 210, 45 N. E. 199, 36 L. R. A. 254, 60 Am. St. Rep. 691. The court, in employing the phrase "distinguished from jurisdiction," apparently had in mind that jurisdiction, strictly so termed, was conferred by the Legislature.

[7, 8] We understand, both from the petition for hearing and from the accompanying brief, that the functions here claimed for the Legislature under the police power are regulatory only. Moreover, it seems that it is conceded in both documents that the power is to "regulate" the performance of a constitutional duty imposed upon the courts; and we call this a concession, for the reason that, if the attitude of counsel is correctly appraised by us, the whole ground upon which they attempt to stand is cut from under them by a process of erosion of which they are the creators. If, however, the concession is not made that the ordering by courts of rules governing admissions is the exercise of a constitutional power, then we are brought to the necessity of determining whether the making of those rules is the exercise of such a power.

Counsel for petitioner says, in effect, that the courts, in the discharge of an inherent function which they characterize as judicial, may adopt a full code of rules concerning admissions; the Legislature not having occupied the field. This power, called judicial, must be constitutional, for it exists because of those parts of the organic law which provide for the three departments of government and which erect the courts of the state as the instrumentalities through which the judicial branch is to operate. If the power does not come from the Constitution, where does it originate? It will not do to say that it is not constitutional, because it is inherent. What powers are inherent in courts find their residence in these forums because they are courts, of course; but it is obvious that they can possess no inherent powers prior to their existence, and they owe their existence to the Constitution. Their inherent powers are therefore derived from that paper. It is well known that the doctrine of implied powers applies to the judicial department. "Courts possess implied and resulting powers from general grants of jurisdiction." McNealy v. Gregory, 13 Fla. 417, 435. "Jurisdiction may be conferred upon a court by necessary implication as effectually as by express terms." Spence v. Fenchler, 107 Tex. 443, 457, 180 S. W. 597, 601. "It is well settled that courts of general jurisdiction possess inherent powers not created or conferred by legislative enactment." Hitt v. Carr, 77 Ind. App. 488, 501, 130 N. E. 1, 6. "A court has the inherent right to function and to function efficiently." People v. Brown, 238 Mich. 298, 212 N. W. 968.

It seems plain that the power in courts to provide for a bar is a resultant from the general provisions of the Constitution to which we have referred. The organic law makes no provision for a bar, and yet lawyers are indispensable to the discharge of the judicial function. They are officers of the courts. They are, in a body, an integral factor of the judicial department. It is therefore just to perceive in the constitutional provisions relating to the department a power in the courts, which stand at the head of the department, to provide for a bar. At any rate, the power certainly exists, and it is difficult to ascribe to it any other origin. In truth, it seems that it can possibly have no other origin.

It is perhaps not strange that counsel should contend that the Legislature, by means of the police power, may occupy this field of constitutional judicial power and totally exclude the courts from it, for some of the courts themselves have reached the same degrading conclusion, albeit without an examination of the principles involved in the question. The brief filed in support of the petition for hearing contains, however, statements which do violence to the attitude which counsel assume. It is said, for instance: "The Legislature has no power to prescribe regulations which substantially impair the discharge by a co-ordinate department of the government of the latter's constitutional functions." At another place: "Numerous as are the decisions holding that the Legislature may not, under the guise of regulation, substantially impair the discharge by a co-ordinate department of its constitutional functions, much more numerous are the decisions holding that the power of regulation still remains with the Legislature, and it is only if the regulations are unreasonable, either in the way of substantially impairing the discharge by a co-ordinate department of its functions or in some other way, that the regulations are invalid."

The idea that the courts may frame rules governing admissions to the bar is utterly inconsistent with the idea that the Legislature, under any circumstances, may do the same thing. It is futile to assert that the Legislature, under the police power, may make such rules either to fill a void left by a failure of the courts to make them or to supplant rules which the courts have made. Let us suppose an illustration which will serve further to develop this point. Let us imagine two states of the Union, which we will call state A and state B. We will suppose that the Supreme Court of state A adopts a complete code of rules governing admissions to the bar. The Legislature of state B passes a bill attempting to put into effect a set of rules in the exact language of those adopted by the court in state A. Can it possibly be said that the rules for state A were adopted in the exercise of a constitutional judicial function, while those framed for state B spring from an exercise of the police power? It cannot. The action of the Legislature of state B was not an attempt to *regulate* the constitutional functions of the judicial branch of the state government. *It was neither more nor less than an attempt to exercise those functions themselves.* The action was a usurpation of power, a plain invasion of the rights of one of the co-ordinate branches of government by one of the others. however benevolent the invasion was intended to be. It was, to employ the language above quoted from the brief filed in support of the petition, a clear violation of the principle that "the Legislature may not, under the guise of regulation, substantially impair the discharge by a coordinate department of its constitutional functions."

The national Constitution (article 2, § 2) provides that the President shall appoint the principal officers of the executive branch of the government "by and with the * * * consent of the Senate." Despite the concurrence allowed the upper house of Congress by this provision, the practice, since the government began to function in 1789, based upon an extended debate in Congress, has been to allow the Chief Executive the sole power of removal of those officers. It has never been questioned that the power of removal would rest in the President, if appointments were not required by the Constitution to be concurred in by the Senate. Before the new government was installed, this question had been presented to the people of the states in the Federalist. The power of removal was there said to be vested in the President and Senate together, but solely on the ground that both participated in appointments. The paper in which the discussion is contained (No. 77) was written by Alexander Hamilton and these are its opening sentences: "It has been mentioned as one of the advantages to be expected from the co-operation of the Senate in the business of appointments that it would contribute to the stability of the administration. The consent of that body would be necessary to displace as well as to appoint."

This view was departed from at the first session of the First Congress. The House of Representatives had under consideration a proposal for the creation of a Department of Foreign Affairs, and during the debate Smith, of South Carolina, advanced the view, a little different from that of Hamilton, that the head of such a department could be removed only by impeachment. 5 Writings of James Madison, 361, note. Madison, who had been a collaborator with Hamilton in the preparation of the Federalist, took issue with Smith, and during the course of the debate said: "I think it absolutely necessary that the President should have the power of removing from office; it will make him, in a peculiar manner, responsible for their conduct, and subject him to impeachment himself, if he suffers them to perpetrate with impunity high crimes or misdemeanors against the United States, or neglects to superintend their conduct, so as to check their excesses. On the constitutionality of the declaration I have no manner of doubt." Id. 362. In the same speech Madison remarked further:

"It is said that it comports with the nature of things, that those who appoint should have the power of removal; but I cannot conceive that this sentiment is warranted by the Constitution; I believe it would be found very inconvenient in practice. It is one of the most prominent features of the Constitution, a principle that pervades the whole system, that there should be the highest possible degree of responsibility in all the executive officers thereof; anything, therefore, which tends to lessen this responsibility, is contrary to its spirit and intention, and, unless it is saddled upon us expressly by the letter of that work, I shall oppose the admission of it into any act of the Legislature. Now, if the heads of the executive departments are subjected to removal by the President alone, we have in him security for the good behavior of the officer. If he does not conform to the judgment of the President in doing the executive duties of his office, he can be displaced. This makes him responsible to the great executive power, and makes the President responsible to the public for the conduct of the person he has nominated and appointed to aid him in the administration of his department. But if the President shall join in a collusion with this officer, and continue a bad man in office, the case of impeachment will reach the culprit, and drag him forth to punishment. But if you take the other construction, and say he shall not be displaced, but by and with the advice and consent of the Senate, the President is no longer answerable for the conduct of the officer; all will depend upon the Senate. You here destroy a real responsibility, without obtaining even the shadow; for no gentleman will pretend to say the responsibility of the Senate can be of such a nature as to afford substantial security. But why, it may be asked, was the Senate joined with the President in appointing to office, if they have no responsibility? I answer, merely for the sake of advising, being supposed, from their nature, better acquainted with the character of the candidates than an individual; yet even here the President is held to the responsibility—he nominates, and, with their consent, appoints. No person can be forced upon him as an assistant by any other branch of the government." Id. 363.

A few days later Madison said again: "It is evidently the intention of the Constitution that the first magistrate should be responsible for the executive department; so far, therefore, as we do not make the officers who are to aid him in the duties of that department responsible to him, he is not responsible to his country. Again, is there no danger that an officer, when he is appointed by the concurrence of the Senate, and his friends in that body, may choose rather to risk his establishment on the favor of that branch, than rest it upon the discharge of his duties to the satisfaction of the executive branch, which is constitutionally authorized to inspect and control his conduct? And if it should happen that the officers connect themselves with the Senate, they may mutually support each other, and for want of efficacy reduce the power of the President to a mere vapor; in which case his responsibility would be annihilated, and the expectation of it unjust. The high executive officers, joined in cabal with the Senate, would lay the foundation of discord, and end in an assumption of the executive power, only to be removed by a revolution in the government. I believe no principle is more clearly laid down in the Constitution than that of responsibility." Id. 392.

Upon this same occasion Madison said further: "The Constitution affirms that the executive power shall be vested in the President. Are there exceptions to this proposition? Yes; there are. The Constitution says that, in appointing to office, the Senate shall be associated with the President, unless in the case of inferior officers, when the law shall otherwise direct. Have we a right to extend this exception? I believe not. If the Constitution has invested all executive power in the President, I venture to assert that the Legislature has no right to diminish or modify his executive authority. The question now resolves itself into this, Is the power of displacing an executive power? I conceive that if any power whatsoever is in its nature executive, it is the power of appointing, overseeing, and controlling those who execute the laws. If the Constitution had not qualified the power of the President in appointing to office, by associating the Senate with him in that business, would it not be clear that he would have the right, by virtue of his executive power, to make such appointment? Should we be authorized, in defiance of that clause in the Constitution, 'The executive power shall be vested in a President,' to unite the Senate with the President in the appointment to office? I conceive not. If it is admitted that we should not be authorized to do this, I think it may be disputed whether we have a right to associate them in removing persons from office, the one power being as much of an executive nature as the other; and the first only is authorized by being excepted out of the general rule established by the Constitution, in these words, 'The executive power shall be vested in the President.'" Id. 394.

In 1850 Senator Bradbury, of Maine, offered a resolution calling upon the President to furnish to the Senate certain information relating to removals from office which he had enforced. Daniel Webster opposed the resolution, on the ground that such matters were of no concern to the Senate. He thus addressed himself to the theory that the power of removal rested solely in the President: "I have looked recently, though not for the first time, into the debates which took place in Congress when that construction of the Constitution was fixed at its first session. You know, sir, that the Senate of the United States, at that time and for several years afterwards, sat with closed doors. There were no debates of the Senate published up to the year 1794, I think. But this question was debated in the House of Representatives at great length. The speeches made there were reported and published. The idea that the President possessed a removing power, without the consent of the Senate, seems to have been chiefly supported by a very able speech from Mr. Madison, whose opinions, as one engaged in framing the Constitution, upon constitutional subjects, were regarded, and have ever been regarded, as very high authority. His judgment appears to have prevailed with the House of Representatives on that occasion. I have understood that the vote affirming that power in the President passed the Senate by the casting vote of the then Vice President, Mr. Adams." 14 Writings and Speeches of Daniel Webster, 360.

During the same speech Webster said, again: "But, sir, since the practice has become a settled practice, since every administration has indulged in it, and since it must now be considered, as the legal construction of the Constitution, that it is one of the powers of the President to remove incumbents from offices which they hold, it follows, as a necessary and as an inevitable consequence, that this power, thus legally vested in the President, must be exercised by him as independently of our control as any other power that is to be exercised by him under the Constitution. If he holds the power, he holds it to be exercised at his own control and discretion. And I see no ground upon which we can call upon him to give us reasons for the manner in which he exercises that power, any more than we can call upon him to give reasons for the manner in which he exercises any other power under the Constitution; or, on the other hand, that we have no more right to call upon him to account to us for the manner in which he exercises a power solely confided to him, than he has to call upon us to give him reasons for the manner in which we exercise a power solely confided to our hands. And I think, therefore, it would be against what is the settled construction of the Constitution, and the practice of the government, for us to make any such requirement of the President." Id. 361.

And later in the speech Webster employed this very striking language concerning the inviolability of the powers of each of the three departments of government: "The powers of the departments are not all mixed up in a jumble. They are separate, and are made separate by the Constitution, and have hitherto been kept separate by the practice of the government. I hope they will continue to be kept separate, for then there is a just responsibility. If every department acts within its own power, it takes the responsibility belonging to its power. But if the powers of two or more departments are mixed up irregularly and jumbled together, there is no just responsibility upon anybody. Every consideration therefore of propriety, as well as the written text of the Constitution, requires that the powers assigned to one department of the government shall not be interfered with or intermeddled with by another." Id. 362.

Notwithstanding the long-settled practice concerning removals from office and the excellent reasons for it, the Congress willfully violated the established construction of the Constitution during the administration of President Andrew Johnson. The national Legislature passed what is known to history as the Tenure of Office Bill (14 Stat. 430), as a part of the frenzied struggle between it and the President over the question of reconstruction. The act contained the following provisions: "That every person holding any civil office to which he has been appointed by and with the advice and consent of the Senate, and every person who shall hereafter be appointed to any such office, and shall become duly qualified to act therein, is and shall be entitled to hold such office until a successor shall have been * * * appointed" by the President, with the advice and consent of the Senate, and duly qualified; and "that the Secretaries of State, of the Treasury, of War, of the Navy, and of the Interior, the Postmaster General, and the Attorney General shall hold their offices respectively for and during the term of the President by whom they may have been appointed and for one month thereafter, subject to removal by and with the advice and consent of the Senate." 6 Messages and Papers of the Presidents, 492.

The measure went to the President, but was promptly returned without his approval. The veto message which accompanied it was with little doubt prepared by the masterly hand of William H. Seward (2 Bancroft, Life of Seward, 465), who was then Secretary of State, and contained a convincing argument against the constitutionality of the bill (6 Messages, 492), based, however, upon the construction which had been placed upon the organic law by the First Congress and upon the acquiescence in it during a period of more than three-quarters of a century. The bill was passed over the veto, the President a little later removed Edwin M. Stanton as Secretary of War without the consent of the Senate, articles of impeachment were presented against him, he was tried by the Senate and was acquitted by only a narrow vote. The question of the constitutionality of the Tenure of Office Bill was never presented to the courts, nor was the general question upon which it trenched. 1 Kent, Comm. p. 310.

[9] It cannot be denied that some reason operates against the construction placed upon the President's power of removal by the First Congress, but the fact that such a construction could be reached, in the face of the constitutional provision allowing the Senate to participate in appointments made by the President, is significant in a consideration of the present proceeding. The President's appointees are subordinate officers of the executive department, and he is responsible for their acts (1 Kent, Comm. p. 310), as Madison points out, and the First Congress saw in this circumstance, as we must see in reason, that it was imperative that he exercise control over them in all respects except the mere matter of their appointments. This latter power he could not exercise because of the direct mandate of the Constitution. Kent, joining with Madison, says at the place above cited that "the participation in that authority by the Senate was an exception to a general principle and ought to be taken strictly." This general principle is, of course, that each of the three departments of government should control the appointment, as well as the discipline and removal of its officers. A reading of Madison's remarks will demonstrate that the construction of the Constitution by the First Congress was based upon this principle and upon the view that the concurrence of the Senate in appointments was an exception to it. There can be no doubt, to our minds, that the principle applies as well to the judicial department as to the executive department.

The various speeches above quoted show the dangers incident to an attempt to divide the indivisible powers of a department of government. Webster, particularly, covers this special question. It is to be observed, too, how Madison, as well as Webster, dwells upon the question of responsibility as fixed in each of the departments by the Constitution. This point is of great moment here. Where is responsibility to be located if the Legislature, from time to time and in a greater or lesser degree, as its uncontrolled inclination may dictate, makes provision for admissions to the bar, leaving the courts to occupy so much of the field as it chooses not to cover?

[10] At several places in our main opinion we characterized the contention of respondent Bar Association as an attempt to dismember an indivisible power, and we said particularly: "All these matters—admissions, discipline, disbarments—are either wholly under legislative control or they are wholly under judicial control." The deeper the subject is probed, the more clearly does the justice of this conclusion become certain; and, as we said in our main opinion, the answer is that the power is judicial. If the courts exercise a constitutional function in making provision for a bar, how can the Legislature *divest* the power through the exercise of an assumed police power? It is too clear for words that the Legislature cannot, under the feeble guise of regulation, destroy a constitutional function of either of the other departments of government. If it could, one of the salient tenets of governmental science is scrapped. The time-honored principle that all government is naturally divided into three branches, the executive, the legislative, and the judicial, perceived by at least as early a thinker as Aristotle, and presented to the fathers of the national Constitution in the forceful phrase of Montesquieu, is relegated to the depths of the despotisms from which it was unearthed, and government itself becomes a reproach.

"When the legislative and executive powers are united in the same person, or the same body of magistrates, there can be no liberty, because apprehensions may arise, lest the same monarch or senate should enact tyrannical laws, to execute them in a tyrannical manner. Again, there is no liberty of the judiciary power if it be not separated from the legislative and executive. Were it joined with the legislative, the life and liberty of the subject would be exposed to arbitrary control; for the judge would be the legislator. Were it joined to the executive power, the judge might behave with violence and oppression. There would be an end of everything were the same man, or the same body, whether of nobles or of the people, to exercise these three powers—that of enacting laws, that of executing the public resolutions, and of trying the causes of individuals." Montesquieu, Esprit des Lois, book 2, c. 6.

We perceive no such dire consequences to result from the present proceeding; but, if the views expressed in the petition for hearing and in the brief were to prevail, we are on the broad highway to serious results. It can make no difference here if the courts of the land, in neglectful submission to the legislative will, imposed without sinister intent, as it has been in the various states, have heretofore slept upon a question important to the general welfare. It is well that in this state an opportunity has been given to stem the tide, which, if it is not curbed, will widen the breaches it has already made in the levees which protect the sacred domain of government.

The writers of the brief which accompanies the petition for hearing in the Supreme Court, in developing the theory that the Legislature, by means of the police power, may "regulate" the matter of admissions to the bar, point to the fact that the law-making bodies of the land have long been accustomed to "regulate" judicial procedure throughout the Union. It is quite pertinent to observe that such matters, either in whole or in part, were formerly in the control of the courts. We have no inclination to go deeply into this question, but we shall briefly notice the auspices under which were developed the principles of the law of evidence, touching only that particular item in the realm of court procedure. The rules of evidence were created, improved, and have reached their present state of excellence through an age-long devotion of the courts to the subject. This point is too well understood to require a lengthy exposition, but it is dealt with in a most instructive historical note in Jones' Blackstone, commencing at page 1969. It appears from this note, not only that the law of evidence was the outgrowth of the successive opinions of the courts, but that the subject was sometimes covered by rules of court. It was also thoroughly explored and elucidated by another factor of the judicial department, in the numerous text-books on evidence, prepared by members of the bar. And yet our Code of Civil Procedure contains what is assumed to be a complete statement of the rules of evidence. Thus the law upon this important subject passed, apparently, into the hands of the Legislatures of the various states, and the same situation applies to other branches of procedure.

If we return again to the general question of court procedure, laying aside the special matter of evidence, it is not to be forgotten that one of the forward-looking movements of the day is toward the ultimate regulation of procedure by rule of court. The judicial department is endeavoring again to come into its own. As an evidence of this movement, on the day on which these lines are written, a newspaper is laid upon our desks which acquaints us with the intelligence that, at the session of the Legislature which is to convene next month, the Judicial Council will endeavor to procure the introduction of a bill authorizing that body to adopt rules of court regulating judicial procedure, with a view to nullifying, by that means, the major portion of the Code of Civil Procedure and large parts of the Penal Code. We do not, of course, take this newspaper report as authorlative, but present it as indicating that the movement to which we have referred is afoot, and as illustrating what may happen under it.

If the courts, by a relaxation of that vigilance which is the price of liberty, have abdicated their dominance over the regulation of court procedure, there is no reason why they should relinquish the control which constitutionally they may exercise over their own officers. Upon that question the sentry is so far awake, and it would be deplorable if he should surrender to the joy of slumbering upon his beat.

I concur in everything that is said in the opinions of my associates which follow.

CRAIG, J. [11] I concur in the opinions of Presiding Justice WORKS and Justice THOMPSON. The question is vital, and its decision must be far-reaching. The right of the legislative branch of the government to invade the province of the judicial, whose authority in its own sphere the Constitution makes absolute, is in question. That such invasions of this realm in the past have not been disputed cannot bar the assertion of the authority of the judiciary over a matter clearly and solely within its power. It is quite probable that certain courts have been reticent to refuse recognition of statutes whose provisions were beneficent, even though it appeared that such acts were in reality beyond the power of the Legislature to enact. It is quite possible that this reticence has been partly due to reluctance to create friction with a sister branch of government, as well as a natural modesty on the part of the judiciary to assert its own authority in conflict with that of the Legislature.

But the question is one to be decided impersonally. The preservation of the complete separation of the functions of the legislative, judicial, and executive branches of government is too fundamental to the maintenance of the American democracy to allow its slightest infringement. It is, I think, worthy of serious consideration that the federal Constitution itself guarantees this form of government in each state, and to that end it is essential that such government shall have these functions independently and separately maintained. To my mind, even the public rights presumably protected by the exercise of the police power of the state might better suffer than have this governmental principle ignored, and a beginning made toward the ultimate complete subjugation of the judicial branch of government to the legislative. The maintenance of an independent judiciary is not merely a privilege permitted that department of the government; it is its imperative duty, perhaps the first and most important one, to guard that independence.

[12] I believe that the courts have the power by rule to regulate the entire subject of admission of attorneys to the bar, their discipline, and disbarment. This necessarily follows from the fact that the entire subject is admittedly incidental to the judiciary, and that the courts have entire supervision of such matters as a constitutional right which follows as incontrovertibly as does the right of the Legislature to enact laws from the mere creation of such a body by the Constitution.

Our courts have been slow, perhaps neglectful, in the exercise of their authority in this behalf. Their failure to act may even have invited the Legislature to take action amounting to an attempt to take over the performance of this judicial duty, but this fact, if it be one, cannot affect in the slightest degree the constitutional apportionment of the separate governmental functions. Nor is the duty of the courts to safeguard their independence any less clear and imperative because such action if taken now would be belated and perhaps might result in the criticism of certain former decisions not altogether well or fully considered.

I have said that the whole subject of the practice of the law by the legal profession is an incident to the judicial department of government. Not only is this true, but the services rendered by the members of the bar are essential to the successful functioning of courts of justice. Several instances are recorded in history where it has been attempted to abolish the legal profession, and to conduct courts without their aid; in every such case utter failure has resulted. In France the bar was formally abolished, but in a short time as a matter of necessity it was reinstated, and resumed its place in the governmental machinery.

[13] The courts should be free, and I believe that they are at liberty, regardless of any edict which the Legislature may enact, to receive such aid in the production of evidence and a proper consideration and presentation of the law as the exigencies of any litigation may demand. To subserve the ends of justice, it might be well that in some case the services of a member of the legal profession might not be available. The assistance of a layman, or of some one learned in the law, though not formally admitted in this jurisdiction, might be invaluable to the court. To my mind, any law attempting to limit such power would be void, as an attempted abridgment of the judicial powers inherent in the courts by reason of the fact that they are courts of justice.

In a number of the decisions which have approved the doctrine that statutory regulations of the practice of the law must be upheld by the courts, it has been reasoned that the power of the legislation in that regard is similar to that admittedly possessed to legislate concerning various trades and professions. Such observations are not in point.

They overlook the fact that the practice of medicine or dentistry, or of the trade of a barber, are in no way incident to the maintenance or functioning of the government. The practice of the law is more than a commercial pursuit. The rights of those who are permitted to practice law are secondary. The right of the public in the makeup of the personnel of the bar and its interest in their rectitude is primary. Superficially it might appear that therefore the matter is one for police regulation, but it must be remembered that the interests of the public may be safeguarded perhaps better through other channels than through the police power in the hands of the Legislature. It is worthy of reflection that the absolute authority of the courts over their own procedure and in their own jurisdiction is at least as potential in the protection of public interest as the police power lodged in the Legislature.

At all events, and beyond the possibility of cavil, the police power exercised by the Legislature is inferior to the Constitution and its provisions, and where, as in this instance, the Constitution allocates judicial prerogatives to the judicial department alone, such authority cannot possibly be lodged in the Legislature under the guise of police power.

THOMPSON, J. [14] I concur in all that has been said by Presiding Justice WORKS and Justice CRAIG. In view, however, of the extreme importance of the case to the cause of an independent judicial system and its protection against the gradual, although well-intended, encroachment of the Legislature, it seems meet that an effort be made, although the hope is probably vain, to add somewhat to the force of what has already been said. Counsel seem to fear that the state bar is in danger of not being permitted "to function properly and bring about the great good in the *administration of justice* which is confidently expected of it by the people of the state." (Italics ours.) What is the basis of this fear? They say it springs from the conclusion, reached in the former opinion, that admissions, discipline, and disbarments are wholly under judicial control. Is this a confession that the Legislature is the better able to *judge* of the qualifications, or misfeasance, or regeneration, of those who are to *assist in administering justice*, or to judge the conditions upon which it is proper to permit persons to aid the courts in dispensing justice, than is the judiciary itself? Since when has the judiciary become so impotent to judge the qualifications of its officers? What has recently occurred to qualify laymen, a majority of whom probably compose the Legislature, to correctly judge of the duties and responsibilities of members of our ancient and honorable profession?—something that was not conceded yesterday. Can it be possible that the present fear is akin to the desire manifested by some in the past few years for a recall of judicial decisions?

The questions are not beside the point. They are asked for the purpose of conveying to the mind a twofold idea: First, that the judicial system is composed, not only of courts, consisting of judges, clerks, and bailiffs, but also of each and every member of the bar, constituting the other officers of the courts, who are named and designated by them as worthy and able to assist, as counsel say, "in the administration of justice"; second, that the process of determining the qualifications of those and the conditions upon which they shall be admitted to practice, of passing upon the nature of unethical conduct which shall subject them to discipline, or the regeneration of character which warrants readmission is wholly and exclusively a judicial function. Every act performed requires a thorough understanding and appreciation of that branch of legal learning, knowledge of which, according to the court in Danforth v. Egan, 23 S. D. 43, 119 N. W. 1021, 139 Am. St. Rep. 1030, 20 Ann. Cas. 418, "has long been recognized as the most important qualification for one who is to be entrusted with the sacred duties of an attorney at law" and which is known to the profession as legal ethics. If it be said to this that the Legislature has the power to confer this judicial authority upon the state bar, the answer immediately suggests itself that the people have already vested their entire judicial power, through the Constitution, in courts already established.

[15] Let us view the matter from another standpoint. What is the purpose of requiring legal learning and good moral character as prerequisites to admission and their retention after admission as conditions to continued membership in the profession? In re Percy, 36 N. Y. 651. If the applicant fails to measure up to the standards of the time, in legal learning, instead of being an aid to the court and one of those indispensable cogs in the machinery, he is a hindrance and an obstruction to the administration of justice. If he fails to attain and preserve that high degree of moral character demanded of an attorney, he is no longer entitled to the confidence of the court, and the latter can repose no trust in his statements or activities. In short, "he is no longer an aid to the court." Fairfield County Bar v. Taylor, 60 Conn. 17, 22 A. 443, 13 L. R. A. 767. From this it follows, as the authorities have repeatedly announced, that the paramount duty of every lawyer is to assist the courts in the administration of justice.

The people, by their form of government and through the Constitution, have designated the courts as the instrumentalities through which justice shall be dispensed. The necessities of the situation have called to their assistance those possessed of the requisite ability and character. But the fact remains that the courts are primarily and solely responsible to the people for administering justice and for that reason have always exercised a supervisory and disciplinary power over their officers. If the vigilance has sometimes been relaxed, it is because the bench has been inclined to place great confidence and trust in the profession. That is no reason, however, why they should now shirk the responsibility placed upon their shoulders by the Constitution, nor is it a reason why any member of the bar should renounce his position as an officer of the courts and rise to protest against that supervision. Conceivably, we might have a somewhat different situation to deal with, if we had a branch of the profession which did not and was not permitted to appear before the courts, such, for instance, as the solicitors of England, the example of which probably gave birth to the provisions now involved. But we have no such branch, and no such problem to consider.

It is said by counsel that, though the enactment which purports to confer upon the state bar certain jurisdiction over the admission, discipline, and disbarment of lawyers is by the former opinion held to be stillborn, yet the opinion says the courts may treat those provisions as still existing, even in defiance of a possible legislative repeal. And they express astonishment at this result. Suppose a newspaper editor had suggested the identical provisions in question, or a member of our profession, and suppose the courts had been forcibly impressed with the merits of the proposed system and had put it into effect by rules adopted for that purpose; certainly no objection could be entertained provided always that it be considered that the courts have the authority to adopt such rules to regulate their judicial business. Nor would any one be astonished if they refused to set aside the rules if the original author should change his mind. And in such light must the various enactments of the Legislature be read which have been recognized from time to time by the courts as reasonable. They have been suggestions emanating from a co-ordinate branch of the government, entitled to consideration only because they did come from such a source, and not by reason of any authority to impose their legislative will respecting a judicial function upon the judiciary. Undoubtedly, if the courts had not thought the suggestions reasonable, as is indicated by all the authorities, the suggestions would have been ignored as of no force or vitality. The problem here presented is simple. It becomes confused only when it is proposed to split up the judicial duty, conceding a part to the judiciary and giving the rest to the Legislature. It becomes impossible of solution when an effort is made to divide an indivisible quantity. It becomes alarming when it is made manifest that under the stress of the modern practice of the law sight is lost of the position and first duty of a lawyer as an officer and aid of the court.

It is argued, in an effort to sustain the contention that the judicial functions may be divided, that the Legislature has authority by reason of the police power. There is a modern tendency to use this expression as a "catch-all." In addition to what has been said by Presiding Justice WORKS, however, upon the subject, I should like to call attention to an instance where, if the power may be invoked at all, there can be no question of its proper application. In fact, the Legislature has spoken upon the subject in subdivision 5 of section 282 of the Code of Civil Procedure, which reads that it is the duty of an attorney "to maintain inviolate the confidence, and at every peril to himself, to preserve the secrets of his client."

It has been argued with great force by an eminent member of the profession that counsel should be compelled to disclose all facts communicated to them in secret which might require a verdict of guilty to be returned; this on the theory that the guilty should not be allowed to escape. See Rationale of Judicial Evidence by Jeremy Bentham (Bentham's Works, John Bowring's Ed., vol. 7, p. 473); excerpt also found in Costigan's Cases on Legal Ethics, p. 82. As a footnote to the excerpt in Costigan's Cases just mentioned, and on page 84, we read the answer of Chief Justice Taft as follows: "I have recently heard an arraignment of our present judicial system in the trial of causes by a prominent, able and experienced member of the Boston bar. * * * He feels that the procedure now in vogue authorizes and in fact requires counsel to withhold facts from the court which would help the cause of justice, if they were brought out by his own statement. To remedy this he suggests that all counsel should be compelled to disclose any facts communicated to them by their clients. * * * *To require counsel to disclose the confidential communications of his client to the very court and jury which are to pass on the issue which he is making would end forever the possibility of any useful relation between lawyer and client.* It is essential for the proper presentation of the client's cause that he should be able to talk freely with his counsel without fear of disclosure." (Italics ours.)

Here is a debatable question of public policy and public welfare. If it be a debatable question, and the Legislature has the right to speak by reason of its possession of police power, and does so speak, then it is the duty of the court to sustain the enactment as a proper exercise of that power. Suppose the Legislature should say, in the place of the subdivision which we have already quoted, that it is the duty of lawyers to communicate to the court and jury all that has been conveyed to them by their clients, thereby destroying the useful relation of attorney and client, and forever putting an end to that beneficent repository of the troubles and tribulations of the layman, and which operates as the cleansing receptacle to divide the chaff from the wheat for the machinery of justice, would the courts be powerless? Must they sit idly by and see the profession deprived of their usefulness, and they themselves deprived of the services of their officers, because the Legislature in the exercise of the "police power" has so decreed? We think it too apparent for argument that the courts are to determine the duty of their officers and the standards of conduct by which their usefulness to the courts and the cause of justice shall be preserved.

---

95 Cal. App. 793

ISSENHUTH v. ROBERT MARSH & CO., Inc. (Civ. 3635.)★

District Court of Appeal, Third District, California. Dec. 27, 1928.

Rehearing Denied Jan. 26, 1929. Hearing Denied by Supreme Court Feb. 25, 1929.

1. Mines and minerals 🔑74—Contract for purchase of interest in oil lease guaranteeing development held complete and unaffected by subsequent assignment of interest not mentioning guaranty authorizing rescission on breach of guaranty.

Where plaintiff and defendant executed instrument conveying interest in oil lease, reciting receipt of buying order for interest in oil lease, consideration therefor, and guaranty of development of properties, contract was complete, and subsequent execution of assignment of lease pursuant to original agreement did not deprive plaintiff of rights under original contract merely because assignment did not refer to guaranty, and hence breach of guaranty authorized plaintiff to rescind entire transaction.

2. Mines and minerals 🔑74—Contract for transfer of interest in oil lease held not severable because consideration was payable in installments.

Contract for transfer of interest in oil lease reciting total consideration *held* not rendered severable by fact that consideration was payable in two installments.

3. Mines and minerals 🔑74—Defendant guaranteeing development of oil properties under contract naming contractors held properly found to have guaranteed development by such contractors.

Where contract for transfer of interest in oil lease recited name of operating company and drilling contractor and that defendant guaranteed development of properties, finding that guaranty covered development by drilling contractor and operating company, assignors of defendant, was justified.

4. Appeal and error 🔑931(1)—Appellate court must construe finding to uphold rather than defeat judgment.

District Court of Appeal is under duty to construe finding in manner to uphold rather than to defeat judgment.

5. Mines and minerals 🔑74—Finding that oil development could not be determined from contract held not inconsistent with finding determined from other evidence that development was not performed.

Finding that court was unable to determine from receipt nature or extent of oil development attempted to be guaranteed *held* in effect finding that court could not so determine from contract alone and was not inconsistent with finding that development had not been performed, since court was not precluded from determining such fact from other evidence.

6. Mines and minerals 🔑74—Opinion evidence that oil development, if completed, would not have produced oil, held properly excluded in action to rescind purchase of interest in oil lease for breach of guaranty of development.

In action to rescind contract for purchase of share in oil lease under which defendant guaranteed development of oil properties, based on breach of guaranty, opinion evidence that development work, if completed, would not have produced oil *held* properly excluded since plaintiff had right to full performance under his contract.

Appeal from Superior Court, Los Angeles County; Reuben S. Schmidt, Judge.

Action by Charles C. Issenhuth against Robert Marsh & Co., Inc. Judgment for plaintiff, and defendant appeals. Affirmed.

Clyde C. Shoemaker, of Los Angeles, for appellant.

Norman T. Mason, of Los Angeles, for respondent.

TUTTLE, Justice pro tem. This is an action brought to rescind a contract for the purchase of a share in an "oil lease" and to recover the sum of $5,000 paid upon the same. Judgment went for plaintiff according to the prayer of the complaint, and from said judgment this appeal is taken.

The following facts are undisputed: On April 14, 1923, Gilbert & Hawley assigned to Reed & Campbell an interest in an oil lease covering 2½ acres of land in the Santa Fé Springs district. By the terms of said instrument the assignees agreed to do certain development work in search of oil. Included in this work, the assignees were to continuously and diligently prosecute the drilling of a well to a depth of 5,000 feet or until production was obtained at a lesser depth in what is known as the "Meyer sand." Gilbert & Hawley then assigned 2 per cent. of the royalty under said agreement to appellant Robert Marsh & Co., and the latter assigned 1 per cent. of said royalty to plaintiff.

★Rehearing denied. Hearing denied by Supreme Court.

On May 15, 1923, respondent paid appellant the sum of $2,000 in cash, and received from it a writing as follows:

> "May 15, 1923.
>
> "Received from C. C. Issenhuth buying order covering 1 % Gilbert Lease, Carter Tract, operating company Reed & Campbell, drilling contractor Roy Evans, Price—$5,000.00. Robert Marsh & Co. Inc., Guaranteeing development of said properties and title pertaining to same. Terms $2,000.00 cash, receipt of which is hereby acknowledged—balance on or before the 31st day of May.
>
> "Robert Marsh & Co. Inc.
> "By C. A. Briggs, Mgr."

The balance of the purchase price, $3,000, was paid June 4, 1923, and on June 18, 1923, appellant executed to respondent an assignment of the 1 per cent. royalty which he had agreed to purchase on May 15th.

The court found, upon sufficient evidence, certain facts to be true, and they are given, in substance, as follows:

At the time of the purchase the oil well had been drilled to about 2,000 or 3,000 feet; a month thereafter (June 7, 1923), it had reached the depth of 2,953 feet; on July 26, 1923, it had been sunk 940 feet deeper—that is, to a depth of 3,893 feet—which was the last development work done upon the property.

Thereafter the drilling contractor was engaged in a "fishing job" which was never completed, and since the middle of October, 1923, all efforts to resume development work ceased. It was necessary, in order to complete a well in this field, to sink it to a depth of about 5,000 feet to the "Meyer sand," where oil at those times was found in commercial quantities.

The lease under the terms of which plaintiff's 1 per cent. royalty was to be paid was forfeited by failure to do the development work therein required, viz., to prosecute drilling "diligently and continuously until it reached what is known as the 'Meyer sand,' being approximately 4800 feet in depth"; "and further upon the completion of the first well and within sixty days thereafter to commence the drilling of a second well and diligently prosecute the same to completion as above provided for the first well, and within sixty days thereafter a third well shall be commenced and drilled to completion as above provided, and within sixty days after its completion, a fourth well shall be commenced and drilled to completion as above provided."

When respondent made the first payment of $2,000 to appellant, it will be noted that he received from it a writing duly signed and which we have quoted in full, supra. This writing contained the clause, "guaranteeing developing of said properties." At the time of the execution of the said instrument containing said "guarantee," respondent also signed a "buying order," which reads as follows:

> "Robert Marsh & Co., Inc.
> "Stocks Bonds
> "Realtors
> "200 Marsh-Strong Bldg., Los Angeles, Cal.
> "May 15, 1923
>
> "I hereby authorize you to buy ~~sell for my account and risk in open market or by private purchase~~ 1% Gilbert Lease, Carter Tract, operating company Reed & Campbell drilling contractor Roy Evans Drilling Company—price—$5,000.00 Terms $2,000.00 cash, balance on or before May 31, 1923.
>
> "Subject to confirmation
> "[Signed] C. C. Issenhuth
>
> "Make checks payable to Robert Marsh & Co., Inc. Address
>
> "The face of this subscription contains all the terms and agreement between the undersigned and Robert Marsh & Co., Inc. This agreement subject to confirmation by Robert Marsh & Co., Inc."

When the final payment of $3,000 was made, appellant executed to respondent a formal assignment of 1 per cent. of the gross production from all oil, gas and other hydrocarbon substances produced and saved as reserved in a certain gas and oil lease between the parties in the manner we have explained. No mention of any guaranty was made in this assignment.

[1, 2] It is contended by appellant that the instrument containing the guaranty was distinct and separable from the sale; that it was a collateral agreement and a separate undertaking; and that a breach of the same would not authorize a rescission of the entire transaction. We do not take this view of the matter. The first instrument executed by the parties was the only contract between them. Upon that date respondent became obligated to pay the sum of $5,000, and, in return, appellant was bound to convey the royalty interest. The subsequent execution of the assignment conveying said interest was an act done in pursuance of the carrying out of said contract. The same applies to the "buying order." It is not contended by appellant that the first contract was incomplete or that it did not express all the terms necessary to complete the transaction, or that there is any inconsistency between these documents. We cannot see how the subsequent execution of the assignment could possibly operate to deprive respondent of a right which he had acquired under the contract, merely because they did not repeat or refer to the guarantee clause which appeared in the said contract. The contract was in its nature entire, and not severable. The fact that the consideration was payable in two installments does not make it otherwise. The consideration of $5,000 was single, and it must follow that the

contract is entire. The contention that there was an apportionment of the consideration is contrary to the obvious intent of the parties, and is wholly without merit. Stern v. Sunset Road Oil Co., 47 Cal. App. 334, 190 P. 651.

[3] It is next contended that the guaranty did not refer to development work which the assignors of appellant were obligated to perform under the various leases and assignments in evidence, and that the finding that the guaranty included the obligations assumed by appellant's assignors is not supported by the evidence. The answer to this is that the contract here referred particularly to the Gilbert lease, and to Reed & Campbell, who agreed to do certain development work upon the property covered by said lease. All of these leases and assignments were in evidence, and the court was justified in drawing the inference and finding that the guaranty referred to and covered the development which appellant's assignors were obligated to perform.

The court made the following finding:

"The court is unable to determine from said receipt the nature or extent of the 'development of said properties' attempted to be so guaranteed, nor the time within which such development should be done."

[4, 5] Thereafter the court found that the development work which the assignors of appellant had agreed to perform had not been done, specifying the particulars. It is contended that these findings are so conflicting as to entitle appellant to a reversal. It is our duty to construe the finding in a manner to uphold rather than to defeat the judgment. But it is scarcely necessary to invoke this rule here. The court merely finds that from the contract *alone* it cannot determine the nature or extent of the development attempted to be guaranteed. This does not preclude the court from turning to the other evidence introduced, for the purpose of ascertaining these facts, and that is precisely what the court did. The nature and extent of the development referred to in the contract was found in the various leases and assignments before the court, and which documents were referred to in the contract.

[6] Appellant offered opinion evidence to the effect that if it had done the development work called for, no oil would have been found. The court excluded this testimony. This ruling was correct. It was no defense to the action to prove that full performance upon the part of appellant would have shown respondent's "investment" to be valueless. The latter had the right to full performance under his contract. It would, indeed, be a lax rule of law which would permit a promisor to exercise his own discretion as to the extent he should perform his part of an obligation. The question of damages is not raised, as respondent merely seeks rescission and return of his consideration, and that was the adjudication made.

It is contended that rescission was not made promptly, under section 1691 of the Civil Code. The court found on this matter adversely to appellant. We have examined the record, and we are satisfied that the finding is amply supported.

The judgment is affirmed.

We concur: FINCH, P. J.; HART, J.

95 Cal. App. 781

DOBBIE v. PACIFIC GAS & ELECTRIC CO. (LONDON GUARANTEE & ACCIDENT CO., Limited, Intervener). (Civ. 6513.)★

District Court of Appeal, First District, Division 1. California. Dec. 27, 1928.

Rehearing Denied Jan. 26, 1929. Hearing Denied by Supreme Court Feb. 25, 1929.

1. Negligence ⟹136(15)—Whether employee of independent contractor was invitee as to portion of premises where he was injured held for jury.

Whether employee of independent contractor was an invitee in going on roof of building, where he was injured by falling through skylight, *held* for jury under evidence, especially as his object in going to such place was not his own pleasure or benefit, but the benefit of his employer.

2. Negligence ⟹136(26)—Contributory negligence of employee of independent contractor, injured when falling through skylight, held for jury.

Contributory negligence of employee of independent contractor in going on roof, where he was injured by falling through a skylight, *held* for jury.

3. Negligence ⟹32(1)—Owner of premises owes duty to invitee only of exercising ordinary care in seeing that premises are in safe condition.

Owner of premises is not an insurer of the safety of an invitee, but owes him the duty to exercise ordinary care in seeing that premises are in safe condition.

4. Negligence ⟹52—Owner of premises had duty of warning employees of independent contractor as to defective condition of skylight on roof, notwithstanding knowledge of contractor and foreman.

The fact that independent contractor and his foreman had actual knowledge of skylight on roof, where employee was injured, and that it was so covered with soot and cinders as to be invisible, and to appear as a solid portion of the roof, did not relieve owner of premises of duty of warning employees of contractor as to such condition.

5. Negligence ⟹52—Owner of premises owes same duty to employees of independent contractor of guarding them against hidden dangers as owed to other invitees.

Though relation of master and servant does not exist between owner of premises and serv-

---

★Rehearing denied. Hearing denied by Supreme Court.

ants of independent contractor, nevertheless contractor's servants are deemed to be on premises by owner's invitation, express or implied, and he therefore owes the same duty of guarding them against hidden dangers thereon as he would to a guest, customer, or other person going there by his invitation.

6. Negligence 🔑52—Duty of owner of premises to warn employees of independent contractor as to hidden dangers cannot be delegated.

Duty of owner of premises to warn employees of independent contractor as to hidden dangers on premises cannot be delegated, and the contractor's knowledge or notice to him of the danger is not imputable to his employees.

7. Negligence 🔑136(22)—Whether owner of premises used ordinary care in having premises in safe condition for employee of independent contractor, injured when falling through skylight, held for jury.

Whether owner of premises used ordinary care in seeing that its premises were in a safe condition for use of employees of independent contractor *held* for jury as respected injury to employee falling through skylight.

8. Trial 🔑337—That jury disregarded instruction erroneously requiring condition precedent to recovery was no ground for reversal.

Fact that jury disregarded instruction in so far as it erroneously required condition precedent to recovery for injury to employee of independent contractor that neither employer nor foreman had knowledge of the existence of skylight where employee was injured *held* not to constitute ground for reversal.

9. Evidence 🔑471(17)—Objection to question asked contractor as to occasion for employee going on roof where he was injured held properly sustained as calling for opinion.

In action to recover for injuries to employee of independent contractor falling through skylight, objection to question to contractor as to whether there was any occasion for men in doing the work to go on the roof *held* properly sustained, in that question called for opinion of witness as to question which was for jury to determine from all circumstances.

10. Evidence 🔑498½—Admission or exclusion of opinion evidence is within discretion of trial court.

Admission or exclusion of opinion evidence rests largely within discretion of trial court.

Appeal from Superior Court, City and County of San Francisco; Franklin A. Griffin, Judge.

Action by Henry Dobbie against the Pacific Gas & Electric Company, wherein the London Guarantee & Accident Company, Limited, intervened. Judgment for plaintiff, and defendant appeals. Affirmed.

Thos. J. Straub and Charles E. Finney, both of San Francisco (George F. Jones, of Oroville, and Leo H. Susman, of San Francisco, of counsel), for appellant.

Edwin V. McKenzie and Jesse H. Miller, both of San Francisco, for respondent.

PER CURIAM. This action was brought by plaintiff, Henry Dobbie, against appellant, Pacific Gas & Electric Company, a corporation, hereinafter called the gas company, to recover damages for personal injuries sustained on its premises.

The plaintiff, a sheet metal worker, was in the employ of W. Heidt, an independent contractor, who was under contract with the gas company to reconstruct a blast pipe and do other work of like character in and about the generator building of the plant of the company in San Francisco.

The complaint alleged that on the day of the accident, and for a long time previously, there had existed on the roof of the generator building a glass skylight, which was near the place where the plaintiff was required to work; that the gas company had knowingly permitted the skylight to become covered to a depth of several inches with cinders and soot discharged from its gas generators; that this rendered the skylight invisible to any person on the roof of the building, and caused the same to appear to be a part of the solid portion of the roof; that the true conditions were unknown to plaintiff, who, in the course of his employment, stepped upon the skylight, which broke with his weight, precipitating him to the floor below and causing his injuries. A jury returned a verdict against the gas company, which has appealed from the judgment entered thereon.

As grounds for reversal, it is urged that no actionable negligence on the part of the gas company was shown; that plaintiff was guilty of contributory negligence as a matter of law; that certain of the court's rulings were prejudicially erroneous; and that two of its instructions were disregarded by the jury.

Appellant's generator building is a steel frame structure about 160 feet in length east and west, 75 feet in width, and is walled and roofed with corrugated iron. The roof is of the gable type, sloping north and south from the ridge. The building has two floors, the first the ground floor, and the second called the generator floor, which is of steel. It is about 26 feet below the ridge of the roof. In the building are located four gas generators, each consisting of a furnace on the ground floor, topped by a cylindrical shell protruding through the generator floor to a height of about 20 feet. On this is a second cylindrical shell of smaller diameter which protrudes through the main roof of the building, and above which is a metal stack 15 feet high capped by a spark arrester. The process of gasmaking consists in spraying crude oil into the generator shells, where it is cracked or decomposed by heat, and the gas separated from other ingredients of the oil. The gas is then filtered to remove a residue of carbon or lamp black, and at this plant about 250 tons of this substance was produced each 24 hours. In the process, a portion of the lamp black adheres to the brick interior of the generators. This is expelled at intervals into the stacks in the form of soot and cinders, which, unless prevented by the spark arresters, pass into the open air. The generators are numbered; the one nearest the east end of the building being No. 5, and that next to the west No. 6. Between and to the north of these is the skylight in question, which is also below another skylight upon the ridge of the building and between it and the north wall. The skylight upon the ridge projects above the level of the main roof, but the one in question is sunk in a light well below the level of the main roof. Immediately below the upper skylight and at the upper or south end of the light well a plank walk 23 inches in width was built across from east to west. The light well, which is about 20 feet wide, begins underneath this walk, and extends to the north wall of the building. The skylight therein, which is 4 feet 10 inches below the level of the main roof, is composed of 10 panes of reinforced glass, each 8 feet 6 inches long, and varying from 17 to 24½ inches in width. These are held in place by metal bars running lengthwise between the panes; their elevation above the panes being 1¼ inches. A portion of the bottom of the light well both north and south of the skylight is covered with corrugated iron roofing. Crossing the light well immediately north of the glass panes, and about 3 feet below the level of the roof, is a blast pipe 36 inches in diameter, which is used for supplying air to the generators 5 and 6. At each generator a spiral steel stairway leads from the generator floor to the top of the lowest generator shell, and from this point another steel stairway leads to the top of the upper generator shell on the main roof of the building. That from generator No. 5 opens upon the roof a few feet to the east, and that from generator No. 6 the same distance to the west of the light well.

On the afternoon of the day of the accident the plaintiff was working at appellant's boiler house on the same premises. He had previously worked on the ground floor of the generator building, but not upon the generator floor. About 30 minutes before the accident occurred he was instructed by his foreman, Volz, to accompany another employee, named Tucker, to the generator building for the purpose of riveting certain flanges and iron sheets about the blast pipe mentioned above. Tucker there pointed out the place where plaintiff was to work; this being upon a scaffold within the building which was placed near the west wall of the light well, and at about the level of the blast pipe mentioned. It appears that two men were required for this work, one within and the other without the building, and that Tucker then took a position on the outside of the wall mentioned and within the light well, seating himself upon the blast pipe near the west wall. According to their testimony, the metal sheets which they were instructed to rivet bulged in a manner which prevented the doing of the work. They were unable to see one another owing to their positions, and the noise about the plant prevented intelligible communication. Tucker, wishing to explain the situation to the plaintiff, then passed through an opening which had been made in the east wall of the light well, thence along a scaffold, and down the stairway leading from the top of the lowest generator shell of generator No. 5 to the generator floor; from there he went to the stairway at generator No. 6, and thence to the scaffold where the plaintiff had been working. In the meantime, however, the plaintiff for the purpose of apprising Tucker of conditions and to consult with him, had left the scaffold which extended to the top of the lowest generator shell of generator No. 6, thence down the metal stairway running from there to the generator floor. From the floor he went to the stairway at generator No. 5 and ascended to the roof of the building. This point was east of the light well, and from there, according to his testimony, he saw a workman in a stooping position at about the place in the light well where Tucker testified that he had been working. This workman, named Koennecke, according to the testimony, had been assisting Tucker, and remained in the light well while the latter went below to communicate with plaintiff. The plaintiff then crossed the light well by the plank walk mentioned and walked to the north to a point about 18 inches north of the south end of the most westerly pane of the skylight. There he lowered himself into the light well until his feet rested upon the skylight, which gave way. He fell to the generator floor, receiving the injuries for which he sought to recover.

It was testified by the plaintiff and other witnesses who were employed on the building at the time of the accident, including the foreman, Volz, that soot and cinders completely covered the skylight, giving it an appearance similar to that of the roof proper; and, according to the testimony of both Tucker and Keonnecke, who had been working in the light well before and on the day of the accident, neither discovered the skylight until shortly before the accident happened. These witnesses also testified that they had not observed it from the floor below. It further appears from the testimony of an employee of appellant that it had been his duty to sweep the skylight weekly, in order to remove the accumulation of cinders, but that, after Heidt commenced work under his contract, which was about four weeks previous to the accident, this was not done.

The negligence charged was in permitting the skylight to become obscured, so that it constituted a hidden danger to invitees. Appellant contends, however, that the plaintiff, at the place where the accident occurred, was a mere licensee and not an invitee, and that in either case no neglect of duty on its part was shown.

[1] The plaintiff, as stated, was unable to carry out the work according to instructions, nor could he from his position communicate with Tucker, his superior. It is clear from his testimony that his object in going to the place where the latter had been stationed was not his own pleasure or benefit, but the benefit of his employer. His going had not been forbidden, and, under the circumstances, the conclusion that the act was impliedly authorized was not unreasonable. Moreover, his destination was a place in the building where the same work in which he had been engaged was being carried on by his employer; this portion of the premises, as appellant states, having been practically turned over to the latter. These facts were such as to make the question of his right to go to that part of the building one for the jury, and support their implied finding that he was an invitee. Bush v. Weed Lumber Co., 63 Cal. App. 426, 218 P. 618; McKee v. Bidwell, 74 Pa. 218; 1 Thompson, Negligence, p. 907, § 989.

[2, 3] It is further claimed that, assuming plaintiff to have been an invitee, his selection of the route followed in order to reach the light well constituted negligence as a matter of law. According to the testimony, an opening for temporary use had been made and left by the contractor in the east wall of the light well; and from this opening a temporary scaffold extended to the lowest shell of generator No. 5. This was the way followed by Tucker in reaching the generator floor; but it is evident from plaintiff's testimony that he was not aware that the light well could be reached in this manner. The route followed by him from the generator floor to the roof was that which appellant had provided for its employees; and, while it was longer than that taken by Tucker, it could be and was followed without hazard. Moreover, after reaching the roof, the plaintiff crossed the light well in safety on the plank walk provided by appellant and only arrived at a place of danger when he stepped upon the skylight. The route followed was both practicable and convenient, and the only other or safer way than that pursued was unknown to him. Under such circumstances, the fact that it ultimately proved to be dangerous did not make his conduct negligent as a matter of law, and the question was one for the jury. Roseberry v. Niehaus & Co., 166 Cal. 481, 137 P. 232; Cozad v. Raisch Improvement Co., 175 Cal. 619, 166 P. 1000. The owner of premises is not an insurer of the safety of an invitee, but he owes him the duty to exercise ordinary care in seeing that the premises are in a safe condition. Means v. Southern California Railway Co., 144 Cal. 473, 77 P. 1001, 1 Ann. Cas. 206. As the rule is stated in Shanley v. American Olive Co., 185 Cal. 552, 197 P. 793, "A person so invited upon the premises of another may recover from such owner 'for any injuries received owing to the dangerous condition of the premises known' to the owner and not known to the person so invited; but such owner 'is not bound to keep his premises absolutely safe.' 29 Cyc. 453. The responsibility of such owner for the safety of such person in such a case is not absolute; he is only required to use ordinary care for the safety of the persons he invites to come upon the premises. If there is a danger attending upon such entry, or upon the work which the person invited is to do thereon, and such danger arises from causes or conditions not readily apparent to the eye, it is the duty of the owner to give such person reasonable notice or warning of such danger. But such owner is entitled to assume that such invitee will perceive that which would be obvious to him upon the ordinary use of his own senses. He is not required to give to the invitee notice or warning of an obvious danger."

[4] Notwithstanding evidence that the plaintiff had no actual knowledge of the skylight, and that the same was a source of danger, appellant claims that the fact that the contractor and his foreman, as was testified, knew or had notice of the condition, relieved appellant of the duty of warning employees of the contractor. In two California decisions cited in support of this contention, it is intimated that knowledge by the contractor or notice to him of the unsafe condition of the premises should be imputed to his employee. Brown v. Board of Trustees, 41 Cal. App. 100, 182 P. 316; Jacobson v. Northwestern Pac. R. R. Co., 175 Cal. 468, 166 P. 3. An examination of these cases discloses, however, that the expressions relied upon were unnecessary for their determination; the decision in each case being that, under the circumstances shown, no warning of the danger was necessary. In the first the death of an employee of an independent contractor was caused by the fall of an unsupported wall of a burnt building. It was held that the deceased, by the exercise of ordinary care, could have observed the danger, and that under such circumstances it was unnecessary for the owner to give warning. In the second it appeared that an employee of an independent contractor, actuated solely by curiosity or for his own convenience, went upon a platform where there had been installed highly charged electric wires, and was killed. It was held that as to the owner he was but a licensee, and that the injury resulted solely from his own negligence.

[5, 6] The case of Proctor v. San Antonio R. Co., 26 Tex. Civ. App. 148, 62 S. W. 938, 939, is also cited by appellant. In that case the deceased was the father of one of the independent contractors, and had brought the latter's lunch to the power house owned by the defendant. The contractors were engaged in removing a pile of cinders, over which at a height of about seven feet was stretched a trolley wire. The deceased was not employed in the work on the premises, and the owner was not shown to have had knowledge of his presence. The deceased casually took up a hoe and dug into the pile of cinders. While so doing the hoe was elevated above his head and struck the trolley wire, from which he received a shock which caused his death. It was held that the duty, if any there was, to warn the deceased of the danger devolved upon the contractor, and not upon the owner. While the court does not so hold, it is clear from the facts that the deceased was but a licensee. Gibson v. Sziepienski, 37 Ill. App. 601; Indian Refining Co. v. Mobley, 134 Ky. 822, 121 S. W. 657, 24 L. R. A. (N. S.) 497; Freeman v. United Fruit Co., 223 Mass. 300, 111 N. E. 789; Kinsman v. Barton, 141 Wash. 311, 251 P. 563. While the relation of master and servant does not subsist between the owner and the servants of an independent contractor, and the obligations of a master are not imposed upon the former (Schmidlin v. Alta Planing Mill Co., 170 Cal. 589, 150 P. 983), nevertheless the contractor's servants, while engaged in the performance of the contract, are deemed to be upon the premises by the owner's invitation, express or implied. John Spry Lumber Co. v. Duggan, 182 Ill. 218, 54 N. E. 1002; Gagnon v. St. Maries Light & Power Co., 26 Idaho, 87, 141 P. 88. He therefore owes the same duty of guarding them against hidden dangers thereon as he would to a guest, customer, or other person who came there by his invitation (Black v. Warehouse Investment Co., 32 Cal. App. 154, 162 P. 403; Union Oil Co. v. Rideout, 38 Cal. App. 629, 177 P. 196; 1 Thompson, Negligence, §§ 680, 970, 19 Cal. Jur. Negligence, § 53, p. 618); and it is his duty to warn them of any danger in coming of which he knows or, as a prudent person, ought to know, and of which they are not aware. Ryan v. St. Louis Transit Co., 190 Mo. 621, 89 S. W. 865, 2 L. R. A. (N. S.) 777. The duty, however, arises from the invitation and not from the contract between the contractor and the invitees, this being but the occasion for the invitation; and the fact that the invitees are servants of the contractor does not relieve the owner of any duty owing to them as invitees. Stevens v. United Gas & Elec. Co., 73 N. H. 159, 60 A. 848, 70 L. R. A. 123; Fidelity & Casualty Co., etc., v. Llewellyn Iron Works, 42 Cal. App. 766, 184 P. 402; Smith v. Twin City, etc., Co., 102 Minn. 4, 112 N. W. 1001; Newingham v. Blair, 232 Pa. 511, 81 A. 556. Moreover, the duty cannot be delegated; and the contractor's knowledge or notice to him of the danger is not imputable to his employees, who are invitees. Lechman v. Hooper, 52 N. J. 253, 19 A. 215; Stevens v. United Gas & Elec. Co., supra; Woodman v. Metropolitan R. Co., 149 Mass. 335, 21 N. E. 482, 4 L. R. A. 213, 14 Am. St. Rep. 427; Pittsfield Cottonware, etc., Co. v. Pittsfield Shoe Co., 71 N. H. 522, 53 A. 807, 60 L. R. A. 116; Rolfe v. Boston & M. Ry. Co., 69 N. H. 476, 45 A. 251; Cabot v. Kingman, 166 Mass. 403, 44 N. E. 344, 33 L. R. A. 45; Engel v. Eureka Club, 137 N. Y. 100, 32 N. E. 1052, 33 Am. St. Rep. 692; Smith v. Twin City, etc., Co., supra; U. S. Cast Iron Pipe Co. v. Sullivan (C. C. A.) 3 F.(2d) 794.

[7] It being shown that the skylight was concealed by cinders and soot to an extent that the danger therefrom was not readily apparent, and that this condition was likely to occur unless steps were taken to prevent it was known to appellant, also that the greater portion of the work under the contract was to be performed in and about the light well, and it being undisputed that no warning of the conditions was given to the plaintiff, the question whether the latter at the place of the injury was an invitee using ordinary care for his own safety, and the further question whether appellant under all the circumstances used a like degree of care in seeing that its premises were in a safe condition, were both for the jury.

Appellant complains that the court erroneously amended an instruction offered by it. The instruction as given was in substance that, before the plaintiff could recover, the jury must find that, if the skylight was so covered with cinders as to be invisible, the existence of the skylight was unknown to the plaintiff or his employer. It is claimed that the court erred in striking from the offered instruction after the word "employer" where that word appears therein the words "or his foreman." In view of the above authorities, this was not error, nor was the refusal of an instruction to the effect that, if the contractor or his foreman had knowledge of the existence of the skylight a sufficient time before the injury to have warned the plaintiff of its existence, no duty to do so rested upon appellant.

[8] Appellant also claims that instruction No. 9, given by the court, was disregarded by the jury. By this instruction the jury was told that, before the plaintiff would be entitled to a verdict, it must find "* * * 3, that if said skylight was so covered with cinders and soot as to be invisible and unobservable as alleged, the existence thereof was unknown to plaintiff or to his employer; 4, that if said skylight was covered over as claimed, defendant had knowledge thereof, and with such knowledge failed to warn plaintiff or his employer of the existence of such skylight. * * *" Although the evi-

dence shows that both his employer and his foreman knew of the existence of the skylight previous to the accident—and it may be conceded that a finding by the jury to the contrary would be unsupported—nevertheless, in view of our conclusions above stated, the instruction, so far as it required as a condition to recovery a want of knowledge on the part of the employer or his foreman of the existence of the skylight, or that appellant failed to warn them of its existence, was erroneous; and the fact that the jury disregarded it is not ground for reversal. Altoona Q. M. Co. v. Integral Q. M. Co., 114 Cal. 100, 45 P. 1047; Edwards v. Wagner, 121 Cal. 376, 53 P. 821; O'Neill v. Thomas Day Co., 152 Cal. 357, 92 P. 856, 14 Ann. Cas. 970; Compressed Air Co. v. San Pablo, etc., Co., 9 Cal. App. 361, 99 P. 531; Lucas v. Walker, 22 Cal. App. 296, 134 P. 374, 379.

[9,10] At the trial the contractor was asked the following question by appellant: "Was there any occasion for the men in doing the work to go on top of the main roof?" The court sustained an objection thereto on the ground that the question called for the opinion of the witness, and this ruling is also assigned as error. The question referred to the fact that the plaintiff, in his attempt to communicate with Tucker, followed a different route than that taken by Tucker. The objection was, we think, properly sustained, as it was for the jury to determine from all the circumstances whether the plaintiff was reasonably justified in going upon the roof, a question which did not call for the aid of opinion evidence. Furthermore, the admission or exclusion of such evidence rests largely within the discretion of the trial court, which in the present instance was not abused. Nolan v. Nolan, 155 Cal. 476, 101 P. 520, 132 Am. St. Rep. 99, 17 Ann. Cas. 1056; Maris v. H. Crummey, Inc., 55 Cal. App. 573, 204 P. 259.

From a review of the whole record, including the evidence, we are of the opinion that the trial court did not err in submitting the case to the jury, and that its determination of the issues is fairly supported by the evidence.

The judgment is affirmed.

206 Cal. 231

LACALUSA INV. CO. v. HESSE et al.
(L. A. 9565.)

Supreme Court of California. Jan. 15, 1929.

1. **Principal and agent ⚷123(5)—Statement of owner that agent was securing lessee held not to warrant finding of agreement to pay commission to broker employed by agent.**

Evidence of statement of owner of lot erecting apartment house that agent was handling business of securing lessee, and that whatever he did was satisfactory, *held* insufficient to support finding of employment by owner of broker whose services agent procured, or of agreement to pay broker commissions.

2. **Frauds, statute of ⚷116(5)—Agent's written approval of lease of principal's property, without written authority, held not binding on principal (Civ. Code, § 1624, subd. 5).**

Written approval of agent to lease of principal's property *held* not binding on principal, where agent had no written authority to execute lease under Civ. Code, § 1624, subd. 5.

3. **Principal and agent ⚷102(1)—Defendants, who authorized agent to submit offers from prospective lessees, held not liable to broker, employed by agent, for commissions for procuring lease which defendants never accepted.**

Defendants, authorizing agent to obtain propositions, from prospective lessees of apartment building, to be submitted for defendants' approval or rejection, *held* not liable to broker, employed by agent, for commission for securing lessee, where lease agreement procured by broker was never accepted and approved by defendants and there were no transactions directly between defendants and broker.

In Bank.

Appeal from Superior Court, Los Angeles County; Harold Louderback, Judge.

Action by the Lacalusa Investment Company against Arvilla A. Hesse and another. Judgment for plaintiff, and defendants appeal. Reversed.

Dan. V. Norland, Randall J. Hood, Minor Moore, and Chas. Mitschrich, all of Los Angeles, for appellants.

William C. Jensen, of Los Angeles, for respondent.

PRESTON, J. This appeal was submitted upon an order to show cause, the respondent having failed to present or file a brief. The trial court found that plaintiff, as a real estate broker, was entitled to recover from defendants the sum of $6,879.60 as a commission for services rendered by it as such broker, and gave judgment accordingly. Defendants appealing urge numerous assignments of error as ground for reversal of the judgment.

It appears that appellants, owners of a lot upon which they planned to erect an apartment house, extended to one Stroud, a man previously in their employ as a general helper in connection with another building being constructed by them, the privilege of securing offers from prospective lessees for said new building. In other words, appellants advised said Stroud of certain terms which they would require to be incorporated in any lease before it would have their approval, and orally authorized him to obtain propositions from prospective lessees and to submit such propositions to them for approval or rejection. In the event of their approval of any proposition, they were to pay said Stroud a commission for his services. Thereafter, said Stroud met and negotiated with Mr. Graf, the president of respondent corporation. As a result of these negotiations, said Stroud, through Mr. Graf, procured the signature of one Ida M. Theurer to a lease prepared by Mr. Graf and witnessed by him and also by said Stroud. Mrs. Theurer also deposited with Mr. Graf $9,555 to cover the five months' rental in advance required by the provisions of said lease, which was to be for a term of ten years.

Appellants refused to accept this proposition. They never signed the lease nor approved it, nor did said deposit ever leave the hands of Mr. Graf. On the contrary, at about the same time, and likewise through negotiations conducted by said Stroud, appellants approved and executed an agreement to lease the property to another party at a slightly higher rental. Thereafter, contending that it earned a commission in securing the signature of Mrs. Theurer to said lease and in procuring said deposit from her, respondent instituted this action, which resulted in a judgment in its favor as aforesaid.

We find that the record substantiates the contentions of appellants, to wit: That there is no evidence of any agency of respondent for appellants; that there is no evidence of the employment of respondent by appellants as a real estate broker or in any other capacity; that there is no evidence that respondent rendered services of any kind at the instance of appellants, or that appellants became indebted to respondent, or that said Stroud had actual or ostensible authority, as the agent of appellants, to either make a lease or to employ another agent to do so.

[1-3] There is no convincing evidence of any direct contract, agreement, covenant, written or oral, or of any transaction of any kind whatsoever between appellants and respondent. Taking at its full value the testimony offered by the witnesses for respondent, among whom were its representative, Mr. Graf, his secretary, and said prospective lessee, its substance, as a basis for upholding the findings and judgment herein, is that in addition to the facts as above detailed, Mr. Graf testified that prior to rejection of the offer, he had a conversation with appellant Arthur T. Hesse, which conversation is de-

nied by said appellant, in the course of which the latter remarked that Mr. Stroud was handling his business and whatever Mr. Stroud did was satisfactory to him. This evidence will not support a holding that appellants employed respondent or agreed to pay it the commission in question or ratified the lease submitted to them by said Stroud. The lease itself executed by Mrs. Theurer, which had the written approval of said Stroud, was, of course, not binding upon appellants, as Stroud had no written authority to so execute it as the agent of appellants (section 1624, subd. 5, Civ. Code).

We are compelled to conclude that respondent was fully aware of the limitation placed upon the authority of Stroud; that Stroud, who did not hold a license himself, was not authorized by appellants to secure the services of a licensed broker, but was merely authorized orally by appellants, if he so chose, to negotiate directly with prospective lessees and to secure from them, and submit to appellants, for approval or rejection, offers or propositions to lease, and that appellants had it within their power to reject the offer procured through respondent, with whom they had had no dealings and to whom they were under no obligation.

These views make it unnecessary to discuss all of the numerous points urged by appellants.

The judgment is reversed.

We concur: WASTE, C. J.; CURTIS, J.; SHENK, J.; SEAWELL, J.; RICHARDS, J.; LANGDON, J.

---

206 Cal. 35

PEOPLE v. TROCHE. (Cr. 3117.)★

Supreme Court of California. Dec. 27, 1928.

Rehearing Denied Jan. 10, 1929.

1. Jury 🔑31(11)—Where substance of right to jury trial is preserved, procedure is within Legislature's discretion (Pen. Code, § 4; Pol. Code, § 4468).

So long as substance of right to trial by jury as guaranteed by Constitution is preserved, procedure is wholly within discretion of Legislature, under Pen. Code, § 4, and Pol. Code, § 4468, in view of Pol. Code, § 4, Civ. Code, § 4, and Code Civ. Proc. § 4.

2. Constitutional law 🔑257—Statutes as to plea of not guilty by reason of insanity in murder case held not to deny "due process of law" (Pen. Code, §§ 1016, 1020, as amended, and § 1026, as added by St. 1927, pp. 1148, 1149).

Pen. Code, §§ 1016, 1020, as amended, and section 1026, as added by St. 1927, pp. 1148, 1149, relative to plea of "not guilty by reason of insanity" in prosecution for murder, *held* not invalid as violating due process provision of either federal or state Constitutions; words "due process of law" meaning law in regular course of administration according to prescribed forms and in accordance with general rules for protection of individual rights.

[Ed. Note.—For other definitions, see Words and Phrases, First, Second, and Third Series, Due Process of Law.]

3. Constitutional law 🔑251—"Due process" may include new methods of procedure unknown to common law.

"Due process of law" is not limited to due process of settled usages of past, but may include new methods of procedure unknown to common law; but they must be orderly and provide for reasonable notice and opportunity to be heard.

4. Jury 🔑31(11)—Statute relative to plea of "not guilty by reason of insanity" in murder case does not violate constitutional right to jury trial (Pen. Code, §§ 1016, 1020, as amended, and § 1026, as added by St. 1927, pp. 1148, 1149; Const. art. 1, § 7; Code Civ. Proc. § 193); "trial jury."

Pen. Code, §§ 1016, 1020, as amended, and section 1026, as added by St. 1927, pp. 1148, 1149, relative to plea of "not guilty by reason of insanity" in prosecution for murder, *held* not to deprive accused person of any of essentials of common-law jury trial, under Const. art. 1, § 7; trial jury, under Code Civ. Proc. § 193, being body drawn from citizens of district before court or officer of competent jurisdiction, sworn to try and determine fact question by unanimous verdict in criminal case.

[Ed. Note.—For other definitions, see Words and Phrases, First Series, Trial Jury.]

5. Criminal law 🔑311—Statutory provision that one pleading insanity is conclusively presumed sane on trial of issue as to guilt held not to amount to splitting of issues and trial by piecemeal (Pen. Code, § 1016, and § 1026, as added by St. 1927, p. 1149).

Provision of Pen. Code, § 1026, as added by St. 1927, p. 1149, that, during trial of murder case on plea of not guilty, one who has also interposed plea of not guilty by reason of insanity shall be conclusively presumed sane, question of sanity to be subsequently determined if he be found guilty, *held* not to amount to splitting of issues for trial by piecemeal, since insanity plea is plea of confession and avoidance, and special pleas have long been recognized, under section 1016.

6. Homicide 🔑179—Evidence of mental condition held inadmissible on separate trial of plea of not guilty where defendant also pleaded insanity (Pen. Code, § 1020, as amended, and § 1026, as added by St. 1927, p. 1149, Cr. Prac. Act 1851; Pen. Code, §§ 1019, 1020, enacted in 1872).

In prosecution for murder in which defendant entered pleas of not guilty and not guilty by reason of insanity, court committed no error on trial of issue as to guilt in excluding all evidence tending to show mental condition at time of commission of offense, under Pen. Code, § 1020, as amended, and section 1026, as added by St. 1927, p. 1149, as against contention that under Cr. Prac. Act 1851 (St. 1851, p. 212), and

---

★Rehearing denied.

Pen. Code, §§ 1019, 1020, enacted in 1872, plea of not guilty puts in issue all matters tending to establish defense except former conviction and once in jeopardy.

7. Criminal law 🔑48—Doctrine of partial insanity is not recognized in California.

Doctrine of partial insanity is not recognized in California, but in order for insanity to be defense defendant must have been so deranged that he was not conscious of wrongful nature of act.

8. Homicide 🔑199—Only evidence concerning circumstances connected with offense is admissible to enable jury to determine whether death penalty should be imposed in murder case.

In prosecution for murder, only evidence admissible for purpose of enabling jury to determine whether death penalty should be imposed in event of guilt of murder in first degree is evidence concerning circumstances connected with offense.

9. Homicide 🔑27—Insanity cannot be used to reduce crime from first degree murder to second degree murder.

Insanity of defendant in prosecution for murder cannot be used to reduce crime from first degree murder to second degree murder.

10. Criminal law 🔑573, 635—In murder case, trial of issue of insanity separately did not prevent trial from being "one speedy public trial," within constitutional requirement (Pen. Code, §§ 1016, 1020, as amended, and § 1026, as added by St. 1927, pp. 1148, 1149).

Trial for murder *held* to be one speedy and public trial, and no more, within provisions of Constitution, notwithstanding that issue of insanity was tried separately, under provisions of Pen. Code, §§ 1016, 1020, as amended, and section 1026, as added by St. 1927, pp. 1148, 1149.

[Ed. Note.—For other definitions, see Words and Phrases, First, Second, and Third Series, Speedy Trial.]

11. Homicide 🔑237—As general rule, defendant in murder case must prove insanity by preponderance of evidence (Pen. Code, § 1105).

In prosecution for murder, general rule is that one who tenders issue of defendant's insanity as bar to punishment for offense committed must satisfactorily establish such insanity by preponderance of evidence, under Pen. Code, § 1105.

12. Constitutional law 🔑55—Statutory provision that on trial as to guilt of murder defendant also pleading insanity shall be conclusively presumed sane held not invasion of province of judiciary (Pen. Code, § 1026, as added by St. 1927, p. 1149).

Provision of Pen. Code, § 1026, as added by St. 1927, p. 1149, that defendant in murder case entering pleas of not guilty and not guilty by reason of insanity shall be conclusively presumed sane on trial of plea of not guilty, *held* not invalid as invading province of judicial branch of government.

13. Criminal law 🔑655(1), 706—It was not misconduct for attorney and court to demonstrate, after evidence was closed, how many shells defendant's pistol would hold, pistol being in evidence.

In prosecution for murder, district attorney and court were not guilty of misconduct as to demonstration before jury, after evidence was closed, how many shells defendant's pistol would hold where pistol was already in evidence.

14. Homicide 🔑237—Evidence held to support finding that defendant, accused of murder, was sane at time of crime.

In prosecution for murder, evidence *held* sufficient to support finding that defendant was sane at time of crime on hearing on such issue under plea of not guilty by reason of insanity.

Preston, J., dissenting.

In Bank.

Appeal from Superior Court, El Dorado County; George H. Thompson, Judge.

Joe Troche was convicted of murder in the first degree with sentence of death, and he appeals. Affirmed.

Rehearing denied: PRESTON, J., voting for a rehearing.

Edmond H. Lomasney, of San Francisco, and William R. McKay, of Hanford, for appellant.

John O'Gara, of San Francisco, amicus curiæ.

U. S. Webb, Atty. Gen., and Henry S. Lyon and William F. Cleary, Deputy Attys. Gen., for the People.

WASTE, C. J. The appellant was charged with the murder of Mary Lorenzo, the killing occurring upon a trip to Nevada, where, according to appellant's story, they intended to be married. On the morning of November 20, 1927, a stockman residing at Negro Hill, Placer county, found the appellant seated back of the steering wheel of an automobile standing on the side of the road. He was in a reclining position, covered with blood, and with a gunshot wound in his head. On the right side of the car was the dead body of the girl. Her death had been caused through severance of the spinal cord from a gunshot wound passing through her neck from left to right. Appellant, who was able to talk, and to walk with assistance, stated to the stockman that he had killed the girl after a quarrel. He also stated to the constable, immediately called to the scene, that he had killed the girl. He made similar statements during his stay in a sanitarium in which he was placed during the time prior to his removal to the county jail. He signed a written statement containing a history of the affair in the office of the district attorney.

On arraignment the defendant entered a plea of not guilty, and also a plea of not guilty by reason of insanity. When the cause came on for trial, the court announced that it would submit the trial of both issues to the one jury then about to be selected, and explained to the prospective jurors the nature of the issues raised by the two pleas and the procedure to follow. On the voir dire the jurors were examined by the court as to their state of mind on each plea. When the examination of the jurors was completed, and those selected were sworn to try the cause, defendant, through his counsel, demanded of the court to know if, during the trial on the issue of not guilty, the defense would be permitted to offer evidence tending to prove the insanity of the defendant at the time of the alleged commission of the offense, and was informed that it would not, for the reason, assigned by the court, that on the trial of the issue of not guilty the defendant was "conclusively presumed to be sane."

The defendant, testifying in his own behalf on the trial of the issue of not guilty, claimed that he had no recollection or knowledge of how the tragedy occurred, and remembered nothing of what happened between the time he was driving in the automobile with the deceased and the time he was taken to the county jail. On cross-examination, however, he gave minute details of the trip, and identified doctors, nurses, officials, and other people who had seen and talked with him during his stay in the sanitarium and jail, and during the period when he claimed to have no recollection. At the conclusion of the trial of the first issue, which the court restricted to the circumstances connected with the offense and the subsequent conduct of the defendant, the jury returned a verdict of guilty of murder in the first degree, without recommendation. Over the objection of the defense, the trial court then directed that the question of the insanity of the defendant, raised by the plea of not guilty by reason of insanity, be forthwith submitted to the same jury which had just rendered the verdict of guilty. At the conclusion of the trial of the second issue, the jury returned its verdict that the defendant was sane at the time of the commission of the offense. The trial court thereupon pronounced its judgment and sentence that the defendant be executed on a day fixed. From the judgment and from the order denying his motion for a new trial the defendant has appealed.

The principal arguments for reversal in the case center in an attack on the constitutionality of the recently enacted law prescribing the procedure to be followed when a person accused of the commission of a penal offense interposes a plea of not guilty together with a plea of not guilty by reason of insanity. Pen. Code, §§ 1016, 1020, 1026. The questions presented in the instant attack on the validity of the Code sections are involved in a number of cases now on appeal to this court. It was because of that fact that a reargument and resubmission of this case was ordered.

Section 1016 of the Penal Code, which was amended in 1927 (St. 1927, p. 1148) to provide for the interposition of a fifth plea, "not guilty by reason of insanity," has already been considered by this court and its validity upheld. People v. Hickman (Cal. Sup.) 268 P. 909. See, also, the more recent case touching the subject: People v. Davis (Cal. App.) 270 P. 715. The provisions of section 1017, also amended in 1927 (St. 1927, p. 1149), and which prescribe the form in which pleas to an indictment or information must be entered upon the minutes of the court, being directory and procedural, and not in any way involving any substantive rights of a defendant, are not called in question.

Section 1020 of the Penal Code, also amended in 1927 (St. 1927, p. 1149), provides that matters of fact tending to establish a defense under certain pleas, including that of not guilty by reason of insanity, may not be given in evidence under the plea of not guilty. Section 1026 (new in 1927; St. 1927, p. 1149) provides that: "When a defendant pleads not guilty by reason of insanity, and also joins with it another plea or pleas, he shall first be tried as if he had entered such other plea or pleas only, and in such trial he shall be conclusively presumed to have been sane at the time the offense is alleged to have been committed. If the jury shall find the defendant guilty, * * * the question whether the defendant was sane or insane at the time the offense was committed shall be promptly tried, either before the same jury or before a new jury, in the discretion of the court. In such trial the jury shall return a verdict either that the defendant was sane at the time the offense was committed or that he was insane at the time the offense was committed. If the verdict or finding be that the defendant was sane at the time the offense was committed, the court shall sentence the defendant as provided by law." Then follows a provision as to the procedure to be taken in the event the verdict or finding be that the defendant was insane at the time of the commission of the offense, a question not here involved. The particular provisions just noted, and which were strictly followed, are the ones here under attack.

The arguments touching the validity of these provisions have been advanced from three points of view: First, that the present law affects the substantive rights of persons accused of crimes, and is unconstitutional and void in that it deprives a defendant of due process of law, and is an invasion of the guaranteed right of a citizen of this state to a common-law jury trial. Second, that, when properly construed, the statute eliminates from the consideration of the jury during the trial of the general issue the question of the "legal insanity" of the defendant—the only kind of insanity which excuses one from punishment for a crime committed—but does not prevent the introduction of evidence tending to establish the mental condition of the accused at the time the offense was committed, for the purpose of showing a lack of criminal intent, malice, or premeditation, such evidence to be also considered by the jury, in the exercise of its discretion in a trial for murder, in fixing the degree of the crime and the punishment at life imprisonment or the extreme penalty, if it finds the offense to have been murder in the first degree. Third, and in support of the validity of the law it is argued that the amendments in question relate merely to procedure in jury trials, and not to substantive law; that the procedural steps provided in no way infringe upon any rights secured to a defendant by the common law or by the state and Federal Constitutions.

[1] So far as the common law is concerned, it has no application to this particular question except in so far as it has been incorporated into our law by statutory enactment and judicial decision. It was but natural that the framers of the first state Constitution and those called upon to first construe the provisions of that document should turn to that system of jurisprudence with which they were most familiar for precedents in enactment and construction. But when California became organized as a state it began to enact its own statutes to take the place of the provisions of the common law. In 1872 it departed entirely from the ranks of the "common-law states," and, following the example particularly of the state of New York, it became a "Code state." It enacted four Codes, to wit, a Political Code, a Civil Code, a Code of Civil Procedure, and a Penal Code, and declared that each established the laws of the state respecting the subjects to which it related. One of the first provisions (section 4) in the Penal Code is that "the rule of the common law, that penal statutes are to be strictly construed," has no application to that Code, but that, to the contrary, "all its provisions are to be construed according to the fair import of their terms, with a view to effect its objects and to promote justice." In the same numbered section of each of the other Codes it is declared that the rule of the common law that statutes in derogation thereof are to be strictly construed has no application to such Code. At the same time it was enacted that the common law, if repugnant to or inconsistent with the Constitution of the United States or the Constitution or laws of this state, shall not be the rule of decision in the courts of this state. Pol. Code, § 4468. So long as the substance of the right to trial by jury, as guaranteed by the Constitution, is preserved, the procedure by which this result is reached is wholly within the discretion of the Legislature, and the courts may not set aside any legislation in this respect because the form of action—the mere manner in which the questions are submitted—is different from that which obtained at the common law. Walker v. New Mexico & S. P. R. R. Co., 165 U. S. 593, 596, 17 S. Ct. 421, 422, 41 L. Ed. 837, 841.

[2, 3] We are also satisfied that the present statutes in no way violate the "due process" provisions of either the federal or the state Constitutions. The words "due process of law" merely mean law in its regular course of administration, according to prescribed forms and in accordance with the general rules for the protection of individual rights. Kalloch v. Superior Court, 56 Cal. 229, 240. Due process of law is not limited to the due process of the settled usages of the past, but may include new methods of procedure unknown to the common law, provided they are in harmony with the accepted underlying principles of such procedure according to the traditions of the common law. They must be orderly and provide for reasonable notice and opportunity to be heard. Hurtado v. California, 110 U. S. 516, 4 S. Ct. 111, 28 L. Ed. 232; Twining v. New Jersey, 211 U. S. 78, 29 S. Ct. 14, 53 L. Ed. 97. Mr. Cooley, in his work on Constitutional Law, says (p. 224): "When life and liberty are in question there must, in every instance, be judicial proceedings; and that requirement implies an accusation, a hearing before an impartial tribunal with proper jurisdiction, and a conviction and judgment, before the punishment can be inflicted. But the states will prescribe their own mode of proceeding and trial." See, also, People v. Hickman, supra.

[4] Neither does the present law deprive an accused person of any of the essentials of a common-law jury trial. The state Constitution (art. 1, § 7) declares that "the right of trial by jury shall be secured to all, and remain inviolate," but does not define what that trial is. Whatever the framers of the Constitution may have had in mind, it seems to be thoroughly settled that the constitutional guaranty refers to the right to a trial by a jury as known at common law. In re Mana, 178 Cal. 213, 214, 172 P. 986, L. R. A. 1918E, 771. Juries at the common law were not always the same, but, through changing conditions and gradual development, it came about that a jury for the trial of a cause was established to be "a body of twelve men, described as upright, well qualified and lawful men, disinterested and impartial, not of kin, nor personal dependents of either of the parties, having their homes within the jurisdictional limits of the court, drawn and selected by officers free from all bias in favor or against either party, duly impaneled under the direction of a competent court, sworn to render a true verdict according to the law and the evidence given them; who, after

hearing the parties and their evidence, and receiving the instructions of the court relative to the law involved in the trial, and deliberating, when necessary, apart from all extraneous influences, must return their unanimous verdict upon the issues submitted to them." Opinion of Justices, 41 N. H. 550, 551, quoted approvingly in Capital Traction Co. v. Hof, 174 U. S. 1, 15, 19 S. Ct. 580, 586 (43 L. Ed. 873). To the same effect, but more concisely stated, was the first definition of a trial jury adopted by the Legislature in this state. Section 193 of the Code of Civil Procedure, enacted in 1872, read: "A trial jury is a body of men returned from the citizens of a particular district before a court or officer of competent jurisdiction, and sworn to try and determine, by [unanimous] verdict, a question of fact." Other than an amendment adopted in 1880, striking out the word "unanimous," in order to permit of a verdict by three-fourths of the jury in civil cases, in accordance with the provision of the new Constitution adopted in 1879, and another amendment in 1917, substituting the word "persons" for the word "men," in order to provide for women jurors, the definition of a jury in this state has remained the same. It is therefore manifest that there is nothing in the new enactments to in any way interfere with the constitutional right of a citizen to a trial by jury, as established by the common law and guaranteed by the federal and state Constitutions. See Smith v. Western Pac. R. Co., 203 N. Y. 499, 96 N. E. 1106, 40 L. R. A. (N. S.) 137, Ann. Cas. 1913B, 264.

[5] It has been very earnestly argued that the provision that, during the trial of the first issue, one who has interposed the plea of not guilty by reason of insanity shall be conclusively presumed to have been sane at the time of the commission of the offense—the question of his sanity to be subsequently determined, if he be found guilty of the offense charged—amounts to a splitting of the issues and a trial by piecemeal. This contention rests upon the proposition that the issue of not guilty under the first plea contains within it the issue of sanity or insanity. That is undoubtedly true where, as under the old system, but one plea was required; but it does not follow that there is any legal objection to the procedure now prescribed. The plea of insanity is, and of necessity must be, a plea of confession and avoidance. State v. Lawrence, 57 Me. 574, 583; People v. Leong Fook, Crim. 3143, 273 P. 779, this day decided. The requirement under the present system, that the two issues be separately tried, while a departure from the old method of procedure, is but a departure in procedure. Each issue must still be tried by a jury of 12 impartial persons, and the verdict must be unanimous. In substance, the old and the new systems are alike. The guaranteed right of a trial by jury is as inviolate and just as much secured to all under the new system as it was under the old.

The interposition of special pleas by way of abatement, or for the purpose of avoiding punishment for offenses committed, has long been permitted in this state and in other jurisdictions. Special pleas of a former judgment of conviction or acquittal of the offense charged, and of once in jeopardy, have long been recognized. Pen. Code, § 1016. In other jurisdictions defendants are required to interpose the special plea of not guilty by reason of insanity where insanity is relied upon for the purpose of escaping punishment, the finding of the jury on that fact to be conclusive during the subsequent proceedings in the cause. Courts in those states have uniformly held that such procedure does not amount to a violation of constitutional provisions, relating to jury trials, similar to our own. In Bennett v. State, 57 Wis. 69, 14 N. W. 912, 46 Am. Rep. 26, the court upheld the validity of a statute requiring that a defendant specially plead insanity, when relied on as a defense, the issue on the special plea to be first tried; if the verdict of the jury be that the defendant was sane at the time of the commission of the offense, his trial upon the plea of not guilty to at once proceed before the same jury, and the finding of the jury on the special plea to be final and conclusive for the purpose of the further trial. Under provisions of a Constitution similar to our own, the Supreme Court of Wisconsin held that there was no constitutional objection to the statute, and that the other objection, that it required the jury to dispose of the special plea by a verdict thereon before the trial proceeded upon the plea of not guilty, was one relating to the form of jury trial, and not to substance. The court said: "All the issues would still be tried by a jury, in the same way they are now tried. * * * It is clear, if the legislature have the power to compel the defendant to plead insanity as a defense, or waive it, then it has the power to prescribe the manner of disposing of that issue on the trial so long as it leaves the accused a trial by jury upon such issue." See, also, Hempton v. State, 111 Wis. 127, 86 N. W. 596; Oborn v. State, 143 Wis. 249, 126 N. W. 737, 31 L. R. A. (N. S.) 966.

A statute of Alabama providing that where the defense of insanity is relied upon it must be set up by a special plea, and cannot be put in issue under a general plea of not guilty, was held not to contravene any constitutional guarantee. Walker v. State, 91 Ala. 76, 9 So. 87; Baker v. State, 209 Ala. 142, 95 So. 467. In People v. Hickman, supra, this court upheld the constitutionality of section 1016 of the Penal Code, which has the same effect as the Alabama statute. See, also, Ex parte Brown, 39 Wash. 160, 81 P. 552, 553, 1 L. R. A. (N. S.) 540, 109 Am. St. Rep. 868, 4 Ann.

Cas. 488, and State v. Saffron, 146 Wash. 202, 262 P. 970.

[6, 7] The trial court committed no error in strictly following the letter of the statute (Pen. Code, §§ 1020 and 1026) and excluding, on the trial of the general issue of not guilty, all evidence tending to show the mental condition of the defendant at the time of the commission of the offense. The doctrine of "partial insanity," announced by some authorities, particularly Wharton in his work on Criminal Law, has never been recognized as the law in this jurisdiction. In this state, in order that "insanity may be available as a defense to a crime charged, it must appear that the defendant, when the act was committed, was so deranged and diseased mentally that he was not conscious of the wrongful nature of the act committed. If he has reasoning capacity sufficient to distinguish between right and wrong as to the particular act he is doing, knowledge and consciousness that what he is doing is wrong and criminal and will subject him to punishment, he must be held responsible for his conduct. Although he may be laboring under partial insanity,—as, for instance, suffering from some insane delusion or hallucination,—still if he understands the nature and character of his action and its consequences,—if he has knowledge that it is wrong and criminal, and that if he does the act he will do wrong, such partial insanity or the existence of such delusion or hallucination is not sufficient to relieve him from responsibility for his criminal acts." People v. Willard, 150 Cal. 543, 554, 89 P. 124, 129; People v. Kerrigan, 73 Cal. 222, 225, 14 P. 849. See, also, People v. Hurtado, 63 Cal. 288. In this state "so far as accountability to the law is concerned, there is no middle ground." People v. Perry, 195 Cal. 623, 639, 234 P. 890, 896. Such is the law in many jurisdictions. Warner v. State, 114 Ind. 137, 16 N. E. 189; United States v. Lee, 4 Mackey (D. C.) 489, 54 Am. Rep. 293; Commonwealth v. Wireback, 190 Pa. 138, 42 A. 542, 70 Am. St. Rep. 625; Dean v. State, 105 Ala. 21, 17 So. 28; Wartena v. State, 105 Ind. 445, 5 N. E. 20; Kirby v. State, 68 Tex. Cr. R. 63, 150 S. W. 455. "Protection is always afforded in courts of law to persons of unsound mind. Distinction is made between sanity and insanity in people, but not as respects their grade of intelligence. The law does not attempt to measure degrees of intellect nor to make distinction with respect thereto, where the power of thought and reason exists." State v. Schlaps, 78 Mont. 560, 578, 254 P. 858, 863. In 14 R. C. L. page 599, § 54, it is said: "It is the general rule that insanity, when interposed as a defense in a criminal prosecution, is either a complete defense or none at all, and it has been held that there is no degree of insanity sufficient to acquit of murder but not of manslaughter." A valuable note on this subject is found in the case of Knights v. State, 76 Am. St. Rep. 83 (58 Neb. 225, 78 N. W. 508).

It follows, therefore, that any evidence tending to establish the insanity of the defendant under his plea of not guilty by reason of insanity at the time of the commission of the homicide, other than evidence of the immediate circumstances of the offense, would have been irrelevant and immaterial on the trial of the general issue as to the guilt or innocence of the defendant raised by the general plea of not guilty. As the statute accorded the defendant his full right, and ample opportunity to submit to a jury his plea of insanity at the time of the commission of the offense, in excuse of his act and as a reason why no penalty of the law should be visited upon him, it follows that the trial court correctly excluded the evidence on the trial of the general issue.

[8, 9] Furthermore, the only evidence admissible for the purpose of enabling the jury to determine whether the death penalty or life imprisonment should be imposed in the event the defendant should be found guilty of murder in the first degree was the evidence which the court did admit, and which concerned "the circumstances connected with the offense." People v. Golsh, 63 Cal. App. 609, 613, et seq., 219 P. 456. See, also, People v. Witt, 170 Cal. 104, 110, 148 P. 928. The insanity of a defendant cannot be used for the purpose of reducing his crime from murder in the first degree to murder in the second degree. If responsible at all in this respect, he is responsible in the same degree as a sane man, and if he is not responsible at all he is entitled to an acquittal in both degrees. State v. Maioni, 78 N. J. Law, 339, 74 A. 526, 528, 20 Ann. Cas. 204.

[10] From these general deductions, applicable to all the cases now in this court in which the new law relating to the plea of insanity in criminal cases is under attack, we pass to a consideration of the special matters raised by the appellant, Troche, in his appeal. Counsel for appellant argues that the provision of the state Constitution guaranteeing a public and a speedy trial to one accused of a crime "means *one* speedy and public trial, and no more." The trial had by the defendant, under the present law, amounted to one trial, and no more. The defendant was charged with the commission of but one crime, and his pleas to the one accusation, constituting his answer and defense, tendered the issues for investigation by the court and the jury selected to try the case. Whether the issue of the guilt or innocence of the accused should be tried before or after the trial of the issue of his sanity or insanity was a question to be determined by the Legislature. The order in which the inquiry upon the issues is to be conducted in such a case is a matter which may be regulated by statute, and, if the course prescribed gives the accused the

right to present his defense fully upon the trial of the case, he is not deprived of any right or privilege incident to the common-law jury trial. Schissler v. State, 122 Wis. 365, 379, 99 N. W. 593.

Appellant further contends that, as the Criminal Practice Act of 1851 (St. 1851, p. 212) and sections 1019 and 1020 of the Penal Code, enacted in 1872, provide that the plea of not guilty puts in issue every material allegation of the indictment or information, and that all matters of fact tending to establish a defense, other than a former judgment of conviction, and once in jeopardy, may be given in evidence under such plea, the action of the trial court in this case was error. An answer to the contention is that the whole matter of trial is one of procedure, which is subject to the control of the Legislature, within the limitations we have already discussed, none of which were transcended in the enactment of the new law. A more complete answer to this contention will be found in the decision of this court in People v. Leong Fook, Crim. 3143, 273 P. 779, supra.

[11, 12] Another contention of the appellant is that the Legislature has no right or power to enact a law declaring that, at the time of the commission of an offense, an accused shall be conclusively presumed to have been sane, or that, at any given time, a person is conclusively presumed to be sane or insane, and that when the Legislature does so it is invading the province of the judicial branch of the government. If the Legislature had gone so far as the appellant would lead us to believe, his contention would arouse considerable interest; but it has not. The presumption established is one merely for the purpose of a trial, and is not one of guilt, but only a presumption of sanity. The whole law relating to crimes rests upon the presumption of sanity, and, if it does not exist in any particular case, such case is an exception, and the absence of sanity must be proved by the person asserting it. In conformity with that principle, one who tenders the issue of insanity, as a bar to punishment for an offense committed, must satisfactorily establish such insanity by a preponderance of the evidence. In other matters the accused has only the burden of raising a reasonable doubt in the minds of the jurors. It has long been the law of this state that: "Upon a trial for murder, the commission of the homicide by the defendant being proved, the burden of proving circumstances of mitigation, or that justify or excuse it, devolves upon him, unless the proof on the part of the prosecution tends to show that the crime committed only amounts to manslaughter, or that the defendant was justifiable or excusable." Pen. Code, § 1105. In view of the general presumption of sanity, which abides until overthrown by the accused by a preponderance of evidence, the Legislature has deemed it wise to provide that the plea of insanity at the time of the commission of the offense must be made in a special manner, and that, unless the issue is raised in that way, it will be held to be waived for the purpose of the trial. It goes no further. If the plea may be waived, it would seem to logically follow that, for the purpose of the trial, the accused may be conclusively presumed to have been sane when he committed the act.

The appellant complains that upon the voir dire "not one question was asked by the court of any talesmen as to their views as to the defense of insanity." Aside from the fact that appellant's counsel might have examined the jurors on that subject, it seems that he is mistaken in making this assertion. The reporter's transcript shows that the court, on the voir dire, fully instructed the jurors as to the nature of the charge and the defenses the defendant was entitled to make, including the defense of insanity, and asked the jurors if, in view of a trial of the second issue—that of the insanity of the defendant—any of them had any objection to that defense, and if any of them "knew of any reason of any kind whatever why [they] could not act fairly and impartially." Subsequently, when the clerk of the court read the information and stated the plea of the defendant, the court very fully defined the issues to the jury, in the light of the two pleas. The court appears to have made it very clear at that time that, if the jury returned a verdict of guilty on the first issue, it would at once submit the issue of insanity to it.

[13] It is contended that the court and the district attorney were guilty of misconduct, the former in permitting, and the latter in demonstrating before the jury, after the evidence was closed, how many shells the pistol of the defendant would hold. As the pistol was already in evidence, it does not appear that any error resulted from the action complained of.

[14] In support of his plea that he was insane at the time of the homicide, and that the direct cause of the act was an attack of insanity suffered by him after his fiancée and he left San Francisco, appellant offered evidence showing that he had received a severe fracture of the skull by a fall from a tree when he was 10 years old, and that he had suffered from temporary insanity on many occasions. There is no question but that all those facts were established; but, a doctor who had the defendant under observation from the time of the homicide until the trial, during which period the defendant talked freely of his crime, testified that, during the greater part of that period the defendant was rational. The superintendent of one of the state hospitals for the insane, testifying as an expert, declared the defendant was sane when he committed the homicide. Under full and accurate instructions on the sub-

ject of insanity, as viewed in this state, when interposed by one seeking immunity from punishment for a crime committed, the jury found that the defendant was sane at the time he killed his sweetheart. The finding of the jury concludes the question.

The judgment is affirmed.

We concur: SHENK, J.; CURTIS, J.; RICHARDS, J.; LANGDON, J.; SEAWELL, J.

PRESTON, J. I dissent. I cannot reach the conviction that the majority opinion is sound. No authority is cited that supports it. In fact, I do not believe it covers accurately the points of attack upon the validity of the statutes. The first statute involved may be set out again as follows:

Section 1026 of the Penal Code, enacted in 1927, reads in part: "When a defendant pleads not guilty by reason of insanity, and also joins with it another plea or pleas, he shall first be tried as if he had entered such other plea or pleas only, and in such trial he shall be conclusively presumed to have been sane at the time the offense is alleged to have been committed. If the jury shall find the defendant guilty, or if the defendant pleads only not guilty by reason of insanity, then the question whether the defendant was sane or insane at the time the offense was committed shall be promptly tried, either before the same jury or before a new jury, in the discretion of the court. In such trial the jury shall return a verdict either that the defendant was sane at the time the offense was committed or that he was insane at the time the offense was committed. * * *"

With this provision must stand or fall the amendment passed at the same time to section 1020 of the Penal Code, which amendment omits the word "and" formerly found between the words "third" and "fourth," in line 2, and adds after the said word "fourth" the words "and fifth," making the section as amended read as follows: "All matters of fact tending to establish a defense other than one specified in the third, fourth, and fifth subdivisions of section 1016, may be given in evidence under the plea of not guilty." The effect of said amendment is to provide that evidence of insanity at the time of commission of the act may not be given upon the trial under the plea of "not guilty." It should also be first noted that likewise, in 1927, section 1016 of the Penal Code was amended to provide for the interposition of this fifth plea, to wit, a special plea of "not guilty by reason of insanity."

As I understand the main opinion, it concludes that the steps inserted in the statutes by the amendments of 1927 were merely procedural, involving no invasion of the substantial rights of a defendant. It is my view that no legal basis can be found upon which to rest these provisions, and, moreover, that no beneficial results can flow from their practical operation. The conscience immediately rebels when the effect of these provisions is contemplated. They are no more nor less than provisions intended to hamper the free, full, and fair consideration of the cause by the jury, a cause, too, which involves the life or liberty of the citizen. The state, representing the whole people, can least afford to be cruel or unjust. These provisions savor of oppression. The rights of the state and the accused are not equal upon entering the temple of justice. The scales of justice are out of balance. A man may not be both guilty and innocent at the same time of a single charge. If the defendant, though insane or an idiot, must first be convicted, and then inquiry by the same jury is made as to his innocence, something is radically wrong. Such a law seems, on its face, clearly to be a step toward a return to the dark ages.

It will be noted that, on the first half of this bifurcated trial or hearing under this procedure, the jury may not stop by merely finding that the defendant physically did or did not do the prohibited act. The jury must go further and find the existence or absence of all the elements of the crime charged. The jury must convict the defendant before any verdict adjudicating sanity may be announced. Even though the jury believe the defendant to have been insane, and, for that matter, to be still insane, yet under its oath it must, in violation thereof, attribute sanity to him, convict him of the crime, report the finding to the court, and assent in open court to the result. Indeed, in a case of first degree murder the jury must also fix the punishment at life or death. The defendant, in other words, with condemnation resting upon his head, and in some instances with execution facing him, must submit the issue of his sanity to the judgment of his condemners, condemners who have already adjudged him sane upon a modicum only of the available evidence that should have been considered by them. I repeat that a sovereign must indeed be unjust who exacts a verdict of guilty by such a method. Surely this court has the power and is charged absolutely with the duty of preventing such a misuse of the machinery of justice.

But the legal infirmities of these provisions are easily discerned. They undertake to subdivide an indivisible integer, and therein lies their chief infirmity. In other words, the plea of not guilty necessarily includes within it the element of insanity. This is true not because of any legislative fiat, but because sanity is a fundamental element of all amenableness to punishment and is the prime ingredient of the criminal legislation of all civilized countries. See Pen. Code, §§ 20, 21, 26. There can be no malice, deliberation, or premeditation without sanity. There can be no criminal intent—indeed, no criminal act—where there is no sanity. If the jury, in ascertaining the intent of the defendant, may not consider the evidence of his insanity, it must follow that the Legislature has the power to dispense entirely with the element of intent. Yes, more is true: If the jury may not, before assessing guilt to the defendant, consider the fact that he is insane, not only may criminal intent be dispensed with, but the time-honored and almost sacred presumption of innocence may be set at naught by the lawmaking power. See State v. Strassburg, 60 Wash. 106, 110 P. 1020, 32 L. R. A. (N. S.) 1216, Ann. Cas. 1912B, 917.

What think ye of a statute providing that, if A commits the physical act of killing B, he shall be declared by law guilty of murder in the first degree, and upon arrest of the person thought to be the criminal he shall be conclusively presumed to be the party wanted, but, after his conviction, he may for the first time have a hearing before the same jury as to whether or not he is the man who really committed the act? If the provisions under review are procedural only, so must it be in the situation I have supposed.

What a storm of protest would arise if the Legislature had provided that, on the first trial under this procedure, a defendant is conclusively presumed to have been insane. Would the prosecution have admitted then that this change was only procedural? Or suppose that the Legislature had provided that on the first trial sanity should be conclusively presumed, but on the second trial insanity should be conclusively presumed. This mere act of reforming procedure would in that case be an entire nullification of the whole criminal law. Would such a strangulation of justice be held procedural only? So a mere contemplation of the effect of these provisions proves more clearly than words could express that the procedure outlined by the statutes is a procedure which destroys for all practical purposes the defense of insanity and thereby destroys one of the principal rights of a person charged with the crime.

It has been said, however, that these changes are procedural because the verdict on the first trial is but a conditional verdict. Is it possible that motive or criminal intent exists or can exist conditionally or hypothetically? They are either present or absent. The admixture making up the compound of criminal intent is not capable of a hypothetical or conditional or presumed existence. It may not be presumed to exist, then reach a conclusion of guilty based on such presumption, and, while still holding to this conclusion, undertake to determine the existence of intent. This is "boot strap" lifting, petitio principii.

Would any one defend a statute which provided that a defendant must first be found guilty and then the same jury be required to retire and consider whether or not the defendant committed the act or was in fact the party wanted for the crime? This contention that the verdict is only conditional illuminates the positive conclusion that the statute is mischievous, unfair and unjust, and contrary to the basic principles underlying our criminal law. Again it is said that it is procedural because on the second trial the jury may pass upon the question of the defendant's sanity. We have already observed that there could be no criminal intent, malice, premeditation, or deliberation without the functioning of a sound but vicious mind. We have already observed that sanity is a necessary element of all crime. A defendant who is convicted has been thereby not only found guilty, but also found to be sane. This conclusion is inescapable and undeniable. The jury on the first hearing has therefore passed upon the defendant's sanity, determined the issue against him, and done so on a consideration of a portion only of the evidence that must be again passed upon at the second or final hearing.

Is a juror, who, after having heard the circumstances of the offense, and after having seen the defendant, and after having heard his testimony, has decided that he is sane, in any condition of mind to be impartial when sitting in review upon his own act solemnly performed under oath and reported to the court? I submit that no juror, whatever his degree of mentality or whatever his degree of theoretical fairness, could impartially rejudge the second issue. No human mind, with the elements we know to exist in it, could do so. That is why our statute (section 1073, subd. 2, Pen. Code) provides that a juror may be challenged "for the existence of a state of mind" in reference to the case, "which will prevent him from acting with entire impartiality and without prejudice to the substantial rights of either party." That is also the reason underlying section 1074 of the Penal Code (subdivision 4), which provides that a citizen may not sit as a juror if he has served on the grand jury which found the indictment, or on a coroner's jury which inquired into the death of a person whose death is the subject of the indictment or information; and subdivision 6 of the same section, which forbids a citizen to sit as a juror if he has been "one of a jury formerly sworn to try the same charge, and whose verdict was set aside, or which was discharged without a verdict, after the case was submitted to it." Yet under the statutes under review it is permissible for the jury which has actually convicted the defendant, and in this case sentenced him to death, to sit again upon the issue of sanity.

The contention is made that there is but one trial. If this is true, then why not dispose of both pleas at one hearing? Why seek to prejudice, shackle, and intimidate the jury by calling them into court in the midst of their deliberations and have them deliver a verdict which prejudges the undetermined issue involved? It is no parallel to this situation to say that the pleas of former acquittal, former conviction, or other special pleas may be heard separately, and therefore the plea of insanity may also be heard in like manner. This is untenable for the reason pointed out above, that insanity is a necessary ingredient of the plea of not guilty, whereas these special pleas rest upon their own separate foundations, and do not depend in any respect upon the plea of not guilty.

Reference is made to the case of Bennett v. State, 57 Wis. 69, 14 N. W. 912, 46 Am. Rep. 26, wherein the court upheld the validity of a statute requiring that a defendant specially plead insanity, when relied on as a defense, the issue on the special plea to be first tried. That procedure is not constitutionally objectionable, and the reason is that, on that issue, every item of evidence admissible under the plea of not guilty may be heard and should be heard on the plea of insanity, and the result is that such a practice involves two separate, distinct, but full and complete, trials of the case. No defendant can constitutionally object to such procedure, nor could he object to a procedure which authorized a new jury for the issue of insanity if the whole field of guilt or innocence could again be traversed. That this duplicate procedure was found impracticable is evidenced by the fact that in 1911 the state of Wisconsin abandoned it by repeal of the statute.

However, in the case of French v. State, 85 Wis. 400, 55 N. W. 566, 21 L. R. A. 402, 39 Am. St. Rep. 855, where the jury which sat on the insanity hearing was unable to agree and was required to sit upon the plea of not guilty over the objections of defendant, the court of that same state had this to say: "The case stood precisely as it would if these statutes in relation to a special issue of insanity had not been enacted. The accused is placed on trial for the crime. His insanity is a question material to the case. A jury is forced upon him to try his case, all of whom had formed and expressed an opinion on the question whether he was or was not insane when he killed the deceased. Does the law suffer or sanction such a biased, partial, and prejudiced jury for the trial of one charged with the crime of murder? Any one would say that this would be a judicial outrage upon the legal and constitutional rights of the accused. And yet this is just such a case. The accused has the right to demand that he be tried before a fair and impartial jury. Constitution, article 1, section 7, provides that the accused shall have 'a speedy public trial before an impartial jury.' Besides this, the right of the accused to have a jury specially selected and impaneled to try him for the crime charged, and his right of challenge, were cut off and denied. It is obvious and self-evident that this jury was an unlawful one, and that the accused was deprived of his constitutional right of trial by jury. It has been uniformly held, and from early times in the history of jury trials for crime, that the grand jury that found the indictment, and each of one of them, is disqualified from sitting on the petit jury to try the accused."

This language is clearly applicable to a jury which the law requires to report their adverse conclusion before they finish their deliberations on the same issue. "Due process of law" is defined as follows: "By the law of the land is most clearly intended the general law; a law, which hears before it condemns; which proceeds upon inquiry, and renders judgment only after trial. The meaning is, that every citizen shall hold his life, liberty, property, and immunities, under the protection of the general rules which govern society. Everything which may pass under the form of an enactment, is not, therefore, to be considered the law of the land." Dartmouth College v. Woodward, 4 Wheat. (17 U. S.) 518, 581 (4 L. Ed. 629). Volumes might be quoted on this subject, but no clearer statement can be found than the above. Who can state that these provisions meet this test?

In thus making a judicial inquiry as to the existence of a fact, to wit, guilt or innocence, the court and jury are circumscribed by a legislative declaration which forbids the introduction of essential evidence upon that issue by declaring that a necessary element of guilt be conclusively presumed. Is this due process of law? Has the defendant in such case had his full day in court? May the Legislature thus commit an incursion into the domain of the courts? The answer universally given is "No." Even in civil cases, unless the Legislature is making substantive law and not merely rules of evidence, it may not make one fact conclusive evidence of another.

Says Mr. Wigmore (2 Wigmore on Evidence [2d Ed.] page 1057, § 1353): "The judicial function under the Constitution is to apply the law in controverted cases; to apply the law necessarily involves the determination of the facts; to determine the facts necessarily involves the investigation of evidence as a basis for that determination. To forbid investigation is to forbid the exercise of an indestructible judicial function. To make a rule of conclusive evidence, compulsory upon the Judiciary, is to attempt an infringement upon their exclusive province."

Again, Judge Cooley wrote: "But there are fixed bounds to the power of the legislature over this subject which cannot be exceeded. As to what shall be evidence, and which party shall assume the burden of proof in civil cases, its authority is practically unrestricted, so long as its regulations are impartial and uniform; but it has no power to establish rules which, under pretense of regulating the presentation of evidence, go so far as altogether to preclude a party from exhibiting his rights. Except in those cases which fall within the familiar doctrine of estoppel at the common law, or other cases resting upon the like reasons, it would not, we apprehend, be in the power of the legislature to declare that a particular item of evidence should preclude a party from establishing his rights in opposition to it. In judicial investigations the law of the land requires an opportunity for a trial; and there can be no trial if only one party is suffered to produce his proofs." 2 Cooley's Constitutional Limitations (8th Ed.) Carrington, pp. 768, 769.

In State v. Beach, 147 Ind. 74, 79, 46 N. E. 145, 146 (36 L. R. A. 179), the rule, with a superabundance of authority to sustain it, has been stated as follows: "We think it clear that the legislature has the power to prescribe rules of evidence and methods of proof. A law which would, in effect, exclude the evidence of a party, and thereby deny him the right to be heard, would deprive him of due process of law. A law which provides that certain facts are conclusive proof of guilt would be unconstitutional, as also would one which makes an act prima facie evidence of crime which has no relation to a criminal act, and no tendency whatever to establish a criminal act. If, however, the legislature in prescribing the rules of evidence in any class of cases, leaves a party a fair opportunity to establish his case or defense, and give in evidence to the court or jury all the facts legitimately bearing on the issues in the cause to be considered and weighed by the tribunal trying the same, such acts of the legislature are not unconstitutional."

In Vega S. S. Co. v. Consolidated Elevator Co., 75 Minn. 308, 312, 77 N. W. 973, 974 (43 L. R. A. 843, 74 Am. St. Rep. 484), the court in discussing the legality of a statute that made conclusive the certificate of a state weighmaster, said: "But is it competent for the legislature to make the weight thus ascertained absolutely conclusive? We are of the opinion that it is not. The legislature cannot in this manner provide for the arbitrary exercise of power, so as to deprive a person of his day in court to vindicate his rights. And the law which closes his mouth absolutely when he comes into court is the same, in effect, as the law which deprives him of his day in court [citing many cases]."

An early annotator stated the rule as follows: "In criminal prosecutions, we apprehend that under no circumstances can the legislature create a conclusive presumption of guilt, nor deprive the accused of the right to offer proof of his innocence, nor require the jury to disregard such proof, nor to give effect to any presumption of the truth of which they are not satisfied. Voght v. State, 124 Ind. 358 [24 N. E. 680]; State v. Beswick, 13 R. I. 211, 43 Am. Rep. 26." Note: People v. Cannon, 36 Am. St. Rep. 689 (139 N. Y. 32, 34 N. E. 759).

A case often cited and frequently distinguished, but at no time overthrown, is Hammond v. State, 78 Ohio St. 15, 84 N. E. 416, 15 L. R. A. (N. S.) 906, 125 Am. St. Rep. 684, 14 Ann. Cas. 732, a case where the court had under consideration a statutory provision as follows: "The character of the trust or combination alleged may be established by proof of its general reputation as such." The court, in declaring it invalid, said: "It may be conceded that, within proper constitutional limits, the legislature has the general power to prescribe rules of evidence and methods of proof,—to determine what may or may not be competent evidence in a particular case,—and, with certain qualifications, has, perhaps, the power to enact and prescribe that in criminal prosecutions certain facts, when duly established, shall be held to be presumptive or prima facie evidence of guilt. But this power is not without its limitations, one of which is that the legislature may not arbitrarily create a conclusive presumption of guilt against the accused, as to any element of the crime charged, by giving artificial and evidential force and effect to certain facts which otherwise would be wholly irrelevant and inconclusive. * * * Thus, the statute in terms makes proof of the general reputation of the trust or combination, not only competent evidence against the accused, but sufficient and conclusive evidence of the unlawful and criminal character of the combination to which he may belong. This, in effect, is to deprive the accused of the protection of the cardinal presumption that every person is to be presumed innocent until he is legally proven guilty,—a presumption which attends the accused throughout his trial, and has reference and relation to every fact that must be established in order to prove his guilt beyond a reasonable doubt. If the general assembly, in order to make conviction easier under this act, can rightfully provide that one of the essential and constituent elements of the crime charged, viz., the unlawful character of the trust or combination, may be shown and made certain by proof of common rumor or general reputation, and the guilt of the accused be thus established, it is difficult to see why it may not, with equal right, provide that murder, arson, or any other crime may be thus established by proof that the person accused thereof is generally reputed to be the person who committed the same—a proposition at once so obnoxious and repugnant to the plainest principles of reason and justice that none would yield assent to it. * * * To concede to the legislature the power to provide, in prosecutions under the act here in question, that the unlawful character of the combination to which the defendant belongs may be established—that is, made certain—by proof of its general reputation as such, is to grant that the legislature has power to, and may, in a criminal case, prescribe a rule of conclusive evidence as to a vital and controlling fact that shall be binding alike upon court and jury. This the general assembly may not do."

Mr. Justice Lurton, in the case of Mobile, etc., R. R. v. Turnipseed, 219 U. S. 35, 42, 43, 31 S. Ct. 136, 137 (55 L. Ed. 78, 32 L. R. A. [N. S.] 226, Ann. Cas. 1912A, 463), summed the whole situation up in a single paragraph: "The law of evidence is full of presumptions, either of fact or law. The former are, of course, disputable, and the strength of any inference of one fact from proof of another depends upon the generality of the experience upon which it is founded. * * * Legislation providing that proof of one fact shall constitute prima facie evidence of the main fact in issue is but to enact a rule of evidence, and quite within the general power of government. Statutes, national and state, dealing with such methods of proof in both civil and criminal cases abound, and the decisions upholding them are numerous. * * * That a legislative presumption of one fact from evidence of another may not constitute a denial of due process of law or a denial of the equal protection of the law it is only essential that there shall be some rational connection between the fact proved and the ultimate fact presumed, and that the inference of one fact from proof of another shall not be so unreasonable as to be a purely arbitrary mandate. So, also, it must not, under guise of regulating the presentation of evidence, operate to preclude the party from the right to present his defense to the main fact thus presumed."

A recent annotator put the question in this form: "The general proposition is supported by many cases that a legislature cannot constitutionally make one fact conclusive evidence of another material fact in controversy, if the former is not, in and of itself, by virtue of its own force, conclusive." 51 A. L. R., page 1149. See Griffin v. State, 142 Ga. 636, 83 S. E. 540, L. R. A. 1915C, 716, Ann. Cas. 1916C, 80.

It will be noted that the above quotations from the opinion in the case of Hammond v. State, supra, bring vividly into play the further evident proposition that to conclusively presume any ingredient of crime is to clash squarely with the presumption of innocence. The defendant in such case enters upon his trial not surrounded by this ancient and wise safeguard but must yield that advantage in part at least to a presumption of an element of guilt which, though he may be able to do so, the strong arm of the law forbids him an opportunity to combat.

This is no time or place for a lengthy dissertation upon this presumption, but it may be well remembered that its object is to protect the innocent and not to shield the guilty. It is a presumption of both law and fact. It was present in the Roman law, and some authorities state that it marks back through Sparta and Athens to the Book of Deuteronomy. It was known to be a part of the common law as early as 1802. In 1817 Lord Gillies, in McKinley's Case (33 St. Tr. 275, 506), in speaking of this presumption said, among other things: "It is a maxim which ought to be inscribed in indelible characters in the heart of every judge and juryman; and I was happy to hear from Lord Hermand he is inclined to give full effect to it. To overturn this, there must be legal evidence of guilt, carrying home a degree of conviction short only of absolute certainty."

Blackstone maintained (1753–1765) that: "The law holds that it is better that ten guilty persons escape than that one innocent suffer." 4 Bl. Com. c. 27, margin page 358, ad finem.

It is the strongest presumption known to the law. It is as much a part of our Constitution, both state and national, as if it were written therein in letters of burnished gold. This fact has been assumed many times in this state and in one case at least expressly stated (In re Wong Hane, 108 Cal. 680, 41 P. 693, 49 Am. St. Rep. 138). We presume that no one would contend that this presumption could be overthrown by any statutory enactment. Prima facie evidence or presumptions may be declared to exist where they flow logically from certain facts, but the presumption of innocence is ever present even in the deliberations of the jury and may alone and of itself sometimes avail to acquit the defendant.

This court should be quick and decisive in its action to declare anew our Bill of Rights and to preserve the essential attributes of a jury trial as known to the common law and as preserved by our Constitution. Article 1, §§ 7 and 13, Const. These provisions are so obnoxious to the spirit of our institutions that the blood of Abel "crieth from the ground" for vindication.

The question of the degree of insanity that shall constitute a defense of crime is not here involved and no reason exists to question the established rule on this subject. People v. Willard, 150 Cal. 543, 89 P. 124; People v. Gilberg, 197 Cal. 306, 314, 24 P. 1000; People v. Sloper, 198 Cal. 238, 245, 244 P. 362.

It should here be noted that the striking down of these provisions will in no wise hamper, but on the contrary will greatly aid the administration of the criminal law. The pleas, and the effect thereof, provided for in section 1016 of the Penal Code, will remain intact and fully effective. People v. Hickman (Cal. Sup.) 268 P. 909. Hereafter a plea of not guilty and the special plea of not guilty by reason of insanity will be tried at the same time before a single jury as in the states of Wisconsin and Washington, and perhaps other states, and the jury may, and doubtless will, under all proper circumstances, be required to find on the special plea. Defendant will, in case of a verdict that he was insane at the time of the commission of the offense, be dealt with as provided in the remaining portion of said section 1026 of the Penal Code.

It may also be said that it is not every double trial that would entitle a defendant to reversal of the judgment of conviction—only those cases where it can be seen that prejudice has been suffered by him. If there be no evidence produced upon the second hearing that would warrant or justify a finding that the defendant was insane, then, of course, no error would appear, but in the case before us there was substantial evidence, in addition to the circumstances of the case, which would have supported the verdict that defendant was insane at the time he committed the act; therefore prejudicial error appeared in the case before us.

It may here also be said that we have not presented this dissent upon the ground that the jury, in assessing the punishment of death in this case, should have been allowed to receive all or a portion of the evidence admissible upon the issue of insanity in order that it might determine in a just manner the question of punishment. I prefer to rest my conclusion upon a broader ground and content myself with citing that situation as additional evidence of the inhumanity of the provisions under consideration. The judgment should be reversed.

---

206 Cal. 64

PEOPLE v. LEONG FOOK. (Cr. 3143.)

Supreme Court of California. Dec. 27, 1928.

1. Criminal law ⚷15—Court must endeavor to reconcile changes in statute as to plea of not guilty by reason of insanity with older procedural provisions not expressly affected, implied repeal not being favored (Pen. Code, §§ 1016, 1017, 1020, as amended, and § 1026, as added by St. 1927, pp. 1148, 1149).

In construing Pen. Code, §§ 1016, 1017, 1020, as amended, and section 1026, as added by St. 1927, pp. 1148, 1149, relative to plea of not guilty by reason of insanity in prosecution for murder, court must endeavor so far as reasonably possible to reconcile changes with older procedural provisions which are not expressly affected thereby, under rule that amendment or repeal by implication is not favored.

2. Criminal law ⚷623—Murder prosecution remains single cause and trial single trial notwithstanding separate hearing on issue of insanity (Pen. Code, §§ 1016, 1017, 1020, as amended, and § 1026, as added by St. 1927, pp. 1148, 1149).

Trial of prosecution for murder in which defendant interposed pleas of not guilty and not guilty by reason of insanity, under Pen. Code, §§ 1016, 1017, 1020, as amended, and section 1026, as added by St. 1927, pp. 1148, 1149, *held* to remain single cause, and trial was single trial notwithstanding separate hearings on such pleas.

3. Homicide ⚷27—Insanity of murderer does not diminish quality of homicide as unlawful act.

Proof of insanity of person committing homicide does not in any degree diminish quality of homicide as unlawful act.

4. Homicide ⚷151(2)—Defendant must prove plea of insanity in murder case, after prosecution has shown commission of crime by him (Pen. Code, § 1105; Code Civ. Proc. §§ 1963, subds. 2, 3, 1957, 1959, 1961); "mitigation."

In prosecution for murder, burden of affirmatively establishing plea of insanity is on defendant where prosecution has shown commission of homicide by defendant, under Pen. Code, § 1105, relative to proof for purpose of "mitigation," which means reduction, diminishing, or lessening amount of penalty or punishment, and under Code Civ. Proc. §§ 1963, subds. 2, 3, 1957, 1959, 1961, citing Words and Phrases, 2d Series, "Mitigation."

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Mitigation.]

5. Jury ⚷31(11)—Statute relative to separate trial of issue of insanity in murder case held not to invade right of trial by jury (Pen. Code, §§ 1016, 1017, 1020, as amended, and § 1026, as added by St. 1927, pp. 1148, 1149).

Provision of Pen. Code, §§ 1016, 1017, 1020, as amended, and section 1026, as added by St. 1927, pp. 1148, 1149, providing for separate hearings in prosecution for murder under pleas of not guilty and not guilty by reason of insanity, *held* not invasion of right of trial by jury, in view of Pen. Code, §§ 21, 187, 188, 190, 1019, 1096, and Code Civ. Proc. §§ 1961, 1962.

6. Criminal law ⚷718—Homicide ⚷179—Evidence of insanity and argument thereto are improper during hearing on plea of "not guilty," where defendant also pleaded insanity.

In prosecution for murder in which defendant entered pleas of not guilty and not guilty by reason of insanity, exclusion of evidence as to insanity and denial of right to present argument on such issue during hearing on plea of not guilty *held* not error.

7. Criminal law ⚷291—In murder case, defendant cannot plead "once in jeopardy" at conclusion of hearing and return of verdict on plea of not guilty and at inception of further hearing on insanity plea.

In prosecution for murder in which defendant entered pleas of not guilty and not guilty by reason of insanity, defendant *held* to have no right to plead "once in jeopardy" at conclusion of hearing and return of verdict on plea of not guilty and at inception of further hearing on plea of insanity.

8. Jury ⚷148(3)—Jury need not be resworn to try insanity issue after hearing on plea of not guilty (Code Civ. Proc. § 604).

In prosecution for murder in which defendant entered pleas of not guilty and not guilty by reason of insanity, cause was single notwithstanding separate hearings on the two pleas, and, jury having been sworn, under Code Civ. Proc. § 604, at inception of cause, it was not necessary that jury be resworn to try issue of insanity.

Preston, J., dissenting.

In Bank.

Appeal from Superior Court, Tulare County; Frank Lamberson, Judge.

Leong Fook was convicted of murder in the first degree with sentence of death, and he appeals. Affirmed.

Russell & Heid, Glenn L. Moran, and Calvin L. Russell, all of Tulare, for appellant.

Leroy McCormick and Leslie A. Cleary, both of Visalia, U. S. Webb, Atty. Gen., and John W. Maltman and John L. Flynn, Deputy Attys. Gen., for the People.

RICHARDS, J. This appeal is from a judgment of conviction of the defendant upon a charge of murder and from an order denying his motion for a new trial. Upon the arraignment of the defendant upon such charge, had upon March 28, 1928, he waived time to plead and entered his pleas as follows: "(a) Not guilty as charged in the information; (b) not guilty as charged in the information by reason of insanity." The cause came on for trial upon April 17, 1928, whereupon his counsel moved the court to permit the defendant to place the defense of insanity before the jury upon the trial of the defendant upon his plea of "not guilty." This motion the trial court denied. The request of the defendant to have his plea of "not guilty by reason of insanity" presented to the jury at the inception of the trial upon the defendant's plea of "not guilty" was also denied. The trial of the cause upon the defendant's plea of "not guilty" was then proceeded with before the court and jury, during the course of which all of the facts and circumstances surrounding and for a considerable period of time preceding and also succeeding the commission of the homicide were exhaustively, and without any objection from either side, made the subject of inquiry, during the course of which the defendant himself volunteered to take the witness stand and testify fully as to his relations with the husband, family, and friends of the murdered woman, during the giving of which testimony he denied the commission of the crime. At the conclusion of the testimony upon the defendant's plea of "not guilty," his counsel requested permission of the court to argue the question of the defendant's insanity to the jury, which request was refused by the trial court. Thereupon the cause, having been otherwise argued, was submitted to the jury, which, after instructions by the court, retired and presently returned a verdict finding the defendant guilty of murder in the first degree without recommendation. Thereupon the trial court proposed to proceed with the further hearing of the cause upon the defendant's plea of "not guilty by reason of insanity," to which the defendant objected, and in support of such objection, offered the plea of "once in jeopardy." The trial court overruled such objection and denied said plea, and in so doing informed counsel for the defendant that the burden of supporting the plea of insanity rested upon the defendant, and inquired whether the defendant desired to offer any such evidence, to which his counsel responded that he did not, declaring it to be the defendant's intent to stand strictly upon his constitutional rights at that time. In this state of the case the prosecution stated that it also had no evidence to offer; and thereupon, and under certain instructions of the trial court touching the plea of insanity which are not herein assailed, the cause was resubmitted to the same jury upon the defendant's plea of "not guilty by reason of insanity"; whereupon the jury retired and presently returned a verdict finding that the defendant was sane at the time the offense charged in the information was committed. Upon the defendant's motion for a new trial it was made to affirmatively appear that while the jury at the outset of the trial was sworn to well and truly try the cause in conformity with the provisions of section 1046 of the Penal Code, the jury was not resworn at the time the trial upon the defendant's plea of "not guilty by reason of insanity" was entered upon. The court denied the defendant's motion for a new trial upon this as well as upon the other grounds urged, and the judgment and sentence followed, from which this appeal has been taken.

We are thus brought to a consideration of the nature, interpretation, and effect of those amendments to the Penal Code which were enacted by the Legislature in 1927 (St. 1927, pp. 1148, 1149) and are embraced in sections 1016, 1017, 1020, and 1026 of said Code. In order to proceed logically with such consideration it is necessary to refer briefly to the state of the law regulating the procedure of criminal trials prior to the enactment of these amendments to the Penal Code. By the provisions of section 1016 of said Code as it read prior to its said amendment, four pleas were permitted to a defendant at the time of his arraignment. These were "guilty," "not guilty," "former conviction or acquittal" and "once in jeopardy." Upon entering a plea of "not guilty," the defendant put in issue every material allegation of the indictment or information. Pen. Code, § 1019. Upon such plea and during the ensuing trial, the defendant, in all crimes to which the existence of a criminal intent was essential, was presumed to be sane until the contrary was established by a preponderance of evidence. People v. Williams, 184 Cal. 590, 593, 194 P. 1019. Upon such plea and trial the defendant was presumed to be innocent until the contrary was proved. Pen. Code, § 1096. While this presumption of innocence prevailed over many of the other disputable presumptions, such as those referred to in Hunter v. Hunter, 111 Cal. 261, 43 P. 756, 31 L. R. A. 411, 52 Am. St. Rep. 180, it did not prevail over such conclusive presumptions as are referred to in sections 1961 and 1962 of the Code of Civil Procedure; nor did the presumption of innocence prevail over the presumption that every person is sane, since, under the provisions of section 1105 of the Penal Code in trials for murder, the commission of the homicide by the defendant being proved, the burden of proving insanity as an excuse for the homicide devolved upon the defendant, and such evidence must have been sufficient to overcome this presumption in order to enable the defendant to rely upon the presumption of innocence for an acquittal based thereon. People v. Harris, 169 Cal. 53, 69, 145 P. 520. Upon a trial for murder, which consisted in the unlawful killing of a human being with malice aforethought (Pen. Code, § 187) and which required proof of a deliberate intention unlawfully to take away the life of a fellow creature (Pen. Code, § 188), such intention was to be manifested by the circumstances connected with the offense (Pen. Code, § 21), and the prosecution was not only entitled to show all of such circumstances for the purpose of proving such intent, but the defendant was also entitled to have admitted in evidence all of the facts and circumstances attending the commission of the homicide for the purpose not only of disproving intent, but also, in all cases wherein murder of the first degree was charged, for the purpose of mitigation (Pen. Code, § 1105). The term "mitigation" as used in the above section of the Penal Code has a well-defined meaning. It means "reduction, diminution, lessening of the amount of a penalty or punishment." 2 Bouvier's Law Dictionary, Rawle's third revision, page 2234: "Mitigation." Or, as more fully stated in Black's Law Dictionary (2d Ed.): "Mitigating circumstances are such as do not constitute a justification or excuse of the offense in question, but which in fairness and mercy may be considered as extenuating or reducing the degree of moral culpability." See, also, "Words and Phrases," Second Series, "Mitigation."

In all cases of first degree murder it was and still is provided by section 190 of the Penal Code that "every person guilty of murder in the first degree shall suffer death, or confinement in the state prison for life, at the discretion of the jury trying the same." In commenting upon this provision of the Penal Code in the case of People v. Perry, 195 Cal. 623, 635, 234 P. 890, 897, this court declared that: "It is the jury's right and duty to consider and weigh all the facts and circumstances attending the commission of the offense, and from these and such reasons as may appear to it upon a consideration of the whole situation, determine whether or not in the exercise of its discretion, life imprisonment should be imposed rather than the infliction of the death penalty." The foregoing statement of the law was quoted and expressly approved in People v. Hall, 199 Cal. 451, 456, 249 P. 859, and it amounts to no more than a restatement of the settled law in this state as announced in the early case of People v. Jamarillo, 57 Cal. 111, 114. In the case of People v. Witt, 170 Cal. 104, 111, 148 P. 928, the following limitation was placed upon the extent of the application of the foregoing rule in a case wherein the defense of insanity was not presented or relied upon by the defendant and wherein the evidence offered and refused admission did not consist of any of the facts and circumstances connected with the commission of the offense charged, but consisted wholly of evidence relating to the character and previous habits of the defendant. This court held that such evidence was not admissible for the sole purpose of enabling the jury to assess the punishment, in the event of conviction, at death or life imprisonment. This conclusion was adopted by the District Court of Appeal in People v. Golsh, 63 Cal. App. 612–613, 219 P. 456, wherein the defense of insanity had been expressly disclaimed by the defendant. It will thus be seen that the rule as stated in the two foregoing cases, while in no way impinging upon the doctrine laid down in People v. Perry, supra, may have an important bearing upon cases to which the recent amendments to section 1016 et seq. of the Penal Code may be given application.

[1-4] The foregoing statement of the law as it previously existed governing the trial of cases wherein the defendant was charged with murder in the first degree has also an important bearing upon the question as to what changes in principle or procedure have been effected by the foregoing recent amendments of the Penal Code. It is to be noted that these amendments and changes in said Code do not expressly purport to amend or repeal any other of the provisions of the Penal Code than those thus immediately amended or changed. In view of the well-settled and

very salutary rule that the amendment or repeal of sections of our Codes, and especially of our Penal Code, by implication is not to be favored and is only to be tolerated where no reasonable basis for harmonizing the new with the older enactments can be found, it becomes our duty to endeavor so far as is reasonably possible to reconcile these new changes in our Penal Code with those older procedural provisions which are not expressly affected thereby.

In such endeavor and in the entire absence of any expressed intent on the part of the Legislature in the enactment of these recent changes in the procedure of criminal trials to essay or to accomplish any other, greater, or more radical change in our long-established criminal procedure than that to which these amendments expressly relate, we are constrained to hold that the cause at issue between the people of the state and the defendant as presented by the indictment or information and by the defendant's several allowable pleas thereto, in so far as the same is affected by these amendments, remains a single cause and the trial thereof a single trial. We are enforced in this conclusion not only by the aforesaid principle which frowns upon repeals by implication, but also by a consideration of the plea of insanity as a defense in criminal causes involving intent and deliberation. It is a canon of the law of crimes existing from antiquity and having its foundation in judicial experience that all persons charged with the commission of offenses against the law are presumed to be sane to the extent of intending the ordinary consequences of their voluntary acts. This presumption, which has been embodied in our law by virtue of the provisions of subdivisions 2 and 3 of section 1963 of the Code of Civil Procedure, is made a form of evidence by the terms of sections 1957, 1959, and 1961 of the same Code; and under the latter section this presumption, unless controverted by other evidence, is made conclusive upon the jury trying such a cause. By the terms of section 1105 of the Penal Code it is provided that upon a trial for murder, the commission of the homicide by the defendant being proved, the burden of proving circumstances which excuse it devolves upon the defendant. The defense of insanity existing in the defendant at the time of the commission of the homicide is a defense which does not in most cases have its foundation in the facts and circumstances attending its commission, but depends, as a rule, upon the proof of antecedent facts and conditions which serve to show such a mental state as would make the defendant incapable of exercising that degree of criminal intent which would render his homicidal act a crime. To quote the apt words of Danforth, J., in the leading case of State v. Lawrence, 57 Me. 574, 583. in dealing with the plea and proof of insanity: "Here as everywhere in the law, sanity is assumed and treated as an essential attribute of humanity. The indictment follows the statute, setting out all the acts deemed essential to the crime, but omitting all reference to the capacity of the accused. Of all that is set out in the indictment he is presumed innocent and that must be proved and nothing else * * * unless he interposes some defense other than a sane denial of the allegations against him. A simple plea of not guilty puts in issue the allegations and only the allegations in the indictment, and as to them the prosecution has the affirmative. But if the accused would put in issue any other allegation, any question as to his capacity or responsibility, he must do it by an affirmative statement. If he puts in the plea of insanity he assumes the affirmative, he changes the issue. * * * It is true it may be resorted to in connection with the plea of not guilty, but it is not and cannot be a part of it. The plea of insanity is and of necessity must be a plea of confession and avoidance." The foregoing language of Judge Danforth is quoted with approval in Wigmore on Evidence in dealing with the affirmative nature of the plea of insanity and of the burden of its proof. 5 Wigmore on Evidence (2d Ed.), page 484.

It is thus made clear that the presentation and proof of insanity in the person committing the homicide do not in any degree diminish the quality of the homicide as an unlawful act. The homicide in question may have every attribute of beastliness. It may have been conceived, attended, and executed with the craftiness and cunning of the fox, the bloodthirstiness and lying-in-wait of the tiger, the cruelty and cowardliness of the hyena, the cold ferocity of the most secretive and deadly of serpents; it may exhibit in its attendant facts and circumstances not a single redeeming incident entitling the defendant to offer any plea for mercy, and yet, if he or those who would save him from punishment are able affirmatively to prove by preponderating evidence a state of mind in the defendant amounting to a lack of capacity to form a criminal intent at the time of the commission of the homicide, which is the test of sanity, he cannot lawfully be found guilty of murder. The proofs of a state of mind in the defendant at the time of the homicide amounting to legal insanity lie in most instances peculiarly within the knowledge of those who by ties of blood or of past association are most familiar with the defendant's mental qualities and deficiencies, and it is for this reason that by the long-established law the burden of affirmatively establishing the plea of insanity has devolved upon the defendant after a time in the progress of the cause when his plea or pleas have been presented, when the presumption of sanity has attached, and when the prosecution has shown the commission of the homicide by the defendant. Pen. Code, § 1105. It has thus been established as a result of long judicial experience that the plea and proofs of insanity are not only such as the defendant must affirmatively offer, but that they are also such as, in the nature of things, and as a rule, are separable from the facts and circumstances attending the commission of the homicide. The plea of insanity as well as the proofs which support it more nearly resembles the plea and proofs of "once in jeopardy" or of "prior conviction or acquittal" than they do, for instance, the plea and proofs of self-defense, in the twofold aspects that, first, the former pleas and the proof thereof do not tend in any degree to diminish the unlawfulness of the homicide, nor, second, do they relate to the facts and circumstances of its commission; while the plea and proofs of self-defense are inextricably interwoven with the facts and circumstances of the homicide, and, if sufficiently established, destroy utterly its unlawful attribute. The Legislature of this state, as of most other states, has for the foregoing reason provided that the pleas of "once in jeopardy" and of "former conviction or acquittal" must, if relied upon by the defendant, be made separately, and are not provable under the plea of "not guilty." Pen. Code, §§ 1016, 1017.

In the state of New York, from which these sections of our Penal Code have been bodily taken, and in the case of People v. Connor, 142 N. Y. 130, 36 N. E. 807, it has been held that when the defendant tendered the plea of "not guilty" and also the separate plea of "former conviction" it was within the discretion of the trial court, even in the absence of an express statute, to order the trial first upon the special plea and, after the hearing and finding of the jury upon that plea, to proceed before the same jury upon the defendant's plea of "not guilty," the court holding that the proceedings upon both issues constituted but one continuous trial; and further holding that the application of the defendant, after the finding and verdict of the jury against him upon his special plea, for permission to re-examine the members of the jury before proceeding upon his plea of "not guilty" as to their qualifications to further act as jurors in view of their determination against him upon his special plea, was properly denied. The court said: "There was but one indictment and one charge, and the defendant's pleas constituted his answer and defense to the accusation. He was entitled to but one trial and could demand but one jury. The order in which the issues should be disposed of was a matter in the discretion of the court, which had power to direct them to be tried separately or together; and whatever course was adopted the trial must be one continuous proceeding, and the rights of the defendant with respect to the examination of the jury were the same as if the plea of 'not guilty' alone appeared upon the record. He had no more right to stop the trial while in progress in order to ascertain the effect which the evidence given had upon the minds of the jury than he would have had if there was only a plea of the general issue." In a recent case decided in the state of Wisconsin, and which involves a direct application of the foregoing principles to the plea of insanity, the Supreme Court of that state was called upon to interpret and apply an act of its Legislature which provided that a defendant in a criminal action, who claimed that he was insane at the time of the commission of the alleged crime, should be required to plead his insanity separately but with the plea of "not guilty," and which further provided that the issue upon a plea of insanity should be first tried by the jury impaneled to try the cause and that the verdict of the jury upon that plea should be taken before the case was tried upon the plea of not guilty, and that if the verdict of the jury upon such former plea was that the defendant was not insane at the time of the commission of the offense, the finding of the jury to that effect should be final and conclusive upon the question of the insanity of the defendant upon his trial upon the plea of "not guilty." Upon an appeal by the defendant upon a charge of murder from a judgment of conviction arrived at in pursuance of the procedure provided for in said statute, practically every question which is presented in the instant case was considered and decided by said court in its decision of the case of Bennett v. State of Wisconsin, 57 Wis. 69, 14 N. W. 912, 46 Am. Rep. 26, to which we shall later and more particularly refer.

[5] We have thus far been considering the state of the law as contained in our Penal Code and interpreted by the courts of this and other jurisdictions prior to the recent changes effected by the amendment or enactment of sections 1016, 1017, 1020, and 1026 of the Penal Code. The substance of these amendments and changes is to provide for the addition of a new and special plea to those already enumerated in sections 1016 and 1017 of the Penal Code, viz. the plea of "not guilty by reason of insanity." In so far at least it could hardly be seriously contended, in view of the principles and course of judicial decision above referred to, that in so providing the Legislature has to any extent invaded the constitutional rights of any defendant in a cause wherein he may be entitled to avail himself of such special plea. The defendant herein made no such contention when required at his trial to present such special plea, and he urges no such contention upon this appeal. It was, however, further provided by the addition of section 1026 to the Penal Code that: "'When a defendant pleads not guilty by reason of insanity and also joins with it another plea or pleas, he shall first be tried as if he had entered such other plea or pleas."

Thus far also we are unable to discover

any vital or constitutional defect in the changed order of procedure provided for in the portion of the new section 1026 above quoted, since, if our foregoing reasoning in this opinion is correct in the conclusion that but a single cause and but a single trial was before the trial court for its full determination and that the body of our criminal law in this respect has not been changed by these recent enactments, and if our conclusions are also correct to the effect that the plea of insanity is a separable plea, that the burden of making the proofs in support of such plea is a burden affirmatively cast upon the defendant presenting it, and that in the ordinary and usual course of judicial experience the proofs to be proffered in support of such plea are such as exist antecedently to the commission of the homicide and are thus disconnected with the facts and circumstances which immediately precede, attend, and follow its commission, and if we are further correct in our foregoing conclusion that the plea and proof of insanity existing in the state of the defendant at the time of his commission of a homicide, even if fully established, in no degree operates to diminish the unlawful quality of the homicidal act, then it seems to us to logically follow that it would be competent in the Legislature to provide for separate hearings in the course of the single trial of a single cause involving such separate pleas, issues, and proofs, and that the order of such separated hearings would be a matter lying entirely within the discretion of the Legislature, invested as it is with the power to provide by law for the procedural courses of criminal trials within the limits of the constitutional rights of persons accused of crime. We are unable to perceive that the constitutional right of trial by jury has been invaded by the procedural changes in the Code thus far considered, our more extended views upon this branch of the question being expressed in the case of People v. Troche (Cal. Sup.) 273 P. 767, this day decided. We desire, however, at this point to express our full approval of the decision of the Supreme Court of Wisconsin in the case of Bennett v. State, supra, as to the singleness of the cause and trial and as to the point that the jury, to which has been submitted one of the separable pleas and issues which arise in the course of a criminal trial, and which renders a verdict thereon, is not thereby, under proper instructions as to their legal and limited duty, disqualified to hear and determine successively the issues presented by the defendant's other and separate pleas. We have already quoted to the same effect the decision of the New York Court of Appeals in the case of People v. Connor, supra.

[6] We come now to consider the further provision of the recent amendments to the Penal Code embodied in section 1026 thereof, to the effect that, upon the trial of a defendant upon his plea of "not guilty," who has pleaded "not guilty by reason of insanity," he shall be conclusively presumed to have been sane at the time the offense is alleged to have been committed. As we have already seen, the presumption of sanity is inherent in criminal trials, and while at the outset of such trials under our procedure, in the course thereof, prior to the recent changes therein, it was a disputable presumption, it could only be disputed by the defendant upon his affirmative assumption of the burden of disproving it under his general plea of "not guilty"; and if he either repudiated such plea or refused to assume such burden the presumption of his sanity became conclusive upon the jury trying the cause. Code Civ. Proc., § 1961. When, therefore, the Legislature saw fit to limit the defendant's plea of "not guilty" so that it no longer included the defense of insanity and hence the right of the defendant in the absence of such special plea to offer under the limited plea of "not guilty" his proof of such defense, and when the Legislature further provided that the right of the defendant to make such defense should be preserved to him in the form of a special plea and that his proofs in support of such defense should be heard in a separate hearing before a jury, the effect of such changed procedure would logically be to render the presumption of sanity conclusive even in the absence of the provision in the new section 1026 making it so, for the very reason that proof to rebut it was no longer presentable under the recently limited plea of "not guilty," and we are thus brought back to the original question as to the power of the Legislature to provide for a separation of the plea of insanity from the plea of not guilty and for a separate trial of such separated issue; and we have already held that the Legislature possessed such power. It follows irresistibly that, when the defendant in the instant case demanded of the trial court the right to offer evidence upon his plea of insanity during the trial upon his limited plea of "not guilty," he was doing nothing more than demanding the right to present evidence upon an issue which his plea of "not guilty" had not presented and which was not at that stage of the trial before the court or jury; and the same reasoning applies to the demand of the defendant of the right to present argument before the jury upon the issue of insanity during the hearing upon the issue of "not guilty"; and this is peculiarly true by reason of the fact that no evidence of any kind had up to that time been presented upon which such an argument could have been predicated. The defendant had been permitted, and properly permitted, to offer and have received in evidence all of the facts and circumstances relating to, attending, and succeeding the commission of the homicide, and he was entitled to present and was not prevented from presenting to the jury those facts

and circumstances with every inference or argument which might be drawn therefrom touching whatever defenses are now available to a defendant upon the plea of not guilty and also as were formerly and are still presentable in mitigation of punishment. The trial court therefore, assuming our previous conclusions to be sound, committed no error in denying the foregoing two requests on the part of counsel for the defendant.

[7] The defendant's next contention was that he had a right to plead "once in jeopardy" at the conclusion of the hearing and return of the verdict upon his plea of not guilty and at the inception of the further hearing upon his plea of insanity. We have recently held that there is no merit in this contention for the reasons stated in People v. Coen (Cal. Sup.) 271 P. 1074.

[8] The defendant's next and final contention is that the jury was not resworn to try the issue of insanity. At the inception of the cause the members of the jury, after having been duly impaneled, were administered the usual oath in the form prescribed by section 604 of the Code of Civil Procedure. This oath expressly covered the cause or matter at issue between the people and the defendant, and hence necessarily covered each and all of the various issues thereof to be successively presented to the consideration of the jury. The cause being single, the administration of no further oath during its progress was required.

We deem it timely to restate in conclusion certain of our foregoing deductions for the purpose of clarifying the procedural courses of jury trials under the changed scope and order of the issues presentable in view of the aforesaid recent amendments to the Penal Code. Under the present plea of "not guilty" and upon the hearing thereon, the consideration of the jury is expressly limited to the determination as to whether the defendant committed the homicide in question, and as to whether he is to be held responsible therefor if sane at the time of its commission, and as to the mitigation, if any, of his punishment in the event of a finding of guilty upon such plea. It would be the duty of the trial court, either at the inception of the hearing upon that issue or at the conclusion of the evidence and argument thereon, as was done in the instant case, to fully instruct the jury as to their limited functions upon such plea. We must assume that a fair and impartial jury of intelligent men and women would obey such instructions and would therefore hold in reserve their ultimate finding upon the issue of the defendant's sanity until that separate issue and the evidence supporting it had, in the prescribed order of the trial, been committed to it for determination. We are not to assume that such a jury will cease to be fair and impartial as the cause progresses upon its successive issues, but, on the contrary, we must assume, in the absence of any other showing, that the jury has retained its attitude of fairness and impartiality under the changed procedure as before until the whole cause, submitted to it successively for its consideration, has been determined. There is no showing that such was not the precise situation in the instant case, nor was there any evidence presented or, so far as the record before us discloses, presentable, tending in any degree to show that this defendant at the time of his commission of this brutal and atrociously cruel murder was other than entirely sane and responsible.

There may be other problems which are yet to present themselves under this changed procedure, but these are not presentable upon the record in the present case.

The judgment is affirmed.

We concur: WASTE, C. J.; SHENK, J.; LANGDON, J.; CURTIS, J.; SEAWELL, J.

PRESTON, J. I dissent. My views are expressed at length in a dissent in the case of People v. Troche (Cal. Sup.) 273 P. 767, this day filed. Nothing appears in the opinion in this case that alters these views. We do get this fact clearly, however, that the division of opinion between us rests upon the proposition of whether the plea of insanity is or is not a separable plea in fact. In this case Mr. Justice RICHARDS declares it to be a separable plea akin in independent status to the plea of former acquittal or conviction or once in jeopardy. If I could even for a moment accede to this proposition it would take all the violence out of this dissent. But I cannot come to this view. This statement ignores the basis of all criminal law.

A sound mind is the foundation upon which rests all responsibility to the sovereign for inhibited conduct. Every crime presupposes a sound mind, guiding and directing the criminal agency. If the party charged is insane, the act is not his act and his vindication is as complete and in essence the same as though he had not in fact perpetrated the deed. As said in State v. Strasburg, 60 Wash. 106, 119, 110 P. 1020, 1024 (32 L. R. A. [N. S.] 1216, Ann. Cas. 1912B, 917):

"We believe enough has been said to show that the sanity of the accused at the time of committing the act charged against him has always been regarded as much a substantive fact, going to make up his guilt, as the fact of his physical commission of the act. It seems to us the law could as well exclude proof of any other substantive fact going to show his guilt or innocence. If he was insane at the time to the extent that he could not comprehend the nature and quality of the act—in other words, if he had no will to control the physical act of his physical body —how can it in truth be said that the act was his act? To take from the accused the opportunity to offer evidence tending to prove this fact is in our opinion as much a violation of his constitutional right of trial by jury as to take from him the right to offer evidence before the jury tending to show that he did not physically commit the act or physically set in motion a train of events resulting in the act. The maxim, 'An act done by me against my will is not my act,' may, without losing any of its force, be paraphrased to fit our present inquiry as follows: 'An act done by me without my will, or in the absence of my will, is not my act.'"

Take the crime of murder in the first degree—the one before us. Is any one ready to say that a defendant insane is capable of forming the intent to murder or of possessing the malice or of doing the premeditation and deliberation necessary to make the crime complete? Certainly not. Our statute specifically provides that criminal intent is the manifestation of a sound mind. Section 21, Pen. Code. Our statute also says that an insane person is not amenable to punishment. Section 26, Pen. Code. Then, I repeat that the plea of not guilty contains within it indissolubly the plea of insanity. No legislative declaration can remove it, and it bears no resemblance to the special pleas enumerated above, but does bear a resemblance to the issue of self-defense or not guilty because of noncommission of the interdicted act.

It seems constantly to be overlooked that the verdict required in this bifurcated trial is not merely whether the defendant did or did not do the prohibited act. If this were alone the issue, the main opinion would be sound and the plea would be separable. But this is not the case—the jury are required to convict or acquit, and to convict the sanity of the defendant must first be found to exist; this, even though the jury from the circumstances of the crime, the res gestæ, see that the defendant was and is insane.

I condemn the procedure because it requires a conviction of the crime charged while excluding much of the material testimony upon the issue.

I condemn the procedure because it enables the state to curtail the deliberation of the jury and prevent the free agency of that body in its deliberations. If this is not true, why the inauguration of this cumbersome, useless, and time-cheating experiment? The trial judges know the effect of the operation of this statute. The bar can easily discern its baneful effects. The plea of insanity is for practical purposes gone. Its loss will work the conviction of innocent men. It shocks the idealism of the citizen. It imputes vengeance to the sovereign. If the state wants to be fair and just with its citizenry, why arrest the jury in the midst of their deliberations, require a verdict of guilty to be recorded, and then return them to deliberate upon the accuracy of the decision so theretofore rendered? Crime will not be lessened by cruelty. It is certainly to be deplored that such a procedure is to be found among our statutes, and it is my hope that the Legislature will speedily rectify this injustice.

206 Cal. 225

KNOKE v. KNIGHT et al. (L. A. 9563.) ★

Supreme Court of California. Jan. 14, 1929.
Hearing Denied in Bank Feb. 11, 1929.

1. Taxation 🔑734(7)—Tax deed is void where notice of delinquent list stating amount of delinquent taxes and costs failed to state amount of penalties.

Proceedings leading up to execution of tax deed are defective and tax deed is void, where notice of delinquent list, though stating amount of delinquent taxes and costs, failed to state amount of penalties.

2. Taxation 🔑830—In action to quiet title, plaintiff claiming under tax deed which was declared void held not entitled under evidence to repayment of amount he expended as taxes, penalties, and costs (Pol. Code, § 3898, subd. 5).

In action to quiet title brought by one claiming under tax deed, in which such deed was declared void, judgment not requiring defendant to repay or refund amount paid by plaintiff as taxes, penalties, and costs under Pol. Code, § 3898, subd. 5, *held* not erroneous, where there was nothing in evidence that would enable trial court to fix amount of taxes, penalties, etc., expended by plaintiff, and no demand or request that court determine amount.

3. Taxation 🔑789(1)—In action to quiet title, introduction of void tax deed did not make prima facie case.

In action to quiet title, brought by one claiming under tax deed which was declared void, introduction of such void tax deed did not make prima facie case that plaintiff was owner of property.

4. Quieting title 🔑10(1)—Plaintiff must recover on strength of his title, not weakness of defendant's.

In action to quiet title, plaintiff must recover on strength of his own title, rather than weakness of defendant's.

Department 1.

Appeal from Superior Court, Los Angeles County; John L. Fleming, Judge.

Action to quiet title brought by A. H. Knoke against Alice R. Knight and others. From an adverse judgment, plaintiff appeals. Affirmed.

Catherine A. McKenna and J. Irving McKenna, both of Los Angeles, for appellant.

John C. Packard, of Los Angeles, for respondent.

CURTIS, J. Action brought to quiet title to certain real property situated in the county of Los Angeles. The appellant relies upon a tax deed issued to him by the tax collector of said county on the 31st day of July, 1922. If this tax deed is invalid by reason of any

---

★Hearing denied in bank.

of the irregularities mentioned by the respondent, then the judgment should be affirmed. Otherwise it should be reversed, unless one of the other objections made to said judgment by appellant is well founded.

[1] The delinquent tax list, together with the notice appended thereto, were identical in form with the delinquent tax list and notice involved in the case of Bussenius v. Warden, 71 Cal. App. 717, 236 P. 371. In that case it was held that the proceedings leading up to the execution of a tax deed thereunder were defective in that the published notice of the delinquent list, while it stated the amount of delinquent taxes and costs, failed to state the amount of the penalties. The deed issued thereunder was held to be void. The case of Bussenius v. Warden, supra, was cited with approval in the case of Snodgrass v. Bell (Cal. App.) 261 P. 497, where the court said: "Respondent also claims the tax title is void because the published notice of the delinquent tax list failed to set forth the amount due for penalties as well as for taxes. The notice is the same notice which was held to be illegal in Bussenius v. Warden, 71 Cal. App. 717, 236 P. 371, for failure to comply with Political Code, § 3764, for the same reason assigned by respondent here. Under this authority the appellant's tax title is void." It is claimed by appellant that the case of Bussenius v. Warden has been overruled by the decision in Re Rogers (Cal. App.) 267 P. 729. We do not so understand that this last-named case has that effect. In that case the court differentiates the case of Bussenius v. Warden from the case then before it in the following language: "In the case of Bussenius v. Warden, 71 Cal. App. 717, 236 P. 371, the facts before the court showed that the notice of delinquent tax sale did not conform to Political Code, § 3764, but was in violation thereof in this, that it recited that the sale would be made for taxes and costs and did not state that it would be made for 'penalties.' That error is not presented by the record in the case before us."

There is language to be found in the case of Stuart v. Smith (Cal. App.) 262 P. 348, which somewhat reflects upon the position taken by the court in Bussenius v. Warden as to the validity of the notice of delinquent sale, but in the case of Stuart v. Smith there appeared to be considerable confusion in the record before the appellate court, and the decision of that court upon the validity of said notice of delinquent sale was based, in part, at least, upon the failure of the record to disclose the facts upon which the defendants in that case predicated their attack upon the said notice of delinquent sale. But notwithstanding any language used in the case of Stuart v. Smith, supra, which might appear to indicate that the court rendering the decision in that case did not approve of the ruling in Bussenius v. Warden relative to the invalidity of the notice of delinquent sale, we are of the opinion that the holding upon this question of the sufficiency of the notice made by the court in the case of Bussenius v. Warden was correct, and we are disposed to follow it in this case. The tax deed, therefore, under which the plaintiff claims title to the real property in controversy, is void, and plaintiff's proof of title has wholly failed. Our determination of this point in favor of respondent renders the consideration of other objections raised by respondent as to the validity of the tax deed under which appellant claims unnecessary.

[2] There is no merit in appellant's contention that the judgment is erroneous in that it does not require that respondent repay or refund the amount paid by the appellant as taxes, penalties, and costs. Subdivision 5 of section 3898 of the Political Code provides for such repayment or refund in certain cases where by decree of court the deed issued by the tax collector upon a sale for delinquent taxes is declared void.

Appellant relies upon Holland v. Hotchkiss, 162 Cal. 366, 123 P. 258, L. R. A. 1915C, 492; Squires v. Estey, 33 Cal. App. 287, 165 P. 34; Beck v. Wilson, 49 Cal. App. 281, 193 P. 158, and Joslin v. Shaffer, 66 Cal. App. 69, 74, 225 P. 307. In each of these cases the claimant of the property adverse to the holder of the tax title was either the plaintiff in the action, and sought to quiet his title to the property against the claims of the holder of the tax title, or he was the defendant and sought affirmative relief quieting his title against the plaintiff, the holder of the tax title. In the present action the holder of the tax deed is the plaintiff, and the judgment does not purport to quiet the respondent's title against the plaintiff's claim under the tax deed. The judgment simply decrees that plaintiff is not the owner of any interest in the real property described therein, and that the respondent recover her costs. The present action is thus differentiated from the cases relied upon by the appellant and renders them inapplicable for our present purpose. This clearly appears from the following excerpt from the opinion in Holland v. Hotchkiss, supra: "Where the owner comes into equity asking equitable relief to remove or cancel a tax deed or sale as a cloud upon his title, or to obtain a judgment which, in effect, will invalidate such sale or deed, the court should refuse any relief except upon the condition that he first repay to the tax purchaser, or his grantee or assignee, the taxes, penalties, interest, and costs justly chargeable upon the land and which the purchaser has paid at the sale, or afterward upon the faith of it." These cases appear to have been decided without any particular reference to subdivision 5 of section 3898 of the Political Code. The provision therein requiring repayment or reimbursement to be made to the purchaser at the tax sale, upon such sale being decreed void by the court, was added by amendment to said section in 1913. The levy and assessment involved in Holland v. Hotchkiss, supra, and Squires v. Estey, supra, was each made prior to the enactment of said amendment, and Beck v. Wilson, supra, and Joslin v. Shaffer, supra, were decided upon the general, equitable principles enunciated in Holland v. Hotchkiss supra, rather than in pursuance of the terms of said amendment.

The only decision of the courts of this state, which we have discovered, bearing directly upon the point here involved, is that of Biaggi v. Mainero, 60 Cal. App. 608, 213 P. 541. In that action the plaintiff claimed under a tax title and brought the action to quiet his title. The court held his tax deed void; that he was not the owner of the real property described therein; and that defendants have judgment for costs. It will be noted that this judgment is precisely in effect like the judgment in the present action. Upon appeal it was insisted by the plaintiff therein that the judgment was erroneous in not providing that he be reimbursed for the amount of taxes, penalties, etc., paid out by him, or his predecessors in interest. In disposing of this claim the court did so adversely to plaintiff's claim, and with the following declaration:

"In its decision the trial court, among other things, found that plaintiff's claim of title was based upon 'an alleged sale of said property for alleged delinquent taxes for the fiscal years 1914-15, and upon alleged conveyances executed to plaintiff's predecessor in interest, R. G. Biaggi, pursuant to said alleged delinquency and pursuant to said alleged sale.' In this connection respondent calls our attention to subdivision 5 of section 3898 of the Political Code, which provides that in an action of this kind no decree of forfeiture shall be given 'until the former owner, or other party in interest, shall have repaid to the purchaser the full amount of taxes, penalties and costs paid out and expended by him.' The finding was unnecessary to the judgment. Furthermore, we note that the court did not find that there was in fact a delinquency on the property in question, or that there was in fact a sale of the property for such delinquency. Neither did it find that plaintiff or his predecessors in interest ever paid any sum whatever for taxes, penalties or costs. In the absence of any evidence showing such payment it must be assumed that there was no evidence in that respect. Had the court made a decree quieting title in defendants, it may be that such decree should have been conditioned on payment of the moneys paid by plaintiff in pursuit of the tax title, but this question does not arise in this case for the reason that the title was not decreed in anyone. If plaintiff is not aggrieved by a judgment declaring someone else to be the owner when he has shown no title in the land in himself, this plaintiff cannot be heard to complain of this judgment."

While the present appeal is not upon the judgment roll, and accordingly the evidence before the trial court is a part of the record on appeal, we fail to find anything in the evidence that would have enabled the trial court to fix the amount of the taxes, penalties, etc., expended by the appellant, nor does the record contain any attempt or offer on appellant's part to prove this amount, nor any demand or request by appellant that the trial court determine the amount thus expended by appellant. The tax deed under which the appellant claims title to said real property called for 158.18 acres of land, while the amount of land described in the judgment was only 80 acres. Under these circumstances there was no duty resting upon the trial court to determine any amount to be repaid appellant, and the judgment is not erroneous for its failure to contain a direction to respondent to make repayment of such amount.

[3, 4] The further contention is made by appellant that as the respondent offered no proof of her ownership of the land described in her answer, it was error for the court to have rendered the judgment which it did in this action. This contention is based upon the claim of appellant that by the introduction of the tax deed the appellant made out a prima facie case in his favor. This claim, of course, has no foundation upon which to rest. The court held the tax deed void. Plaintiff therefore failed to make a prima facie case that he was the owner of said real property. Having failed to establish any title in himself, the appellant's case utterly failed. It is hardly necessary to cite an authority in support of the well-established principle of law that in an action to quiet title the plaintiff must recover on the strength of his own title rather than any weakness of the defendant's. It has been repeatedly so held by this court. We will only cite among the many cases decided by this court in which this point was directly determined the following: Rockey v. Vieux, 179 Cal. 681, 178 P. 712, Sears v. Willard, 165 Cal. 12, 130 P. 869, and Williams v. City of San Pedro, etc., Co., 153 Cal. 44, 94 P. 234. Upon this point appellant's case is summed up in the concluding words found in the opinion in Rockey v. Vieux, as follows: "Having shown no interest in the land, the plaintiffs are not aggrieved by a judgment declaring some one else to be the owner."

The judgment is affirmed.

We concur: PRESTON, J.; SEAWELL, J.

206 Cal. 235

PEOPLE v. SMITH. (Cr. 3152.)

Supreme Court of California. Jan. 16, 1929.

1. Criminal law ⚷1172(9)—Instruction that restoration of property embezzled authorized mitigation of punishment held reversible error, where court, under circumstances, could not grant probation (Pen. Code, § 1203).

In prosecution for embezzlement by city treasurer, instruction that restoration of property allegedly embezzled authorized court to mitigate punishment, in its discretion, *held* reversible error. under Pen. Code, § 1203, depriving court of right to grant probation under the circumstances.

2. Criminal law ⚷1186(4)—Where, but for erroneous instruction, jury might have rendered acquittal, conviction must be reversed (Const. art. 6, § 4½).

Where jury might have entertained a reasonable doubt as to the existence of all the necessary elements of the felony charged against defendant, and acquitted him, but for erroneous instruction, Const. art. 6, § 4½, does not operate on the judgment of conviction, and it must be reversed.

3. Criminal law ⚷957(2)—Affidavits that jurors would not have voted for conviction, but for instruction, held properly excluded as attempt to impeach verdict.

Affidavits of several members of jury that they would not have voted for verdict of guilty, except for instruction complained of, *held* properly excluded as an attempt to impeach jury verdict.

In Bank.

Appeal from Superior Court, Imperial County; A. C. Finney, Judge.

W. D. Smith was convicted of embezzlement, and he appeals. Reversed.

Superseding opinion of Court of Appeals in 267 P. 387.

Edgar B. Hervey, of San Diego, for appellant.

U. S. Webb, Atty. Gen., Frank Richards, Deputy Atty. Gen., and Elmer W. Heald, Dist. Atty., and Edward B. Patterson, Deputy Dist. Atty., both of El Centro, for the People.

SHENK, J. The defendant was charged in four counts with embezzlement of public funds during the time he was treasurer of the city of Imperial. On the first trial the jury disagreed. Counts 1 and 3 were dismissed on motion of the district attorney. On the second trial the defendant was acquitted on the fourth count and was found guilty on the second count, which charged the embezzlement, on the 9th day of November, 1926, of the sum of $218.46 of the funds of the city of Imperial. He appeals from the judgment of conviction, and from the order denying his motion for a new trial.

The grounds of the appeal are that the evidence is insufficient to support the verdict, and that the court erred to the prejudice of the defendant in certain instructions given. It appears that one C. H. Hawkins was city recorder and justice of the peace of the city of Imperial. On November 1, 1926, he handed a check for the amount of fines collected during the preceding month, in the sum of $342, to his clerk for delivery to the defendant as city treasurer. This check was delivered to the defendant on November 9, 1926. On the same day the defendant signed and delivered to said clerk a receipt, showing the deposit of that sum in the city treasury. The defendant had pursued the method of depositing in bank to the credit of designated accounts the funds of the city reposed to his custody. He maintained a checking account under the designation, "W. D. Smith, Trustee." The money represented by the check received from the city recorder could not, in whole, be credited to one fund. Thirty dollars was subject to be credited to the general fund, and the balance to the street improvement fund. On November 9, 1926, he deposited the full amount of the check in the Farmers' & Merchants' Bank of Imperial to the credit of the street improvement bond account. On the same day he withdrew by check from said account the sum of $218.46 and deposited the same in the Pacific Southwest Trust & Savings Bank to the credit of the W. D. Smith Trustee account. Six days later, to wit, on November 15, 1926, the defendant deposited to the credit of a city treasurer account in the Farmers' & Merchants' Bank said sum of $342, being the amount received from the city recorder on November 9. The accounts of the city treasurer were experted on the 30th day of the same month. No shortage was discovered, and the defendant thus fully accounted for all public moneys on hand on that day, and said funds were thereupon turned over to the defendant's successor in office. With this state of the treasurer's accounts as to count 2, the defendant was, on December 28, 1926, formally charged with embezzlement of public funds.

The respondent insists that the evidence was sufficient to support the verdict, because it further appeared in evidence that between November 9 and 15 certain amounts were withdrawn from the W. D. Smith Trustee account and devoted to the defendant's personal use, which withdrawals reduced the W. D. Smith Trustee account to the extent of $218.46. It is not claimed by respondent that on November 15 and thereafter all moneys received by the defendant from the city recorder were not on deposit in the proper accounts.

By reason of the strictness with which the law surrounds the custody and use of public funds, it may reasonably be contended that the showing with reference to the withdrawal and use of moneys from the trustee account during the times intervening between November 9 and 15 was sufficient to support a verdict of guilty of embezzlement of public funds, provided the jury was satisfied that all of the elements of the felony charged were present in the transaction and no prejudicial error was committed by the court. This brings us to the consideration of the most serious error complained of.

[1, 2] The court instructed the jury that, whenever a person is charged with embezzlement, and it appears that the accused voluntarily or actually restores or tenders restoration of the property alleged to have been embezzled, or any part thereof, such fact is not a ground of defense, "but it authorizes the court to mitigate the punishment in its discretion." Without intimating what would be the effect of such an instruction in an ordinary embezzlement case, it is obvious that it is entirely inappropriate and misleading in the case of alleged embezzlement of public funds. Section 1203 of the Penal Code has in effect deprived a defendant in this class of crimes of the right to apply for probation, and has absolutely divested the court of all power therein to grant probation. Except by an order of probation, there would be no way by which the trial court could "mitigate the punishment." That the instruction was considered by the jury to the prejudice of the defendant is evidenced by the form of the verdict, wherein the defendant was found guilty as charged in count 2 and "We recommend probation—unanimously." The jury retired for deliberation at 4:40 p. m., and returned with the verdict at 9:30 the following morning, and it is conceded by the respondent that it was only by reason of the showing on the question of restitution that the jury recommended probation. We are satisfied from the record that the jury was misled by said instruction into rendering the verdict which was returned, and that it is fairly apparent that, but for such mistaken statement as to the powers of the court in the premises, the jury would not have agreed upon a verdict of guilty.

The case of Territory v. Griego, 8 N. M. 133, 42 P. 81, is in point. In that case the defendant was charged with murder. The court instructed the jury as follows: "While the law fixes the punishment in the case, or rather while the court assesses the punishment, the law authorizes you, in case you find the defendant guilty, to recommend him to the mercy of the court, and that recommendation made by the jury will be considered by the court in fixing the punishment." The jury found the defendant guilty as charged and recommended the prisoner to the mercy of the court. The judgment was reversed on the ground that the court, under the law in that jurisdiction, upon a verdict of guilty in murder cases, had no discretion to mitigate the punishment, and had no alternative but to sentence the defendant to death. It was held that, if the jury had been informed of the true state of the law, it was within the range of reasonable probability that the jury would not have agreed upon a verdict, and that because of the gravity of the punishment the jury might well have clung to a doubt of guilt, rather than to hang a man whose guilt they doubted. Persuasive authorities to the same effect are cited in the opinion in that case.

The vice in the instruction here complained of is that the intimation or promise extended to the jury, that leniency in the punishment might be extended to the defendant by the court, had a tendency to draw the attention of the jury away from the evidence and overcome reasonable doubt, and thus to induce the jury to reach a verdict on ulterior considerations. On the facts in this case the jury might have entertained a reasonable doubt as to the existence of all the necessary elements of the felony charged against the defendant and acquitted him but for the erroneous instruction. Under these circumstances the saving clause of the Constitution (Art. 6, § 4½) may not operate on the judgment of conviction and it should be reversed. The fact that the court further instructed the jury that the question of punishment is left wholly to the court did not cure the error. It may not be said to have effaced from the minds of the jury the hope and expectation that the court in the exercise of its powers might extend leniency to the defendant.

[3] On the motion for a new trial the defendant produced the affidavits of several members of the jury that by the instruction complained of they were led to believe and did believe that the court had the power to grant the defendant probation, that they believed that under the circumstances shown in the case the court would grant probation, and that they would not have voted for a verdict of guilty except for said instruction. The court very properly ruled that the showing thus made was insufficient to support the motion, in that, under the well-established rule, a juror will not be permitted to impeach his verdict in the manner thus sought to be done. People v. Kromphold, 172 Cal. 512, 524, 157 P. 599; 8 Cal. Jur., p. 437. No other alleged errors require discussion.

The judgment and order are, and each is, reversed.

We concur: WASTE, C. J.; RICHARDS, J.; PRESTON, J.; CURTIS, J.; LANGDON, J.; SEAWELL, J.

206 Cal. 102

FOGARTY et al. v. DEPARTMENT OF INDUSTRIAL RELATIONS OF CALIFORNIA, DIVISION OF INDUSTRIAL ACCIDENTS AND SAFETY et al. (S. F. 12793.)

Supreme Court of California. Dec. 28, 1928.

1. Master and servant 🔑398—In absence of appointment of guardian, injured minor employee was not required to institute proceedings within six months, but right existed to time of death (Workmen's Compensation Act, § 11(b) (1) and (d).

Under Workmen's Compensation Act (St. 1917, p. 831) § 11(b) (1), in absence of appointment of guardian under section 11(d) and by virtue of his minority, there continued to exist in injured minor employee, up to time of his death during minority, right to institute proceedings for collection of disability indemnity, and he was not required to institute proceedings within six months.

2. Master and servant 🔑388—On death of minor employee without having instituted proceedings for compensation, right to collect accrued compensation passed to dependents (Workmen's Compensation Act, § 9(b) 3).

On death of minor employee, for whom no guardian had been appointed, without having filed claim for compensation for injuries, right to collect accrued, but theretofore unclaimed compensation passed to dependents under Workmen's Compensation Act (St. 1917, p. 831) § 9(b) 3.

3. Master and servant 🔑398—Claims of minors for death benefits held not barred by limitations, where guardian was not appointed until minors were brought into proceeding pending before commission (Workmen's Compensation Act, §§ 9(b), (3), (c), 11(d).

Claims of minor brothers and sisters of deceased employee for death benefit provided by Workmen's Compensation Act (St. 1917, p. 831) § 9(c), and for accrued compensation covered by section 9(b) (3), *held* not barred by limitations provided by section 11(d), which did not run against minors until guardian had been appointed, where appointment of minors' father as guardian was not made until minors, as parties claimant, were brought into proceeding pending before commission.

4. Master and servant 🔑398—Filing of minors' application for death benefits gave commission jurisdiction to determine claims of parents and dependents of deceased, whose claims were barred by limitations (Workmen's Compensation Act, § 11(a).

Under Workmen's Compensation Act (St. 1917, p. 831) § 11(a), providing that filing of application with commission for any portion of benefits shall render limitations inoperative as to all further claims of persons arising from same transaction, filing of application of minors for death benefit and accrued compensation in proceedings pending before commission gave commission jurisdiction to hear claims of all persons for compensation arising from same transaction, including claims of parents of deceased, regardless of whether latter were seasonably filed or not.

5. Master and servant 🔑417(7)—Supreme Court can only overthrow Industrial Commission's finding on question of fact, where there is no substantial evidence supporting finding.

Power of Supreme Court to overthrow finding of Industrial Accident Commission on question of fact is confined to cases in which there is no substantial evidence to support finding.

6. Master and servant 🔑405(4)—Evidence showed employment and exposure caused rheumatism, diseased heart condition, and death, which arose in course of employment.

In proceedings to recover compensation for death of employee, evidence that employment and exposure induced acute attack of rheumatism in employee, which led to diseased heart condition, which ultimately proved fatal, showed that exposure and exhaustion from work precipitated train of symptoms resulting in death, and hence Industrial Accident Commission erred in finding that employee's illness and death were not caused or precipitated by employment or injury arising out of or in course of employment.

In Bank.

Proceeding under the Workmen's Compensation Act (St. 1917, p. 831) by K. J. Fogarty and others to recover compensation for the death of Harlan Fogarty, employee, opposed by the Pacific Gas & Electric Company, employer. From an order of the Industrial Accident Commission, denying application for adjustment of claim, petitioners bring certiorari. Annulled and remanded, with directions.

Superseding opinion 269 P. 641.

Matthew A. McCullough, of San Francisco, for petitioners.

G. C. Faulkner and John J. Briare, both of San Francisco, for respondents.

PER CURIAM. The petition of the respondent Pacific Gas & Electric Company for a rehearing in this cause was granted solely for the purpose of elaborating upon that portion of our opinion (76 Cal. Dec. 231, 233, 269 P. 641) wherein it is determined that the application of the dependents of Harlan Fogarty for adjustment of claim was timely filed.

[1, 2] In the petition for rehearing it is urged that we overlooked the "vital feature" in our treatment of this phase of the case, viz., that "there was no valid subsisting claim to adjust." With this assertion of petitioner we cannot agree. In the interest of clarity we will express in greater detail our views upon this subject, to the end that confusion may not result from that portion of the opinion now assailed. Harlan Fogarty, while still a minor, died June 24, 1926, a victim of chronic endocarditis. As will more fully hereinafter appear, the performance of his duties while in the employ of the Pacific Gas & Electric Company from May 8 to June 3, 1924, aggravated this heart condition, and thus precipitated the train of symptoms culminating in his death. Fogarty, during his

lifetime, neglected and failed to institute proceedings for the collection of the disability indemnity to which he was unquestionably entitled under the provisions of section 9 (b) of the Workmen's Compensation Act. St. 1917, p. 831. The right to institute such proceedings, while ordinarily lost to an employee if not exercised within six months after the date of injury (section 11 (b) (1), is saved as to a minor employee at least until the appointment of a guardian for such minor (section 11 (d). Therefore, in the absence of the appointment of a guardian and by virtue of his minority, there continued to exist in Harlan Fogarty up to the very time of his death a right to institute proceedings for the collection of the disability indemnity above referred to. Upon his death this right to collect the accrued but theretofore unclaimed compensation passed to his dependents (section 9 (b) 3). And this, without any necessity for the institution of proceedings by the minor employee during his lifetime. The act, so far as we have been able to ascertain, does not in express language designate any particular period of time within which the dependents of a deceased employee must institute proceedings for the collection of any accrued compensation, but, whatever that period might be, we need not now concern ourselves, for, as indicated in our opinion heretofore filed and hereinafter adopted, "certain of the applicants are minors, against whom the limitations of time provided by the Workmen's Compensation Act (section 11 (d) do not run unless and until a guardian has been appointed."

[3, 4] A guardian for the minor dependents of Fogarty had not been appointed, as stated in the opinion, until they were brought into the proceeding then pending before the respondent commission as parties claimant. This being so, it necessarily follows that the application of these minor dependents for the accrued compensation due the deceased was timely filed. Having thus secured jurisdiction to pass upon this claim, the commission was invested with jurisdiction to determine all claims, whether for accrued compensation or for death benefits and whether claims of the minor dependents or other dependents, for section 11 (a) of the act, as quoted in the opinion, contains the proviso that "the filing of an application with the Commission for any portion of the benefits prescribed by this Act shall render this section inoperative as to all further claims of any person or persons for compensation arising from the same transaction. * * *" By virtue of this proviso the provisions of section 11 (b) (2) of the act, so strongly relied on by petitioner, became "inoperative" as to this particular proceeding and it is unimportant, therefore, so far as the application for the death benefit is concerned, that Fogarty did not die within a year after his injury or that a disability payment had not been made or an agreement for its payment made or proceedings for its collection commenced by the deceased during his lifetime. Petitioner's contention in this respect is therefore without merit.

With this prefatory statement, we hereby adopt as the decision of the court the opinion written by the CHIEF JUSTICE, heretofore filed. It reads:

The dependents of Harlan Fogarty, deceased, are seeking to have annulled an award of the respondent commission denying their application for adjustment of claim. At the time of his death, which occurred on June 24, 1926, the deceased was a minor. Commencing May 8, 1924, and for a period terminating, by reason of his disability, on June 3, 1924, Harlan Fogarty was employed by the Pacific Gas & Electric Company as a laborer and rough carpenter on the timber flume which supplies water to one of its power houses. Before he began any actual work, but on the same day that he assumed his duties as such employee, the deceased was subjected to a thorough physical examination at the hands of Dr. W. P. Sawyer, representing the employer. The examination disclosed that the deceased at the time was a normal youth of 19 years, in apparent excellent health. The examining physician testified before the respondent commission that:

"There [was] no pathology on the whole card. It [was] one of the cleanest cards of any examination I ever made."

The deceased commenced work immediately following this physical examination. On June 2, 1924, together with other workers, he was summoned to repair a break in the flume some 84 feet in length, which interrupted the flow of water to the power house. In their endeavor to complete the repair work with all possible expedition, the men worked laboriously for many hours. One shift was engaged continuously without sleep for 18 hours, another for 16 hours, and a third, of which the deceased was a member, for 38 hours. During this prolonged period the men were subjected by day to the heat of the sun's rays and by night to the cool air. There is evidence to the effect that during the night Fogarty worked in wet clothes and shoes, and "felt pain and stiffness in both knees." By reason of exhaustion and the presence of pains in his knees and ankles, he was incapable of going to his home, some distance away when the work was done, and he remained with a fellow employee during the night of June 3d. While there he received some slight care intended to relieve his plight. He was conveyed by automobile the following day to his own home. Dr. Sawyer, who, as previously noted, had examined him, was called and found the young man to be the victim of an acute attack of rheumatism, for which he prescribed salicylates, a specific for acute rheumatism. Dr. Sawyer's medical statement, introduced in evidence, shows that the knees and ankles of the deceased were at that time swollen, hot, and tender, and that he had a pulse rate of 110 and a temperature of 103.4.

Dr. Sawyer attended Fogarty until July 10th, at which time he entered the Sutter Hospital, in Sacramento, and came under the care of Dr. J. W. James. The hospital records show that deceased had a pulse rate of 120 and a temperature of 102 on that date. Dr. James found:

"Nearly all small joints swollen and tender; heart increased in all diameters; and murmur replacing first sound. Tongue heavily coated. Patient rather stupid in action."

As to the patient's past history the record noted:

"Occasional sore throat 8 years ago; had tonsils removed. Otherwise well; present illness first serious trouble."

Fogarty remained in the hospital approximately 10 days, and then visited with an aunt for 2 weeks, continuing all the while under the care of Dr. James. It appears that some years prior to his employment by the Pacific Gas & Electric Company Fogarty had been operated upon by Dr. G. E. Chappell and had his tonsils removed. In the fall of 1924 Dr. Chappell examined him, and found that he was suffering from enlarged heart and valvular trouble, as well as weakness of the heart muscle. The doctor advised him to remain at home and to do no manual labor. The rheumatic and heart condition continuing, in October, 1925, Dr. Chappell removed certain remnants of deceased's tonsils, in the hope that it might effect a cure. On March 24, 1926, the deceased was taken to the Krull Hospital, in Sacramento, where, upon examination, Dr. Chappell found his condition aggravated, and by means of an operation removed fluid from the pleural cavity. A similar operation was thereafter performed by Dr. Brown. Fogarty was continuously nursed and cared for during the following months. He died on June 24, 1926, the death certificate giving chronic endocarditis, which is a diseased condition of the membrane lining the valves and cavities of the heart, as the cause of death.

At the conclusion of the several hearings of the dependents for adjustment of their claim, the respondent commission, on September 23, 1927, made its findings and award denying the application, and discharging the employer from all liability in connection with the death of the deceased. Among other things it was found that the death of Harlan Fogarty had not been caused or precipitated by his employment, or by any injury arising out of or in the course of such employment. The applicants' petition for a rehearing was granted and the cause resubmitted without the taking of further testimony. The findings thereafter filed declared the evidence to be insufficient to establish that the deceased had received an injury arising out of and in the course of employment, or that the employment had caused any temporary disability. It was further found that the disability complained of had not been caused by any injury arising out of and in the course of said employment, or by said employment; that the deceased died from disease, and said death had not been caused or precipitated by the employment, or by an injury arising out of or in the course of said employment; that the death of the deceased had not ensued within one year from the date of the alleged injury, and that no disability payment had been made for the injury complained of, or agreement made therefor, or proceedings for its collection commenced, and that no right, therefore, accrued to the applicants to claim a death benefit as a result of the death of the deceased.

Because of this latter finding there is first presented for consideration the question whether the application for adjustment of claim had been timely filed. Certain of the applicants are minors, against whom the limitations of time provided by the Workmen's Compensation Act (St. 1917, p. 831) § 11(d), do not run unless and until a guardian has been appointed. Therefore the respective claims of the minor brothers and sister of the deceased, both for the death benefit provided by section 9(c) and for the accrued compensation covered by section 9(b) 3 of the act, were not barred, because the appointment of their father as their guardian was not made until they as parties claimant were brought into the proceeding then pending before the commission. We are of the view that, under the provisions of section 11(a) of the act, the filing of the application of such minors gave to the commission jurisdiction to hear and determine the claims of any and all persons for compensation arising from the same transaction, including the claims of the parents of the deceased, whether the latter were seasonably filed or not. Section 11(a), supra, provides:

"Unless compensation is paid or an agreement for its payment made within the time limited in this section for the institution of proceedings for its collection, the right to institute such proceedings shall be barred; provided, that the filing of an application with the commission for any portion of the benefits prescribed by this act shall render this section inoperative as to all further claims of any person or persons for compensation arising from the same transaction, and the right to present such further claims shall be governed by the provisions of section 20(d) and section 65(b) of this act."

This court had occasion, in the case of Great Western Power Co. v. Ind. Acc. Comm., 196 Cal. 593, 602, 238 P. 662, 666, to interpret the foregoing section of the act. It is there declared:

"By both constitutional enactment * * * and legislative decree * * * the Industrial Accident Commission is vested with wide powers, to the end that the administration of legislation enacted to create and enforce a complete system of workmen's compensation 'shall accomplish substantial justice in all cases expeditiously, inexpensively, and without incumbrance of any character.' The Workmen's Compensation Act provides (sec. 17 [c]) that there shall be but one cause of action for each transaction coming within the provisions of the act. All claims brought for medical expense, disability payments, death benefits, burial expense, liens, or any other matter arising out of such transaction may, in the discretion of the commission, be joined in the same proceeding at any time. Going one step further, we see no reason why the Legislature may not have intended to provide, in the proviso to section 11 (a), that when a claim for any portion of the benefits prescribed by the act has reached the point where it is necessary or expedient to submit the matter to the decision of the Industrial Accident Commission, the whole subject-matter of the controversy, including the further claims of the applicant, or of any and all other persons, should be thereby submitted to the jurisdiction of the commission for a complete determination, provided, of course, that all claims relating to the transaction be presented within the life of the continuing jurisdiction of the commission. That, we conclude, was the legislative intent, and the effect of the proviso added to section 11 (a)."

Having reached such conclusion, we held in that case that the commission had jurisdiction to make an award in favor of a dependent grandparent of the deceased, even though it appeared that such claimant had not been made a party to the proceeding before the commission until after the expiration of the time limited for the institution of proceedings for the collection of the death benefit. It therefore follows that the respective claims of the parties hereto, both for accrued compensation and for the death benefit, may properly be determined by the commission.

[5, 6] This brings us to a consideration of the important point as to whether the illness and death of the deceased were compensable within the provisions of the Workmen's Compensation Act. This court is well aware that its power to overthrow a finding on a question of fact made by the respondent commission is confined to those cases in which there is no substantial evidence to support the finding. That is the exact situation now before us. The history of the case, as testified to by the witnesses for the applicants and for the employer, presents an unbroken chain of events indicative of the fact that, whatever the condition of the health of the employee had theretofore been, the exposure and exhaustion to which he was subjected precipitated the train of symptoms which culminated in his death. In Singlaub v. Ind. Acc. Comm. (Cal. App.) 262 P. 411, it is declared to be the "unquestioned law that, where the death of an employee may be traced to two causes: First, to that of a primary disease; and, secondly, to overexertion in the work in behalf of his employer in which the employee is engaged, at the time of his death, the employer or his insurer is liable. In other words, notwithstanding the previous diseased condition of the employee and in the natural consequence of which the inevitable death of the employee will ensue, if satisfactorily established that the demise of the employee, though primarily caused by his idiopathic condition, nevertheless was superinduced by overexertion of the employee arising out of his employment, the liability of the employer is fixed. As is said in Eastman Co. v. Industrial Accident Commission, 186 Cal. 587, 594 (200 P. 17, 20): 'If the disability, although arising from a chronic heart trouble, was brought on by any strain or excitement incident to the employment, the industrial liability still exists. Acceleration or aggravation of a pre-existing disease is an injury in the occupation causing such acceleration (citing cases).' "

To the same effect is Knock v. Ind. Acc. Comm., 200 Cal. 456, 253 P. 712, wherein it appeared from the medical testimony adduced that, while the deceased must have been affected with a previous heart affection, the conditions of his employment were such as to have precipitated his collapse sooner than would otherwise have happened.

In the case at bar an effort was made by the employer to show that the deceased employee was the victim of a latent and pre-existing rheumatic and heart condition. The evidence is in apparent conflict on this point. There is also testimony which points to a "focus of infection" as a major causative factor. There is, however, but one conclusion which can be drawn from the whole evidence, and that is that, aside from all other factors, the employment, with its consequential exposure, was the precipitating cause, and induced the acute attack of rheumatism with which Fogarty was immediately thereafter seized, and, further, that such attack not only could, but actually did, lead to the heart condition which ultimately proved fatal. It is necessary to only briefly epitomize the evidence relating to this phase of the case to demonstrate that it falls squarely within the rule of the cases previously cited.

Dr. Sawyer, the physician who examined the deceased prior to his employment by the Pacific Gas & Electric Company, and later attended him, testified that at the time he made the examination he found nothing suggesting that the deceased was then suffering from or a victim of either endocarditis or myocarditis, and that there was no doubt in his mind but that the acute attack of rheumatism was brought on by the exposure, which was the sudden cause of it. Dr. Chappell, called by the employer, testified that, with all the facts before him, he would say there was a causal connection between the prolonged period of labor, with its resultant exposure and exhaustion, and the acute attack of rheumatism suffered by the deceased. Dr. R. W. Harbaugh, assistant medical director of the respondent commission, informed the referee in the proceeding that exposure to cold or wetting or sudden changes of temperature, are among the factors in determining the onset of an attack of rheumatism; that it is generally recognized that a certain kind of heart disease is directly connected with an attack of rheumatism, and he had no doubt but that that was "what happened in this particular case."

There was much evidence as to the "major" and "minor" factors of heart disease, and some of the witnesses refused to commit themselves beyond the assertion that the strain and exposure to which the employee was subjected was only "some slight factor" in precipitating the acute and fatal attack. But the record read as a whole—and we have given it a most searching scrutiny—removes any and all doubt, and sets the case beyond the realm of argument, inference, or conjecture. The employer's own witnesses established that the deceased's employment was a factor in the precipitation of the rheumatic and heart condition which ultimately led to his death. There is not a substantial contradiction on that point. The only fair inference that may be drawn from the evidence is that, if it should be conceded that the deceased was the victim of a latent and preexisting rheumatic and heart condition, a condition which, in our opinion, was not established, the exposure and exhaustion incident to his employment accelerated his collapse. Any contrary inference is inconsistent with the verity of the record. The respondent commission, therefore, erred when it found that the deceased's illness and death had not been caused or precipitated by his employment, or by an injury arising out of or in the course of his employment.

The award is annulled, and the cause is remanded, with directions to the commission to proceed as outlined, and to further find upon the degree of dependency, in order to properly ascertain the amount of the benefits payable to the claimants.

PEOPLE v. BRYANT et al. (Cr. 3140.)★

Supreme Court of California. Jan. 15, 1929.

Rehearing Granted Feb. 14, 1929.

1. Statutes 🔑181(1)—Legislative intent controls in interpreting statutes.

Intention of Legislature and object in mind must not be lost sight of in interpreting statutes, and, where apparent conflict or uncertainty exists or separate acts are not harmonious, courts must look to purpose of Legislature and give that construction to the various acts which reason and sense of the situation reasonably demand.

2. Criminal law 🔑1106(2)—Statute, relating to time and manner of making and filing record on appeal, held not intended to be repealed until rules should be adopted by judicial council (Pen. Code, § 1247; St. 1927, c. 620, § 4; Const. art. 6, § 1a, subd. 5).

Pen. Code, § 1247, relating to the time and manner of making up and filing the record on appeal, *held* not intended to be repealed by St. 1927, ch. 620, § 4, until rules contemplated by section 1 of such chapter should be promulgated and adopted by the judicial council provided for in Const. art. 6, § 1a, subd. 5, since preparation and filing of statement in section 1247 is a necessary step, not only in the perfection of a criminal appeal, but is the proper presentation of the record on such appeal.

In Bank.

Appeal from Superior Court, Los Angeles County; K. S. Mahon, Judge.

J. F. Bryant and another were convicted of obtaining money by false pretenses, and they appeal. Affirmed.

Charles W. Ostrom, John Henderson Pelletier, and Elliott H. Barrett, all of Los Angeles, for appellants.

U. S. Webb, Atty. Gen., and John L. Flynn, Deputy Atty. Gen., for the People.

SEAWELL, J. This matter comes to us on petition for hearing after decision by the District Court of Appeal, First Appellate District, Division 1, dismissing the appeal. The appellants were jointly tried and convicted in the superior court in and for the county of Los Angeles of a felony, to wit, the crime of obtaining money by false pretenses, upon the verdict of the jury trying them, on January 27, 1928, and judgment was pronounced upon said verdict on January 31, 1928. On the day last named, they filed a written notice of appeal and also gave oral notice of appeal from the judgment and order denying their respective motions for new trials. On the following day, February 1, 1928, they filed with the clerk of the court in which the proceedings were had the following notice and request, addressed to the clerk of said court: "Please take notice that the defendants have appealed from the judgment heretofore rendered in the above entitled action, and state that in order to properly prepare the appeal, it will be necessary for them, to have a phonographic copy of the reporter's transcript, together with all the evidence taken upon the trial and of proceedings had in the case relative to testimony taken before the court at the trial of said action and, as well, the clerk's transcript as required by the Penal Code of this State, including the indictment; a copy of the minutes of the trial; a copy of other minutes of the action, including the proceedings on motion and arrest of judg-

---

★Superseded by opinion 278 P. 1025.

ment and new trial; a copy of the written charges given by the court to the jury; a copy of the instructions requested by the defendants and refused by the court, and a copy of instructions requested by defendants and modified by the court, after given; also transcript of any oral charges; a copy of the judgment and any written or printed exhibits offered in evidence at the trial of the cause, and the defendants hereby request that an order of this court be made accordingly."

It is not disputed that the record on appeal is sufficient in every respect, excepting the failure on the part of appellants to comply with those particular portions of section 1247, Penal Code, which we have indicated by symbols of emphasis and which provide that the appellant "must, within five days [upon appeal taken], file with the clerk and present an application to the trial court, *stating in general terms the grounds of the appeal and the points upon which the appellant relies, and designate what portions of the phonographic reporter's notes it will be necessary to have transcribed to fairly present the points relied upon.* If such application is not filed within said time, the appeal is wholly ineffectual and shall be *deemed dismissed* and the judgment or order may be enforced as if no appeal had been taken."

It is not contended by appellants that they complied with that portion of said statute which provides for the filing with the clerk and the presentation to the trial court of an application containing a statement of the grounds of appeal and the points upon which the appellants relied. It is appellants' contention that section 1247, Penal Code, was directly and unqualifiedly repealed by the Legislature of 1927 and was not effective at the time the appellants attempted to perfect their appeal, to wit, February 1, 1928. The Attorney General, on the other hand, contends that said section remained effective by virtue of the saving clause of section 1246, which by amendment was made a part of said section by the same act which also conditionally repealed said section 1247. Said amended section 1246 became effective in the latter part of July, 1927, and reads: "The record on appeal shall be made up and filed in such time and manner as shall be prescribed in rules to be promulgated by the judicial council. Until such rules are promulgated, the time and manner provided by statutes in force on January 1, 1927, shall govern." St. 1927, p. 1047.

By article 6, § 1a, subd. 5, of the Constitution, as amended, the judicial council may adopt or amend rules of practice and procedure for the several courts not inconsistent with laws that are in force. It is conceded that, at the time the motion was made to dismiss the appeal, the judicial council had not promulgated any rules on the subject.

Sections 1246 and 1247, Penal Code, and successive sections amended conditionally or unqualifiedly repealed are in pari materia and have to do with the preparation and perfection or dismissals of appeals and were considered in *one* act. There can be no doubt that it was the intention of the Legislature to continue in force the rules of procedure then in effect until such times as said procedural rules should become supplanted by a system that would better harmonize with the new order of things, which was assuming shape under the supervision and direction of the judicial council. In People v. McClellan (Cal. App.) 263 P. 841, it was held that section 1247 relates to the time and manner of making up and filing the record on appeal, and, if not complied with, the appeal would be subject to dismissal. There can be but little doubt that the Legislature regarded the subject-matter of said section as constituting a part of the procedure upon appeal, inasmuch as said section provided not only that "if such application is not filed within said time, the appeal is wholly ineffectual", but that it "shall be *deemed dismissed.*" This language renders the act self-executing.

[1] The intent of the Legislature and the object it had in mind must not be lost sight of in interpreting or giving effect to statutes, and, where apparent conflict or uncertainty exists in the several provisions of an act, or where several separate acts promotive of a general plan or system are not harmonious or congruous, it is the duty of courts to look to the purpose or intent of the Legislature and give that construction to the various acts which the reason and sense of the situation manifestly demand. 23 Cal. Jur. 725.

"The question whether a repeal of a prior statute, absolute in terms, can be limited in its operation and effect for any reason has frequently arisen; and the decisions of the courts have been uniform, that while the language of the repealing clause must be accepted as the expression of the will of the legislature, and effect given to it according to its terms, unless it appears, although the language of the appeal was general and unqualified, that it was intended to be used in a qualified or limited sense; that whenever that intent is discovered effect must be given to it, as in the interpretation of other acts." (Authorities cited.)

"Statutes in pari materia relate to the same subject, the same person or thing, or the same class of persons or things, and are to be read together, for the reason that it is to be implied that a code of statutes relating to one subject is governed by the same spirit, and are intended to be harmonious and consistent. They are to be taken together as if they were one in law, as one statute." (Authorities cited.) Smith v. People, 47 N. Y. 330, 338.

While section 4 of chapter 620 of the Statutes of 1927 (p. 1047) purports on its face to repeal, upon the effective date thereof, section 1247 of the Penal Code, yet, if in construing said chapter 620, as a whole, it can reasonably be said that the Legislature intended such repealing clause to become effective only as of the time the judicial council might promulgate the rules contemplated by section 1 of said chapter 620, then this court may very properly disregard a literal interpretation of the repealing clause and give effect to the legislative intent. That the courts should not literally construe an express repealing clause contained in a statute, but must, when ascertainable, give expression to the legislative intent as evidenced by other portions of the same or contemporaneous statutes, has long since been judicially determined. Smith v. People, supra; State v. Moorhouse, 5 N. D. 406, 408–411, 67 N. W. 140; State v. Joyce, 307 Mo. 49, 269 S. W. 623, 625; Golden Valley County v. Lundin, 52 N. D. 420, 203 N. W. 317, 319; Hogg v. Bd. of Com'rs, 57 Colo. 463, 141 P. 478, 480; Parshall v. State, 62 Tex. Cr. R. 177, 138 S. W. 759, 764; Attorney General v. Duncan, 76 N. H. 11, 78 A. 925, 927; Indianapolis Union R. Co. v. Waddington, 169 Ind. 448, 82 N. E. 1030, 1032. The New York case above cited (Smith v. People, supra) appears to be a leading case upon the subject. The rule announced in the foregoing cases is again well stated in 26 Am. & Eng. Encyclopedia of Law (2d Ed.) 720, § 5, as follows: "A clause in a statute purporting to repeal other statutes is subject to the same rules of interpretation as other enactments, and the intent, if fairly expressed, must prevail over a mere literal interpretation clearly at variance with such intent. But even where the repealing statute is broad enough in its terms to embrace a particular earlier statute, yet if it is apparent that it is not the legislative intent to repeal such statute, a literal interpretation of the repealing act will not be adopted."

As was said in State v. Moorhouse, supra, the repealing clause must be construed "in the light of the circumstances surrounding its enactment, and also in connection with other statutes passed at the same time as part of the general scheme of legislation of which this repealing statute was only a subordinate feature."

[2] While it may be true that the statement provided for in section 1247 of the Penal Code does not, in strictness, constitute a part of the record on appeal, its preparation and filing is a necessary step, not only in the perfection of a criminal appeal but is essential to a proper presentation of the record on such appeal. Rhodes v. Sargent, 17 Cal. App. 54, 57, 118 P. 727; People v. Fleming, 166 Cal. 357, 375, 136 P. 291, Ann. Cas. 1915B, 881. This being so, it is apparent that the Legislature intended the repeal of section 1247, supra, by section 4, c. 620, Stats. 1927, to be suspended until the rules contemplated by section 1 of said chapter should be promulgated and adopted by the judicial council.

Appellants did not file with the clerk and present the application to the court, stating in general terms the grounds of appeal, etc.; nor was it contained in any record on appeal. This being so, the appeal was ineffectual and was properly dismissed if the saving clause of section 1246 was valid and applied to section 1247. No case has been called to our attention by appellants which held that an adoption of rules of procedure by reference is not permissible.

Acts and statutes, which provide that a method of procedure in effect at a designated past period of time shall be continued in force, are not uncommon, and are generally accepted as being within the power of the Legislature. The amendment of section 1246, Penal Code, and the repeal of section 1247, Penal Code, accomplished in the same act, gave notice as to the procedure that was in effect. If appellants were not informed of the adoption of rules by the judicial council in some approved method, they could have safely relied upon the procedure as it formerly stood.

From what has been said, it follows that we would not be justified in disturbing the order of the district court dismissing the appeal.

The order is affirmed.

We concur: WASTE, C. J.; SHENK, J.; RICHARDS, J.; CURTIS, J.; PRESTON, J.; LANGDON, J.

---

206 Cal. 148

BOONE v. KINGSBURY, State Surveyor General, and six other cases. (S. F. 12707, 12708, 12728–12730, 12743, 12766.)★

Supreme Court of California. Dec. 31, 1928.

Rehearing Denied Jan. 29, 1929.

1. Constitutional law 🔑77—Ministerial officer may not, under guise of a rule, vary or enlarge terms of statute.

A ministerial officer may not, under the guise of a rule and regulation thought to be necessary to carry out the purpose of an act, vary or enlarge the terms or conditions of a legislative enactment.

2. Mines and minerals 🔑6—Statute requiring applicant for permit to prospect on state lands and for lease held not to authorize surveyor general to require notice to littoral owners (St. 1921, p. 404, as amended by St. 1923, p. 593; St. 1921, p. 404, § 18).

Under St. 1921, p. 404, as amended by St. 1923, p. 593, providing for granting of permits to enter and prospect for minerals on tidal and

---

★Rehearing denied.

submerged lands and to lease them on royalty basis, and merely requiring applicant for permit or lease to post notice on land and record it, surveyor general may not, under guise of regulation authorized by section 18, require service of personal notice or publication of notice on littoral or riparian owners.

3. Statutes ⇒112—Statute relieving littoral owners entering and prospecting on tidal lands from onus of trespassers held not violative of constitutional requirement that subject be expressed in title (St. 1921, p. 404, § 17, as amended, and § 17a as added by St. 1923, p. 593, §§ 1, 2; Const. art. 4, § 24).

St. 1923, p. 593, §§ 1, 2, adding section 17a to St. 1921, p. 404, amending section 17 by relieving littoral owners of onus of trespassers in entering on tide or submerged lands in prospecting for minerals, *held* not violative of Const. art. 4, § 24, requiring subject of act to be expressed in its title.

4. Statutes ⇒125(1)—Statute authorizing surveyor general to refuse permit to prospect on state mineral lands held invalid because subject is not expressed in title (St. 1921, p. 404, § 18a, as added by St. 1923, p. 593, § 3; Const. art. 4, § 24).

St. 1923, p. 593, § 3, amending St. 1921, p. 404, by adding thereto section 18a, authorizing surveyor general to refuse to grant permit to enter and prospect on tide and submerged lands and to lease them on royalty basis when in his judgment the work of prospecting for, developing, or extracting mineral would cause damage or loss to nearby property, *held* violative of Const. art. 4, § 24, in that title makes no reference to anything germane to the subject thereof.

5. Mandamus ⇒164(3)—Allegation that certain lands were within known geological structure held not to traverse allegation that, when application for prospecting permit was made, lands were not part of known geological structure (St. 1921, p. 404, as amended by St. 1923, p. 593).

In proceeding for mandamus to compel surveyor general to issue permits to prospect for minerals in tidal and submerged lands, under St. 1921, p. 404, as amended by St. 1923, p. 593, allegations of answer that certain lands "are situate within a known geological structure of a producing oil and gas field" did not traverse allegation that, when application for permit was made, such lands were not part of a known geological structure, but became such thereafter.

6. Mandamus ⇒164(3)—Answer, not unequivocally denying that petitioner for mandamus filed application for prospecting permit on date alleged by him, and contrary statements in answering petitioners' petition, pleaded latter out of court (St. 1921, p. 404, as amended by St. 1923, p. 593).

In mandamus proceeding to compel issuance of permit to prospect for minerals in tide and submerged lands under St. 1921, p. 404, as amended by St. 1923, p. 593, answer of alleged littoral owners, which did not unequivocally deny that petitioner filed his application on date alleged by him, but merely that on or about certain later dates he filed application for prospecting permit, and their petition alleging on information and belief that adverse party's petition was filed on date alleged therein, pleaded answering petitioners out of court.

7. Pleading ⇒121(4) — Positive allegation of record fact is conclusive, as against contrary allegation on information and belief.

The positive allegation of a record fact is conclusive on that issue, as against contrary allegation on information and belief made by parties having means of acquainting themselves with such fact.

8. Mines and minerals ⇒1—Minerals in tidal and submerged lands belong to state in its sovereign right.

Minerals contained in the soil covered by tidal and submerged lands belong to the state in its sovereign right.

9. Mines and minerals ⇒6—Littoral owners not complying with statutes authorizing prospecting on tidal lands cannot defeat right of citizens who have complied with statutes (Civ. Code, § 830; St. 1921, p. 404, as amended by St. 1923, p. 593).

Under Civ. Code, § 830, the proprietary rights of owner of land bordering tide water do not extend beyond ordinary high-water mark, and littoral owners who have not complied with St. 1921, p. 404, as amended by St. 1923, p. 593, providing for permits to prospect on tidal and submerged lands, have no such right by reason of littoral ownership as would defeat right of any other citizen who has complied with statute, and they have no right of access to ocean, as against state or its grantee in exercise of a lawful use or purpose.

10. Navigable waters ⇒37(2)—State can grant preference in tidal and submerged lands to littoral owners for substantial reasons.

The state has power to grant a preference in favor of littoral owners as respects rights in tidal and submerged lands, where substantial reasons exist justifying a distinction.

11. Mines and minerals ⇒6—Littoral owner, filing application for permit to prospect on tidal lands over six months after another's prior application, had no right as against latter (St. 1921, p. 404, as amended by St. 1923, p. 593).

Under St. 1921, p. 404, as amended by St. 1923, p. 593, providing for permits to prospect for minerals on tidal and submerged lands and to lease such lands on royalty basis, littoral owner, who filed application for permit more than six months after another prior application covering same land, had no right as against prior applicant.

12. Mandamus ⇒9—That intervener had filed mandamus petition in superior court held no bar to another applicant's similar petition in Supreme Court (St. 1921, p. 404, as amended by St. 1923, p. 593).

That intervener, in original mandamus proceeding in Supreme Court to compel surveyor general to issue permits to prospect for minerals in tidal and submerged lands under St. 1921, p. 404, as amended by St. 1923, p. 593, had filed a similar petition in superior court which had not been formally disposed of, *held* no bar to petition of another applicant, where there was no allegation that latter was party to superior court proceeding, was served with process, or had knowledge thereof, in view of fact that intervener abandoned superior court as forum and selected Supreme Court for hearing and determination of same questions.

13. Mandamus 🔑143(2)—Delay in commencing mandamus proceeding to compel surveyor general to issue permit to prospect on tidal lands held not to estop petitioner on ground of laches (St. 1921, p. 404, as amended by St. 1923, p. 593).

Where applicant for permit to prospect for minerals on tidal and submerged lands under St. 1921, p. 404, as amended by St. 1923, p. 593, posted required notice on property in March 17, 1926, and filed his application for permit April 12, his failure to bring mandamus proceeding against surveyor general to compel issuance of permit promptly after receiving notice in March, 1927, that his application would not be granted, *held* not to estop him on ground of laches, where he made many efforts to convince surveyor general that he was entitled to permit and manifested a willingness to conform to any reasonable requirement that might be prescribed, and in view of doubt in surveyor general's mind as to his duties and powers under statute.

14. Mandamus 🔑141—Mandamus to cancel tidal lands prospecting permits issued to certain applicants, and grant them to others, should have been brought in superior court, instead of Supreme Court (St. 1921, p. 404, as amended by St. 1923, p. 593).

Mandamus to compel surveyor general to cancel permits to prospect for minerals on tidal and submerged lands under St. 1921, p. 404, as amended by St. 1923, p. 593, issued to one group of applicants, and grant them to another group, and that judgment be entered against parties interested in subject-matter who have had no opportunity to be heard, should have been brought in superior court, where pleadings could have been settled and disputed questions of fact found and determined, instead of in Supreme Court, and original proceeding in latter court will be dismissed.

15. Navigable waters 🔑36(1)—Common law vesting title to soil of sea in sovereign for people is law of land, except as affected by express grant, prescription, or usage.

The common law vesting title to soil of sea or arms of sea in sovereign in trust for the people is law of the land, except in so far as it may be affected by express grant, prescription, or usage.

16. Mines and minerals 🔑6—One purpose of statute authorizing prospecting on submerged lands was to give citizens opportunity to reduce to useful purpose minerals beneath ocean's bed (St. 1921, p. 404, as amended by St. 1923, p. 593).

One of purposes in enacting St. 1921, p. 404, as amended by St. 1923, p. 593, providing for granting of permits to residents of state who are citizens of United States to prospect on tidal and submerged lands and to lease such lands on royalty basis, was to give citizens an opportunity to intercept the large volumes of oil gravitating seaward to inextricable depths, and to reduce to useful purposes all gas and mineral deposits reposing beneath ocean's bed.

17. Mines and minerals 🔑4—Development of mineral resources should not be hampered by courts, except for most substantial grounds.

The development of mineral resources, of which oil and gas are the most important, is the settled policy of state and nation, and courts should not hamper this manifest policy, except for the most practical and substantial grounds

18. Constitutional law 🔑70(3)—Legislature's finding that authorizing oil wells on tidal lands would not substantially impair paramount public interest is conclusive (St. 1921, p. 404, as amended by St. 1923, p. 593).

Finding of the Legislature, disclosed by enactment of St. 1921, p. 404, as amended by St. 1923, p. 593, that there is nothing in the drilling and operation of oil wells on tidal and submerged lands in the manner provided in the statute that would substantially impair the paramount public interest in the lands and water remaining, is conclusive in such matters.

19. Constitutional law 🔑70(1)—To justify court interference with Legislature's right to alienate submerged lands, grants must impair power of succeeding Legislatures.

To justify interference by courts with right of Legislature to alienate tidal or submerged lands, it must appear that such grants do or will impair the power of succeeding Legislatures to regulate, protect, improve, or develop the public rights of navigation and fishing.

20. Navigable waters 🔑37(4)—Constitutional provisions become incorporated in grant of tidal waters.

Words of the Constitution are to be considered as incorporated in a grant or patent to tidal lands, the same as if inserted therein, and qualify grants, so that estate granted is limited to the permitted uses.

21. Mines and minerals 🔑6—License to explore and mine for minerals on tidal lands is not "grant" or "sale" prohibited by Constitution (St. 1921, p. 404, as amended by St. 1923, p. 593; Const. art. 15, § 3).

Under St. 1921, p. 404, as amended by St. 1923, p. 593, the license, privilege, or leasehold by which permittees are granted right to explore and mine for gas and oil does not constitute a "grant" or "sale" of tidal lands, in the sense that those terms are used in the prohibitory provisions of Const. art. 15, § 3.

[Ed. Note.—For other definitions, see Words and Phrases, First, Second, and Third Series, Grant; Sale.]

22. Evidence 🔑10(4), 51—Court takes judicial notice of coast lines of state, and will resort to publications of commerce department describing coast.

The court will take judicial notice of the coast lines within the state, and will resort to publications issued by the Department of Commerce describing and delineating the United States coast and geodetic surveys.

23. Navigable waters 🔑37(2)—State has absolute power to alienate tidal and submerged lands unfit for navigation, commerce, or fisheries.

State has absolute right to alienate its tide and submerged lands when they are unfit for navigation, are useless as aids of commerce, and possess no substantial value as fishing grounds, and it is only where reduction of the water area amounts to a substantial interference with navigation, commerce, or fisheries that absolute power by the sovereign and its control and dominion over said lands can be questioned.

24. Navigable waters 🔑37(2)—State cannot abdicate its trust over property for people so as to leave property entirely under control of private parties, except to promote public interest.

State cannot abdicate its trust over property in which whole people are interested, like navigable waters and soils under them, so as to leave them entirely under control of private parties, except in case of parcels used in promoting interest of public therein, or when parcels can be disposed of without impairment of the public interest in what remains; but the trust in which tidal and submerged lands are held does not prevent state from reclaiming such lands from the sea where it can be done without prejudice to the public right of navigation and applying them to other purposes and uses.

25. Evidence 🔑10(1)—It is common knowledge that gas and oil strata exist in but few sections of state, and that indications thereof are easily recognized by experts.

It is common knowledge that gas and oil strata exist in but a few sections of the state, and that the geological indications are easily recognized by geologists and those familiar with subject.

26. Mines and minerals 🔑6—Statute authorizing prospecting and leasing of mineral rights in tidal and submerged lands held valid (St. 1921, p. 404, as amended by St. 1923, p. 593).

St. 1921, p. 404, as amended by St. 1923, p. 593, providing for granting of permits to residents of state who are citizens of United States to prospect for minerals on tidal and submerged lands and to lease such lands on a royalty basis, *held* valid exercise of right inhering in state by virtue of its sovereign power, and does not impinge on the state or federal Constitutions, and is not in conflict with any act of Congress or of state.

Shenk, J., dissenting.

In Bank.

Original applications for mandamus by K. E. Boone, H. E. Shudde, Charles M. Workman, Hickey Bros. Company and others, R. W. Harthorn and others, Harry A. Chamberlin, and by Kittie C. Ballard and others, against W. S. Kingsbury, Surveyor General of the State of California, and ex officio Register of the State Land Office, to require him to issue permits to prospect for minerals on tidal and submerged lands. Writs granted as to petitioners Boone and Shudde, and denied as to all other petitioners.

Rehearing denied: SHENK and CURTIS, JJ., dissenting.

Faries & Williamson, David R. Faries, Frederick W. Williamson, Edwin Heizman, and McIntyre Faries, all of Los Angeles, for petitioners Boone and Shudde.

A. L. Weil and Morrison, Hohfeld, Foerster, Shuman & Clark, all of San Francisco, and Roy Maggart, Geo. B. Bush, Thomas A. Joyner, and Philip C. Farman, all of Los Angeles, amici curiæ.

Harry A. Chamberlin, of Los Angeles, in pro. per.

Jerry H. Powell, Paul M. Gregg, and Arthur W. Eckman, all of Los Angeles, for petitioners Hickey Bros. Co. and Harthorn.

Clarke & Bowker, of Los Angeles, and James C. Hollingsworth, of Ventura, for petitioner Workman.

Clarke & Bowker, of Los Angeles, for petitioners Ballard and others.

U. S. Webb, Atty. Gen., for respondent.

Flint & Mackkay, Frank P. Flint, Arthur R. Smiley, and Alexander T. Sokolow, all of Los Angeles, amici curiæ.

SEAWELL, J. Original applications for writs of mandamus by which the validity of chapter 303, Statutes and Amendments 1921, p. 404, and certain specific sections thereof, and also chapter 285, Statutes and Amendments 1923, p. 593, amendatory of said chapter 303, which provides for the granting of permits to residents of the state who are citizens of the United States, to enter and prospect upon tidal and submerged lands and to lease the same on a royalty basis, is assailed.

All of the petitioners herein are applicants for permits to enter and prospect for oil, oil shale, gas, phosphate, sodium, and other mineral deposits upon the several areas of public lands described in each respective application. Said lands are tidal and submerged lands situate in the vicinity of a small cove of the Pacific Ocean at Seacliff, county of Ventura, this state. Respondent, W. S. Kingsbury, surveyor general of the state of California and ex officio register of the state land office, has refused to grant the permits applied for, basing his refusal to do so upon the ground that the granting of the same would authorize the conduct of a business in and upon tidal and submerged lands which would interfere with and be destructive of navigation and the fisheries in the proximity of and within the areas described in said applications, and that the Legislature, in adopting the statute purporting to authorize the granting of said permits, exceeded its authority in attempting to provide a method by which tidal and submerged lands held by the state in trust for its inhabitants by virtue of its sovereign right and not by its proprietary right may be leased to residents of this state who are citizens of the United States or who had declared their intention to become citizens. The title of said chapter 303, Statutes and Amendments 1921, is as follows: "An act to reserve all minerals in state lands; to provide for examination, classification and report on the mineral and other character of state lands; to provide for the granting of permits and leases to prospect for and take any such minerals; to provide for the rents and royalties to be paid, and granting certain preference rights; to provide for the making of rules, regulations and contracts necessary to carry out the purposes of this act; and repealing acts or parts of acts in conflict herewith; providing for an appropriation to defray the cost of administering this act."

By the provisions of said act, all coal, oil, oil shale, gas, phosphates, sodium, and other mineral deposits in lands belonging to the state are reserved to the state and are reserved from sale except upon a rental and royalty basis, and a purchaser of any lands belonging to the state or which may thereafter become the property of the state shall acquire no right, title, or interest in or to such deposits except as in said act expressly provided. The right of such purchaser shall be subject to the reservation of said coal, oil, oil shale, etc., and to the conditions and limitations prescribed by law for the state and persons authorized by it to prospect for, mine, and remove such deposits and to occupy and use so much of the surface of said land as may be required for all purposes reasonably extending to the mining and removal of such deposits therefrom. All applications to purchase state lands filed subsequent to the passage of the act and all sales are made subject to a reservation to the state of one-sixteenth of all the coal, oil, gas, and other mineral deposits in all lands so acquired. The surveyor general is authorized to classify from time to time any or all state land for its different possible values and uses, and is authorized, upon payment to him of 50 cents per acre for each acre embraced within the boundaries of the lands proposed to be prospected, and under such rules and regulations as he may prescribe, to grant any person or association of persons who are qualified under the citizenship clause, or corporations, 90 per cent. of whose stockholders are likewise qualified under said citizenship clause, a prospecting permit, which shall give the exclusive right, for a period not exceeding two years, to prospect for oil or gas, not exceeding 640 acres of land wherein such deposits of oil or gas belong to the state and are not within any known geological structure of a producing oil or gas field, upon condition that the permittee shall begin drilling operations within six months from the date of the permit and shall prosecute said drilling to depths and subject to certain conditions therein required, unless for the causes therein named he is excused from so doing, which are not material to the issues before us. The said act provides that the applicant shall locate such land in a reasonably compact form according to the legal subdivisions of the public land surveys, if the land be surveyed, and in an approximate square or rectangular tract if unsurveyed, said surveying to be at the expense of the applicant. In case of prospecting permits and leases to river beds, lake beds, overflowed, tide, and submerged lands, the width or length of the prospecting permit or lease along the shore line is prescribed. If the applicant shall cause to be erected upon the land for which a permit is sought a monument not less than four feet high at some conspicuous place thereon, and shall post a notice in writing on or near said monument, stating that an application for a permit will be made within 30 days after the date of posting said notice, giving the name of the applicant, the date of the notice, and general description of the land covered by such permit, by reference to courses and distances from such monument and such other natural objects and permanent monuments as will reasonably identify the land, stating the amount thereof, in acres, he shall, during the period of 30 days following such marking and posting, be entitled to a preference right over others to a permit for the land so identified; provided, that such applicant shall, as a part of his application for a permit, show that within 2 days after the posting of the said notice he recorded a copy of the same in the county recorder's office of the county in which the said land is situated. Within 90 days after receiving a permit the applicant shall mark upon the ground each of the corners of the tract described in the permit with substantial monuments, so that the boundaries can be readily traced on the ground, and shall post in a conspicuous place upon the lands a notice that such permit has been granted and a description of the lands covered thereby. Where the boundaries sought to be prospected or developed are wholly or partially in river beds, lake beds, overflowed, tide, and submerged lands, the notice shall be conspicuously posted on a monument as closely to a corner of the land as possible, and shall describe the area to be developed by courses, and distances, so that the limits of the area can be easily determined. In no case shall permits or leases be granted covering tide, overflowed, or submerged lands fronting on an incorporated city or for a distance of one mile on either side thereof. In case of an application for a permit or lease covering tide, overflowed, or submerged land by any one other than the littoral or riparian proprietor, said littoral or riparian proprietor shall have six months within which to file an application for a permit or lease; but if said littoral or riparian proprietor fails to comply with the requirements of said act and its rules and regulations made in pursuance thereof, his preferential rights shall thereupon cease and be forever terminated, and the original applicant shall be permitted to proceed with his application.

Upon establishing to the satisfaction of the surveyor general that valuable deposits of oil or gas have been discovered within the limits of the land embraced in any permit, the permittee shall be entitled to a lease for one-fourth of the land embraced in the prospecting permit, but in any event he shall be granted a lease for as much as 160 acres of said lands, if there be that number of acres within the permit. If the lands are unsurveyed they shall be surveyed by the surveyor general in accordance with rules and regulations prescribed by him. Such lease shall be for a period of 20 years upon a royalty basis of 5 per centum in amount or value of the production and the annual payment in advance of a rental of $1 per acre. The permittee is given a preferential right to a lease for the remainder of the land in his prospecting permit at a royalty of not less than 12½ per centum in amount or value of the production, under such other conditions as are fixed for oil and gas leases in the act, the bonus and royalty to be determined by competitive bidding or fixed by such other method as the surveyor general may by regulation prescribe. The surveyor general is given the right to reject any and all bids. Until the permittee shall apply for a lease to the one-quarter of the permit area, he shall pay to the state of California 20 per centum of the gross value of all oil or gas secured by him from the lands embraced within his permit and sold or otherwise disposed of by him or held by him for any disposition whatsoever. All permits and leases of lands shall be subject to the condition that no wells shall be drilled within 200 feet of any of the outer boundaries of the lands described in said permit or lease unless the adjoining lands have been patented or the title thereto otherwise vested in private owners, and to the further condition that the permittee or lessee will, in conducting his explorations and mining operations, use all reasonable precautions to prevent waste of oil or gas developed in the land, or the entrance of water through wells drilled by him to the oil sands or oil-bearing strata to the destruction or injury of the oil deposits. Violations of this provision of the act works a forfeiture of the permit or lease enforceable by appropriate court proceedings.

Power is given the surveyor general, whenever the average production of any oil well shall not exceed ten barrels per day, to reduce the royalty on future production when in his judgment the well cannot be successfully operated upon the royalty fixed in the lease. Leases shall be for a period of twenty years with the preferential right in the lessee to renew the same for successive periods of ten years upon such reasonable terms and conditions as may be prescribed by the surveyor general. Section 10 provides, that "for the purpose * * * of promoting the sale of state land, and the more active cooperation of the owner of the soil, and to facilitate the development of its mineral resources the state hereby constitutes the purchaser of the soil, its agent for the purposes herein named and in consideration hereof, relinquishes to and vests in the purchaser of state lands an undivided fifteen-sixteenths of all oil and gas and the value of the same that may be upon or within any state land purchased after the passage of this act." The purchaser is authorized to sell or lease to any person, firm, or corporation the oil and gas and other minerals that may be thereon or therein upon such terms as such purchaser and owner may deem best, subject to reservations therein contained. Upon the discovery of oil or gas in paying quantities on adjoining lands, the purchaser shall within three months thereafter begin the drilling of wells upon his land, which shall be continuous as provided by appropriate rules and regulations prescribed by the surveyor general. The surveyor general shall reserve and may exercise the authority to cancel any prospecting permit or lease upon failure by the permittee to exercise due diligence and care in the prosecution of the prospecting work in accordance with the terms and conditions stated in the permit or lease which shall form a part of said instruments. No person, association, or corporation shall take or hold more than one oil or gas permit or lease; no corporation shall hold any interest as a stockholder of another corporation in more than one lease, and no person or corporation shall take or hold any interest as a member of an association or associations or a stockholder of a corporation or corporations holding a lease under said act which together with the area embraced in any direct holding of a lease, or which together with any other interest or interests as a member of an association or associations or as a stockholder of a corporation or corporations holding a lease under the provisions of said act for any kind of mineral leased thereunder exceeds in the aggregate an amount equivalent to the maximum number of acres of the respective kinds of minerals allowed to any one lessee under said act. Provision is made for any number of lessees combining their several interests for the purpose of constructing and carrying on the business of a refinery, or of establishing and constructing, as a common carrier, pipe lines, or railroads to be operated and used by them jointly in the transportation of oil from their several wells, or the transportation of coal. Combinations in the form of unlawful trusts or conspiracies in the restraint of trade in the mining or selling of coal, phosphate, oil, shale, gas, or sodium are prohibited, and the leasehold in such cases is to be declared forfeited to the state. Provision is made for rights of way through all state lands for pipe line purposes, subject to certain regulations. No lease is to be assigned or sublet except with the consent of the surveyor general. Each lease shall contain provisions for the purpose of insuring the exercise of reasonable diligence, skill, and care in the operation of said leased property, and a provision for the safety and welfare of miners and the prevention of undue waste, as may be prescribed by the surveyor general, including the observance of the eight-hour work day; prohibitions against the employment of any boy under the age of 16 years or the employment of girls or women in any mine below the surface, restraint against freedom of purchase by employés, compulsory payment of wages at least twice a month, and such provisions as the surveyor general may deem necessary to insure the sale of the production of said leased lands to the public at reasonable prices, for the protection of the interests of the state, for the prevention of monopoly, and for the safeguarding of the public welfare, are made conditions of the lease.

Section 18, and other clauses of said act containing similar language, form the basis of the authority assumed by the surveyor general to enlarge upon the statutory notice required to be given by the applicant of his filing any application for a permit by providing that, in addition to the statutory notice, said applicant shall personally serve littoral owners, if they can be found within the state, and, if they cannot, then by publication in a newspaper of general circulation, much after the manner of serving summons in a civil action. This section is important by reason of the claim advanced by some of the littoral owners—based upon the effectiveness of such a rule as above referred to—that a nonlittoral owner's right to a permit and lease would not be considered if he failed to serve littoral owners with notice, as required by the surveyor general's rule. Said section 18 provides: "The Surveyor General of the state is authorized to prescribe necessary and proper rules and regulations and to do any and all things necessary to carry out and accomplish the purposes of this act, also to fix and determine the boundary lines of any structure, or oil or gas field, for the purpose of this act."

A preferential right to a permit to prospect mineral lands may, under section 4 of said act, be acquired "if the applicant shall cause to be erected upon the land for which a permit is sought a monument not less than four feet high, at some conspicuous place thereon, and shall post a notice in writing on or near said monument, stating that an application for permit will be made within thirty days after the date of posting said notice, giving the name of the applicant, the date of the notice, and such a general description of the land to be covered by such permit by reference to courses and distances from such monument and such other natural objects and permanent monument as will reasonably identify the land, stating the amount thereof in acres, he shall during the period of thirty days following such marking and posting, be entitled to a preference right over others to a permit for the land so identified; provided, however, that applicant shall, as a part of his application for a permit, show that within two days after the posting of the said notice, he recorded a copy of the same in the county recorder's office of the county in which the said land is situated. The applicant shall, within ninety days after receiving a permit, mark each of the corners of the tract described in the permit upon the ground with substantial monuments, so that the boundaries can be readily traced on the ground, and shall post in a conspicuous place upon the lands a notice that such permit has been granted and a description of the lands covered thereby; provided, however, that where the boundaries of the land sought to be prospected or developed under lease are wholly or partially in river or lake beds, overflowed, tide and submerged lands, the notice shall be conspicuously posted on a monument as close to a corner of the land as possible and shall specifically describe the area to be developed by courses and distances so that the limits of the area can be easily determined; provided further, however, that in no case shall permits or leases be granted covering tide, overflowed or submerged lands fronting on an incorporated city, or for a distance of one mile on either side thereof; provided further, however, that in case of an application for a permit or a lease covering tide, overflowed or submerged land by anyone other than the littoral or riparian proprietor, said littoral or riparian proprietor shall have six months within which to file an application for a permit or lease, but if said littoral or riparian proprietor fails to comply with the requirements of this act and its rules and regulations made in pursuance hereof, his preferential rights shall thereupon cease and forever be terminated, and the original applicant shall be permitted to proceed with his application." The foregoing is all the statute contains on the subject of notice.

Nowhere in the act is the applicant required to personally serve the littoral or riparian owner with notice of the filing of his application for a permit. Under the provisions of the act the only requirement as to notice is that the applicant post notice and within two days thereafter record the same in the county recorder's office of the county in which the land is situated, as therein specified. The surveyor general, assuming to act under the authority conferred upon him by section 18, has, by the adoption of article VII, subsections c, d, e, and f, Rules and Regulations, attempted to impose burdens upon the applicant not imposed by statute by requiring personal service of notice, and, under certain circumstances, publication of notice of the filing of an application for a permit.

[1] That a ministerial officer may not, under the guise of a rule and regulation, thought to be necessary to carry out and accomplish the purpose of an act, vary or enlarge the terms or conditions of a legislative enactment, has often been the subject of judicial decision. The very authorities cited by petitioners in support of the particular rule of the surveyor general now under consideration clearly and definitely indicate that said rule is without and in excess of his jurisdiction. Petitioners cite Hodgson v. Midwest Oil Co. (D. C.) 297 F. 273, and Leonard v. Lennox (C. C. A.) 181 F. 766. In the former of these cases, at page 276 of 181F., it is declared: "While the Leasing Act [30 USCA § 181 et seq.] itself does not provide for notice, it in effect gives the Interior Department the right to prescribe rules and regulations to carry the act into effect. Such rules and regulations were prescribed by the Land Department requiring notice to be given of all applications for leases, which regulations should be given the full force and effect of statutes, *when not inconsistent with or repugnant to the law itself.*" (Italics supplied.) The latter case holds that: "The power of those officers under the law to adopt such a regulation is not reasonably open to question. Although powerless to adopt a regulation which is in anywise inconsistent with or repugnant to the public land laws, they possess ample power to enforce, by appropriate regulations, every part of those laws, *as to which it is not otherwise specially provided.*" (Italics supplied.)

In U. S. v. George, 228 U. S. 14, 21, 33 S. Ct. 412, 414 (57 L. Ed. 712), it is declared: "It is manifest that the regulation adds a requirement which that section does not, and which is not justified by [sec.] 2246. To so construe the latter section is to make it confer unbounded legislative powers. What, indeed, is its limitation? If the Secretary of the Interior may add by regulation one condition, may he not add another? If he may require a witness or witnesses in addition to what [sec.] 2291 requires, why not other conditions, and the disposition of the public lands thus be taken from the legislative branch of the Government and given to the discretion of the Land Department?"

Again, in Williamson v. U. S., 207 U. S. 425, 462, 28 S. Ct. 163, 177 (52 L. Ed. 278), it is stated: "True it is that in the concluding portion of [sec.] 3 of the timber and stone act it is provided that 'effect shall be given to the foregoing provisions of this act by regulations to be prescribed by the Commissioner of the General Land Office.' But this power must in the nature of things be construed as authorizing the Commissioner of the General Land Office to adopt rules and regulations for the enforcement of the statute, and cannot be held to have authorized him, by such an exercise of power, to virtually adopt rules and regulations destructive of rights which Congress had conferred."

U. S. v. United Verde Copper Co., 196 U. S. 207, 215, 25 S. Ct. 222, 225 (49 L. Ed. 449), holds that: "If rule 7 is valid, the Secretary of the Interior has power to abridge or enlarge the statute at will. If he can define one term, he can another. If he can abridge, he can enlarge. Such power is not regulation; it is legislation. The power of legislation was certainly not intended to be conferred upon the Secretary."

Morrill v. Jones, 106 U. S. 466, 467, 1 S. Ct. 423, 424 (27 L. Ed. 267), declares: "The Secretary of the Treasury cannot by his regulations alter or amend a revenue law. All he can do is to regulate the mode of proceeding to carry into effect what Congress has enacted. In the present case we are entirely satisfied the regulation acted upon by the collector was in excess of the power of the Secretary. The statute clearly includes animals of all classes. The regulation seeks to confine its operation to animals of 'superior stock.' This is manifestly an attempt to put into the body of the statute a limitation which Congress did not think it necessary to prescribe."

[2] To the same effect is Waite v. Macy, 246 U. S. 606, 609, 610, 38 S. Ct. 395, 62 L. Ed. 892. In each of the foregoing cases there was provision, as in the act here involved, for the adoption of rules and regulations by a specified officer to carry into effect the purposes of the respective acts. These cases are authority to the effect that so long as the act here under consideration merely requires posting of notice by an applicant the surveyor general may not, under the guise of a regulation authorized by section 18, require the service of personal notice or the publication of notice. This rule is ineffective and cannot defeat the rights of any of the parties to these proceedings.

All the moneys received by the surveyor general under the provisions of the act from rents, fees, bonuses, and royalties accruing from the use of state school lands shall be paid into the school fund, and all other moneys shall be deposited in the state general fund.

The act concludes with the provision that, if any section, subsection, sentence, clause, or phrase of said act is for any reason held to be unconstitutional, such decision shall not affect the validity of the remaining portions of said act, etc.

[3] Prior to the passage of the amendment

of section 17, chapter 285, Statutes and Amendments, 1923, littoral or riparian owners, as well as nonlittoral owners, who had entered upon tide, overflowed, or submerged lands, were regarded as trespassers. Said amendment relieved littoral owners of the onus of trespassers by adding section 17a with respect to their status, as follows: "If any littoral or riparian owner of land, without objection by the State of California or the United States of America or any of its officials, shall have entered upon tide, overflowed or submerged land, and for more than ten years next preceding the passage of this act, has been engaged in drilling the same, or has operated thereon, a producing well or producing wells, said littoral or riparian owner shall be entitled to a lease of such portion of such tide, overflowed or submerged land as may be necessary for the drilling of uncompleted wells and for the deepening of wells now producing or now being drilled that may hereafter become a producing well; provided, however, that application therefor shall be made by such littoral or riparian owner within three months after the passage of this act. [June 1, 1923.] Any such lease shall provide for the payment by the lessee of a royalty of twelve and one-half per centum in amount or value of the production. * * *"

This amendment is not open to the objection that the subject is not expressed in its title in compliance with article 4, § 24, state Constitution.

[4] Without mention of or reference to anything germane to the subject being made in the title of said amendatory act by number or otherwise, section 18a was added to the original act. That section attempts to confer authority upon the surveyor general with respect to a subject that was not included in the original act. It provides: "The Surveyor-General is hereby authorized to refuse to grant any permit or lease applied for under the provisions of this act when in his judgment the work of prospecting for, developing or extracting mineral would cause loss or damage to property near the land applied for."

The validity of this amendment is attacked on two grounds: First, that it is an attempt to delegate to the surveyor general, an executive officer, legislative power, the exercise of which is forbidden by the provisions of article 3, § 1, and article 4, § 1, state Constitution. It is asserted, under the express authority of Inglin v. Hoppin, 156 Cal. 483, 105 P. 582, that "the granting of state lands is a legislative power and prerogative," and that any act which attempts to confer such power upon an executive officer is void. Secondly, that the subject of the act is not embraced in its title. This last objection being clearly inescapable, it is not necessary to discuss the first ground of objection. Adopting the most liberal rule of construction, which we must, in the interest of protecting meritorious legislation from being declared void through inartificially drawn statutes (People v. Jordan, 172 Cal. 391, 156 P. 451; Estate of Wellings, 192 Cal. 506, 221 P. 628), it is not possible to save the section from the condemnation of the constitutional provisions cited. The purposes of the provisions of the Constitution in the premises are too familiar to lawyer and legislator to justify restatement. The reasons of the rule and its history are elaborately set out in Ex parte Liddell, 93 Cal. 633, 29 P. 251. Section 18a, being void, cannot, therefore, be considered in the determination of the rights of any of the parties to this proceeding.

The remaining, and in fact the major, law question presented by the case is pressed by respondent surveyor general and goes to the validity or effectiveness of the act in so far as it attempts to authorize the leasing of tide and submerged lands to private citizens, or authorizes the holding of said lands in any other use than in trust for a strictly public use. This question will receive attention at a later period in the consideration of the case. The substance of the act having been substantially set out, and its offending section pointed out, and the misinterpretation given another by the surveyor general having already been considered, the conflicting claims of the several petitioners, as shown by the proceedings, will receive attention.

The petitions of the several parties, while constituting separate proceedings, have been treated by the several counsel for petitioners in their briefs as presenting issues and principles of law which are largely, as to the major questions, common to all the causes or proceedings, and a decision of the rights of any one of petitioners will necessarily control to a greater or lesser degree the decision as to the others, except as to the questions of priority of rights or a failure on the part of an applicant to comply with the procedure prescribed by the act. In other words, we understand that it is the desire of all the parties to the several proceedings that all petitions be considered together and that a decision upon the main questions presented, to wit, the validity of said chapter 303, Statutes and amendments of 1921, and section 18a of said amendatory chapter 285, Statutes and Amendments of 1923, and upon all other questions presented by the pleadings or otherwise arising in which the decision made in one case may be applicable, is to be adopted as the rule of decision in such other cases and is to have the same force and effect in such other proceedings as if separately stated therein. Petitioners stand united as against the main contention of the surveyor general that the act under which each claims is invalid. Their cross-contentions among themselves are based upon certain provisions of the act, as will fully hereafter appear.

Petitioner Boone, a nonlittoral landowner, was the first one of the group of petitioners to file a petition herein. He alleges that on March 5, 1927, he caused to be erected upon the lands described in his petition a monument upon which he posted a notice in compliance with the requirements of said act; that on March 25, 1927, within the statutory period of 30 days thereafter, he filed an application for a permit to prospect upon said land for oil and gas and paid the $5 filing fee and tendered a bond in the amount fixed by the rules and regulations of the surveyor general conditioned for the faithful performance of the terms and conditions of the permit, and also tendered 50 cents per acre for each and every acre embraced in the petition for a permit, as required by law. By supplemental petition it is averred that petitioner, subsequent to the filing of the original petition, to wit, October 31, 1927, retendered said 50 cents per acre and said bond in the amount fixed by said surveyor general, and that said officer accepted said bond and filed the same in his office, but again refused to accept said tender of money computed at the rate of 50 cents upon each acre of land embraced within the petition. Said sum was deposited by petitioner in a bank of good repute to the credit of said surveyor general, as provided by section 1500, Civil Code, and notice thereof served upon the surveyor general. By the original petition it is also alleged that since the filing of the application for a prospecting permit more than six months elapsed and no littoral owner or other person applied for or received a permit to prospect the lands described in the petition herein; that petitioner possessed all of the qualifications of citizenship and complied with all of the requirements of said act and all valid rules and regulations prescribed by the surveyor general and was entitled to a permit to prospect the lands described in his petition; that he was refused such a permit on the sole ground that, in the judgment of respondent surveyor general, the work of prospecting for, developing, or extracting mineral would cause loss or damage to the property near the land described in his application. This alleged reason is founded upon section 18a, which section we have held to be void. It is further alleged, and nowhere pointedly denied, that the lands described in the Boone application were not at any of the times mentioned in said petition within any known geological structure or producing oil and gas field. By a supplemental petition Boone averred that thereafter, to wit, on November 1, 1927, said lands became and have at all times since said day continued to be a part of the known geological structure, and that on November 16, 1927, respondent surveyor general classified and declared all of the tide lands embraced in the Boone application to be within and a part of said geological structure.

[5] The Attorney General, on behalf of respondent surveyor general and the petitioners Charles M. Workman et al. and R. W. and Thelma I. Harthorn et al., whose respective applications include a large portion of the lands described in Boone's application, filed general demurrers to Boone's petition and also filed separate answers and returns to the writ. The surveyor general, answering Boone's petition, alleged that all of said lands described in the Boone petition "are situate within a known geological structure of a producing oil and gas field." This allegation does not traverse the Boone averment as to the time said lands became a known part of such structure. Continuing, it is alleged that a portion of the lands described in the petition are tide lands lying between the ordinary high and the ordinary low tide lands and the remaining portions are below the line of ordinary low tide, are continuously submerged, and form a part of the bed of the ocean, and that the state holds such lands in trust for the public uses of navigation and the fisheries; that prospecting for oil or gas thereon would interfere with navigation and the fisheries—destructive of both—and would deprive the people of the full, free, and unobstructed use of such lands and the water over the same and would impede and prevent the people of the state from the use, for any purpose, of the beach and tide land area of that portion of the Pacific Ocean included within the boundaries of said described lands; that the waters covering said lands are navigable and the granting of the petition would enable the permittee to destroy the navigability thereof and prevent the use thereof for navigation and prevent access to navigable waters of this state in violation of article 15 of the Constitution. It is also alleged that the prospecting for oil and gas or the production of oil and gas or either within the limits of the areas described would prevent and destroy fishing in the waters of said area and also in waters beyond said area and pollute them to such an extent as to render the fish therein unfit for human consumption; that the work of prospecting for, or developing or extracting, minerals on said described lands, would cause loss and damage, in the judgment of said surveyor general, to property near said described lands. Finally, it is alleged, by way of answer, that respondent is without authority to grant the permit asked for in the petition for the reason that said lands, being tide and submerged lands, constitute a part of the ocean's bed, and are held in trust for the uses of navigation and the fisheries, and there is no authority in the state of California to destroy or prevent the free and unobstructed use of such lands and the waters over them by the people, and the act in question is void in that it is violative of the state Constitution and contrary to the policy of this state and its people.

[6, 7] By way of answer, R. W. and Thelma I. Harthorn et al. allege themselves to be the owners of littoral rights in all the tide lands described in the Boone petition and that said petitioner is not such littoral landowner. It is alleged that petitioner Boone lost his rights in the premises, inasmuch as he did not comply with article VII, section 2, and its subsections, rules and regulations, adopted by the surveyor general, requiring personal service of the application for a permit. We have heretofore held such rules and regulations to be invalid, and no further discussion of that subject is necessary. Said answering petitioners do not deny by unequivocal and positive terms that Boone filed his application on March 25, 1927, as alleged by him, but allege merely that on or about July 27 or August 27, 1927, Boone filed said application for said prospecting permit. If his application was filed as late as either of the days last above mentioned, R. W. and Thelma I. Harthorn would be within the six months' period, and they would have a preference over nonlittoral claimants as prescribed by section 4, chapter 303, Statutes and Amendments of 1921. The failure to deny in positive terms that Boone filed his application as early as March 25, 1927, leaves the matter in a state of uncertainty but for the allegation in the Harthorn et al. petition, which, contrary to their answer, alleges, on information and belief, that the Boone petition was filed on or about March 25, 1927. Under the rule of construing pleadings, the petitioners have pleaded themselves out of court. Besides, they had the means of acquainting themselves with a record fact, and, having failed to do so, the positive allegation of petitioner Boone as to the fact is conclusive upon that issue. For the foregoing reasons the answering petitioners have no standing as against the Boone claim. It is lastly alleged in general terms, by way of answer, that the granting of the Boone petition would enable him to obstruct, and he would obstruct, said littoral landowners' access to the navigable water on which their lands front, and he would damage other property rights of said littoral landowners, and that the permit which Boone seeks, if granted, would be used to serve as a shield to exploit tide lands for oil and gas for private gains, and that the granting of said permit would be an invasion upon, and would impair, the natural rights of said adjoining littoral owners. The force of these allegations will be noticed hereafter.

[8-10] The Harthorn petition alleges that they took their first step to obtain said permit on October 10, 1927, and filed their application for the same on October 14, 1927. As littoral owners they would not be within the six months' period in making application following the earlier application made by Boone. The minerals contained in the soil covered by tidal and submerged lands belong to the state in its sovereign right. Littoral owners who have not complied with the provisions of the acts before us have no such right by reason of littoral ownership as would defeat the right of any other citizen who has complied with the requirements of said act. The proprietary rights of the owner of land bordering on tide water do not extend beyond the ordinary high water mark. Section 830, Civ. Code; Koyer v. Miner, 172 Cal. 448, 156 P. 1023; Henry Dalton & Sons Co. v. Oakland, 168 Cal. 463, 143 P. 721; State ex rel. Peruvian Phosphate Co. v. Board of Phosphate Commissioners, 31 Fla. 558, 12 So. 913; State v. Black Bros., 116 Tex. 615, 297 S. W. 213, 53 A. L. R. 1181. In San Francisco Savings Union v. R. G. R. Petroleum Co., 144 Cal. 134, 77 P. 823, 66 L. R. A. 242, 103 Am. St. Rep. 72, 1 Ann. Cas. 182, it was held that the absolute sovereignty of the state over the soils under tide water in the several states does not deprive the littoral owner of his right of access from his own land to the ocean as against a stranger. But this right is not given to the owner of land bordering upon the ocean shore as against the state or its grantee in the exercise of a lawful use or purpose. People v. Southern Pacific R. R. Co., 166 Cal. 627, 138 P. 103; Shively v. Bowlby, 152 U. S. 1, 14 S. Ct. 548, 38 L. Ed. 331. It does not appear from the case presented that the right of access of littoral owners to the ocean will be cut off, but if it should be substantially impeded they would not be remediless if, in fact, they have any legal right as against the state or its agents in the premises. The littoral owners propose to do the things which they deny the right to others to do on lands that are held in trust for all the people. Their rights are prescribed by the state, which alone has the power to grant a preference, where substantial reasons exist justifying a distinction. That such a distinction may be made in favor of littoral owners is reasonable and just and has been recognized by several sister states in the adoption of acts similar to the act before us in the instant case. State ex rel. Peruvian Phosphate Co. v. Board of Commissioners, 31 Fla. 558, 12 So. 913.

Petitioners Harthorn et al. allege offers and tenders in compliance with the requirements of the act, but that the surveyor general refused to recognize their offers and tenders. The reason alleged for so doing is the same reason given for refusing the Boone permit. Both the attorney-general on behalf of the surveyor general, and Boone demurred to the petition of Harthorn et al. on general grounds, and both also answered. The demurrer and answer of the surveyor general are substantially the same as recited in the Boone petition. The demurrer interposed by Boone is good, as the petition does not state facts sufficient to authorize the granting of the writ. As to the answer, it would justify an order granting judgment upon the face of the pleadings.

Charles M. Workman demurred on general

grounds and filed an answer to the Boone petition. By said answer he alleges that he and Katherine Irene Workman, Jerome W. Workman, and John Elines Workman, adult children of said Charles M. Workman, are littoral owners of a portion of the tide and submerged lands described in the Boone petition, and as such owners, and within six months after the Boone application, and prior to November 1, 1927, he, the said Charles M. Workman, with the consent of his said children, who were owners with him, as tenants in common, filed his application for a prospector's permit. The same objection which was made by other petitioners to the Boone petition, based on the ground that he did not comply with article VII, section 2, of the rules and regulations prescribed by the surveyor general requiring personal service of the application for said permit to be made upon the littoral landowner, is again repeated, but this objection is ineffectual for the reasons already pointed out. A full compliance with all the provisions of said act and the amendment and with all rules and regulations prescribed by the surveyor general with respect to the granting of a prospecting permit is alleged. The right of the state to grant a permit to a nonlittoral owner is alleged to be an invasion of the paramount inherent and constitutional right of the littoral landowners and violative of the due process clauses of the state and federal Constitutions.

Charles M. Workman also filed a petition for a permit to prospect a portion of the lands included in the Boone petition. By said petition he avers that he took his first preliminary step on August 8, 1927, and that on August 15, 1927, he filed with the surveyor general his application for a prospecting permit. He paid the filing fee and tendered the fee of 50 cents per acre for each acre included in his application, and tendered a good and sufficient bond in the amount prescribed by the surveyor general as a guaranty of good faith; but said fee and bond were rejected and said application for a permit was denied on the ground that prospecting the submerged ground described in his petition would, in the judgment of the surveyor general, cause loss or damage to property near the land described in his application. Boone demurred to the Workman petition on general and special grounds and filed an answer.

[11] Workman, in a supplemental pleading filed by him, fixed the time when he applied for a permit as of October 19, 1927, more than six months after the Boone application, and, this being so, he would have no right whatsoever as against Boone, inasmuch as his application came too late.

On March 17, 1926, H. E. Shudde, a nonlittoral landowner, caused to be erected at a conspicuous place upon the tidal and submerged lands described in his petition a monument conforming to the statutory height and size, and posted thereon the notice required by law, and performed and offered to perform and stood ready to perform all the other acts required to be performed in the order and in the manner and at the time fixed by the act governing the procedure herein. That on April 12, 1926, he filed an application for a permit to prospect the submerged lands described in his application, paid the filing fee, and tendered to said surveyor general the bond as fixed and required by him and also the fee of 50 cents per acre for each acre of land included in his application, but said surveyor general refused both tenders; that subsequently to the filing of petitioner's application, he filed, on September 24, 1926, upon the request of the surveyor general, an amended description, which is a true description of the lands described in the petition herein; that on September 13, 1927, petitioner again tendered said fee and bond to said surveyor general and that the fee was refused, but the bond was accepted and placed on file by said surveyor general; that no person claiming to be a littoral owner of said lands has within a period of six months after the filing of said amended description taken any steps or made application to obtain a prospecting permit covering any of the lands in said petition described. The surveyor general's refusal to grant petitioner said permit is based upon the grounds that petitioner not having complied with article VII, section 2, rules and regulations, requiring personal notice to be served upon littoral landowners, is not entitled to said permit and upon the further ground that the surveyor general is authorized to refuse permits to applicants when in his judgment the developing or extracting of minerals by the applicant would cause loss and damage to adjacent property. These reasons we have held to be insufficient to justify a refusal of a prospecting permit. Actual notice on the part of Shudde is alleged to have been given to said littoral landowners by the fact that the petitioner published for four successive weeks in a newspaper of general circulation published in the county of Ventura a notice of the filing of his application, and, further, because of petitioner's repeated posting of notices, at the suggestion of the surveyor general, upon the land described in his petition, and for the further reason that petitioner's application was brought to the personal notice of said littoral owners.

The answer to the petition and return to the writ of mandate filed by the surveyor general are the same in the main features as those filed by said officer in the other proceedings. Harry A. Chamberlin, who had filed an application for a prospecting permit covering a portion of the said lands described in the Shudde petition, was granted permission to intervene in the Shudde proceeding. He is a nonlittoral landowner and took his first step under the provisions of chapter 303, Statutes of 1921, on August 18, 1927, by erecting a monument upon the lands described by him. On

September 14, 1927, he filed his application for a prospecting permit and on the same day tendered the filing fee computed at the rate of 50 cents upon each acre included in his application and the $5 filing fee, as prescribed by law, but the surveyor general refused to accept the application of said Harry A. Chamberlin and refused to issue him a prospecting permit. As a separate and distinct defense to the petition of Shudde and by way of further answer to Shudde's petition for a writ of mandamus, Harry A. Chamberlin, as intervener, alleges that Shudde did not within a reasonable time after the expiration of six months next succeeding his application dated April 13, 1926, apply to this court or any other court to enforce such rights as he may have been entitled to by virtue of his application, and he was guilty of bad faith and laches in not pressing his rights sooner, inasmuch as he had notice in March, 1927, that said surveyor general would not grant his application. The petition in intervention alleges that Shudde did not apply for the writ of mandamus herein until after intervener Chamberlin had applied to the superior court of the county of Sacramento to compel said surveyor general to issue to him a permit to prospect said described lands; that the petitioner Shudde did not apply for a writ of mandamus until the character of the geological structure in which said property is situated became greatly increased in value.

[12] The fact that a petition was filed in the superior court of the county of Sacramento on September 17, 1927, by intervener Chamberlin against the surveyor general for an order commanding him to issue to intervener said prospecting permit, which action has not been formally disposed of, seems to be relied on by intervener as a bar to the Shudde petition herein. We are unable to see how the filing of that proceeding in the superior court of Sacramento county could affect the rights of petitioner Shudde. The Chamberlin petition herein contains no allegation that Shudde was made a party to that proceeding or was served with any process or had any knowledge of the Sacramento county proceeding. Besides, the Sacramento county forum was voluntarily abandoned by petitioner Chamberlin, and this forum selected in its place to hear and determine precisely the same questions that were involved in the Sacramento county proceeding.

[13] In the original petition filed by petitioner Chamberlin for said writ, he avers that at the time he posted notice of his application upon said described lands there was no other notice posted upon said lands of like or similar purport; nor was there any application pending with the respondent for a permit to prospect for oil or gas upon said described lands. The petitioner admits, however, that Shudde's application was made prior to his, but attempts to avoid its force by invoking the doctrine of laches. The allegation that there was no other application pending with the surveyor general at the time Chamberlin filed his application, in the face of the averments and admissions appearing upon the face of the papers before us, amounts to but an erroneous conclusion drawn by the pleader. The Shudde application appears to conform to the provisions of the act, and the only grounds urged against his asserted right by his adversary is that the doctrine of laches estops him. The delay in commencing proceedings against the surveyor general, considering the uncertain state of mind in which that officer found himself as to his duties and powers under the act, was not so great as to justify a finding that Shudde was guilty of laches. Besides he made many efforts to convince the surveyor general that he was entitled to a permit and manifested a willingness to conform to any reasonable requirement that might be prescribed. Said petitioner Chamberlin, who, like Shudde, is not a littoral proprietor of any land along the ocean shore line, erected his monument on the lands described in the petitions of both claimants on August 18, 1927, and filed his application for said permit on September 14, 1927, a little short of a year after the Shudde application. The surveyor general from the beginning refused to recognize his application and rejected all of his tenders and offers made in an effort to bring himself within the provisions of said act.

Shudde and Hickey Bros. Company, a corporation, and the surveyor general either demurred to or filed answers or both demurred and filed answers to the Chamberlin petition upon grounds similar to those considered in other applications, which will not be set out for the additional reason that the Shudde application was filed prior to the Chamberlin application and consequently claimant Shudde has priority over claimant Chamberlin.

The joint application of Hickey Bros. Company, a California corporation, et al., claims the right to have issued to them a permit to prospect a portion of the lands embraced in the Shudde application. Said petitioners allege that they are the littoral proprietors of all the tide and submerged lands described in their petition, which includes lands described in Shudde's petition, and are the owners of all the lands abutting or fronting on the lands described by them. It is further alleged, on information and belief, that Shudde filed an application for a prospector's permit on April 12, 1926, and that said petition was accepted by the surveyor general on September 24, 1926, and that said Shudde was requested by the surveyor general to make personal service upon all the littoral proprietors of tide and submerged lands in compliance with the rule and regulation which we have herein declared void as being in excess of the authority of the surveyor general, but that Shudde refused and neglected to make such personal service. It is also alleged that the surveyor general refused to consider or recognize their application, which in every respect complied with the provisions of law and the rules and regulations prescribed by the surveyor general in such cases provided. The application of Hickey Bros. Company et al. was filed October 14, 1927, more than six months after the Shudde application, and as to the lands included in the latter's application, it came too late. Harry A. Chamberlin, whose petition herein has been considered, intervened in this proceeding (Hickey et al.), as he did in the Shudde proceeding, setting forth his claims upon substantially the same grounds as are set out in the pleadings in the other proceeding. Shudde and the surveyor general demurred, and the latter filed an answer. It is unnecessary to notice specifically the substance of said demurrers and answers, other than to say that the objections raised therein, if not already disposed of by what has been said, will be amply covered in the course of this decision.

The seventh and last petition for a writ of mandamus filed herein is the petition of Kittie C. Ballard, J. C. Ballard, Jessie Ballard Daggs, and Jean Ballard Saxby. Claiming to be the owners as tenants in common of lands littoral to tide and submerged lands situated in the Pacific Ocean, petitioners applied for a prospecting permit on October 10, 1927, and their application was rejected by the surveyor general for the reason, as expressed in his correspondence with the representatives of petitioners, that he entertained a doubt as to the constitutionality of the act authorizing the issuance of said permits, the validity of which act being then pending in the courts for decision. Four months prior to petitioner's application for a permit, permits had been granted to Neil C. Needham and R. N. Ferguson, respectively, upon applications made by them to prospect for oil and gas a portion of the lands included in the application of Kittie C. Ballard and her associates. Wilbur C. Finch applied for a permit on June 12, 1927, to prospect other lands included in the subsequent Ballard application; but his application is alleged to be pending for decision in the office of the surveyor general. Neither Needham, Ferguson, nor Finch are owners of lands littoral to the tide lands described by them.

Kittie C. Ballard and her associates insist that the permits issued to Needham and Ferguson are invalid, for the reason that said littoral proprietors were not personally served with notice, nor in lieu thereof served by publication, as provided by the rules and regulations prescribed by the surveyor general, and, this being so, they are entitled to the permit as prayed for. This question has been disposed of adversely to petitioners' contention. None of the parties whose interests as permittees will be affected by this proceeding have appeared except Finch, whose application was filed prior to the Kittie C. Ballard petition. Neither Needham nor Ferguson, or the assignees of either, has been joined in the action, nor does it appear that either was served with process or had any kind of notice of the commencement of this proceeding or the hearing thereof. Finch, by his demurrer, which is both general and special, raises the question of several actions being improperly united; for example, an action for the revocation of permits heretofore issued with an action to compel the issuance of a permit to petitioners herein; further, that petitioners, being but private citizens, are not the proper parties, nor have they the authority to maintain an action to revoke said permits, implying that such a suit may be maintained only upon the relation of the state. The point is also made that the permittees are necessary parties to the action. The answer denies that said petitioners are or were at any time mentioned in said petition the owners as tenants in common or otherwise of any real property adjoining or littoral to any of the lands embraced in any of the applications referred to as the Needham, Ferguson, and Finch applications. It is affirmatively alleged by the answer that a strip of land not owned by petitioners and in which they claim no interest lies between the uplands claimed by petitioners to be owned by them and the tide lands embraced in the permits issued to Needham and Ferguson, including also the tide lands described in Finch's pending application. The allegation which uniformly appears in the various petitions, to the effect that on November 1, 1927, all of the tide and submerged lands in controversy became a part of the known geological structure of a producing oil and gas field by reason of the fact that a well drilled thereon began to produce oil on or prior to November 1, 1927, and that on November 16, 1927, the surveyor general classified and declared said tide lands herein described or referred to as lying within and being a part of said known geological structure, is repeated and seems to be conceded to be true. Finch alleged that petitioners did not at any time prior to November 16, 1927, actually tender to the surveyor general the bond required by the rules and regulations prescribed by said officer, nor any portion of the prospecting fee. Finch alleges that assignments of the permits sought to be revoked were made by permittees Needham and Ferguson, with the approval of the surveyor general, and points out the omission of said assignees as parties, and insists that they are necessary parties to this proceeding. He also, by way of answer, alleges the pendency of an action brought by him in the superior court of the county of Sacramento to compel the surveyor general to grant him a permit upon the application heretofore mentioned, but he does not plead said action by way of abatement of the present action, nor does he make any request that the present action abate by reason of the pendency of said other proceeding.

The specific claim stressed in the Ballard petition (S. F. No. 12766) is that the adversary claimants did not observe the rule prescribed by the surveyor general as to the service of notice upon littoral proprietors. If that was the only justiciable question in the case, it would be decided against petitioners on what has already been said. But the Ballard petitioners claim to be littoral proprietors and allege that their application was made within six months subsequent to the filing of the Needham, Ferguson, and Finch applications. If that is true, they may have rights by virtue of section 4 of said act. That they are littoral proprietors, however, is disputed, and that they complied with the provisions of the law in other respects is denied.

[14] It is obvious that the pleadings in this proceeding should have been settled and the disputed questions of fact found and determined by the superior court of this state, a tribunal constituted and provided with the appropriate machinery for hearing and determining both questions of fact and law reasonably expeditiously. We are asked to command the surveyor general to cancel permits issued to one group of applicants and grant them to another group, an order which can only be made after a judicial determination of disputed issues of fact. In addition to this and the settling of pleadings, we are asked to enter judgment against parties interested in the subject-matter who have had no opportunity to be heard. For obvious reasons the Kittie C. Ballard et al. petition for a writ of mandamus (S. F. No. 12766) must be and is hereby dismissed and petitioners are remitted, if, after what has been said, they are so advised, to an appropriate forum to litigate such questions as are not concluded by this decision. That neither time nor labor have been conserved by permitting any of the petitioners herein to come into this court in the first instance is forcefully illustrated by the elaborate and laborious statement which the many issues and cross-contentions raised by adversary claimants and numerous amici curiæ have made necessary.

Boone and Shudde have alleged a strict compliance with the provisions of the act by setting forth, step by step, the course pursued by them and have kept their tenders good. The other adversary claimants alleged in general terms a compliance with the provisions of said act or a refusal on the part of the surveyor general to treat with them.

Those petitioners claiming to be owners of littoral rights herein, in making their several applications to the surveyor general for permits, did not base their claims upon the preference given to littoral owners by said act, but followed the procedure prescribed for nonlittoral claimants in making their applications, and it was in this court that they set up for the first time claim to a preference by virtue of being littoral owners. Some of the respective owners of lots littoral to said tide lands pooled their interests. Objection is made to this method of attempting to acquire such rights as being without statutory warrant. In view of our conclusions on other controlling points which conclude them as permittees, it becomes unnecessary to consider the rights of several owners to pool their interests.

[15] We now turn from the consideration of the adverse claimants, inter se, to a consideration of the objections made to the act on constitutional grounds by the Attorney General on behalf of the surveyor general and the state of California, which are supplemented by exhaustive briefs presented by amici curiæ supporting the action of the surveyor general in his refusal to grant the permits sought to be obtained by these proceedings. Several hundred pages of briefs are devoted to discussions of the title in the soil of the sea or arms of the sea, which at common law was vested in the sovereign in trust for the people. The common law, or law of England, upon this subject was brought to this country by our early ancestors and continues to be the law of the land except so far as it may be affected by express grant, by prescription or usage. In the leading case of Shively v. Bowlby, 152 U. S. 1, 14 S. Ct. 548, 38 L. Ed. 331, Mr. Justice Gray made an exhaustive examination of the entire subject, and, after reviewing the laws of many states, he thus summarized the result of his examination: "The foregoing summary of the laws of the original states shows that there is no universal and uniform law upon the subject; but that each state has dealt with the lands under the tide waters within its borders according to its own views of justice and policy, reserving its own control over such lands, or granting rights therein to individuals or corporations, whether owners of the adjoining upland or not, as it considered for the best interests of the public. Great caution, therefore, is necessary in applying precedents in one state to cases arising in another."

[16] We do not deem it necessary to pursue the question of the title to tide lands to the extent that the subject has been discussed by counsel, for the reason that the act does not purport to divest the state of its title to any part of its tide lands, but merely grants to its permittees a license or privilege of extracting minerals from the soil, the ownership of which is held in its proprietary right, for a term of years, upon an acreage and royalty basis. It is clear that one of the purposes of the Legislature by the enactment of said chapter 303, Statutes and Amendments 1921, p. 404, was to give to the citizens an opportunity to intercept the large volumes of oil gravitating seaward to inextricable

depths, and to reduce to useful purposes oil, gas and mineral deposits reposing beneath the ocean's bed. The commercial value of these subterranean products is enormous. The contribution made to commerce and the varied industries of the world and to the comfort of the race by the modern intensive development of the oil and gas industry is not surpassed, if it is equaled, by any other of the natural agencies or physical forces which are contributing to the material welfare of mankind, including electrical energy. Gasoline is the power that largely moves the commerce of nations over lands and sea; it furnishes much of the power necessary to the manufacturer, agriculturist and miner, as well as power needful in the reclamation of swamp and overflowed land and in the irrigation of arid and waste land. It is the only power that is practical for aeroplane navigation. Gasoline is so closely allied with state and national welfare as to make its production a matter of state and national concern. If it can be said of any industry that its output is "in aid and furtherance of commerce and navigation," and its production "a public benefit," the production of gasoline, by reason of the motive elements that inhere in it and its universal use and adaptability to varied uses and the convenient and portable form in which it may be confined, would entitle it to a high classification in the scale of useful, natural products. It is a mover of commerce and fills the office of "a public benefit." The government has recognized it as a necessary naval supply and has fostered and encouraged exploration for mineral deposits and the development of oil fields wheresoever found to exist. The state Legislature, by adopting the act before us, recognized the use of gasoline and oil to be practically indispensable to the needs of rapid, expanding industry and commerce.

[17] The federal government from its earliest organization, has consistently adopted acts containing the most liberal terms as inducements to engage its citizens in the exploration and development of its mineral resources. In fact, the development of the mineral resources, of which oil and gas are among the most important, is the settled policy of state and nation, and the courts should not hamper this manifest policy except upon the existence of most practical and substantial grounds. Our state act was fashioned after an act adopted by Congress in 1920, known as the Federal Leasing Act, and the two acts are very similar in every important feature.

None of the lands involved in these proceedings front upon any incorporated city, nor are they situated upon a harbor, bay, inlet or estuary. Neither are they within the inhibitions of the distance limitations or the sale and grant clauses of article 15, § 3, state Constitution, which provides: "All tide lands within two miles of any incorporated city or town of this state, and fronting on the waters of any harbor, estuary, bay, or inlet, used for the purposes of navigation, shall be withheld from grant or sale to private persons, partnerships, or corporations."

The license or privilege authorizing the permittee to prospect and mine tide lands is denominated by the act a lease, but in practical effect it strongly partakes of the character of a contract to prospect or mine said tide lands on a share or percentage basis. In no sense does the state part with title to its tide lands. More than this, it expressly "reserves from sale except upon a rental and royalty basis" all coal, oil, oil shale, phosphate, sodium and other mineral deposits in lands belonging to the state, and persons authorized by said act to prospect for, mine and remove such deposits are restricted to as small a portion of the surface area as may be reasonably required for mining and removing such deposits. In this respect the instant case is widely different from Illinois Central R. Co. v. People of the State of Illinois, 146 U. S. 452, 13 S. Ct. 118 (36 L. Ed. 1018), the case frequently cited by respondent, surveyor general, and the amici curiæ in sympathy with his position. In the case last cited the state undertook to grant into exclusive private ownership 1000 acres of the submerged beds of Lake Michigan, constituting a large acreage of the city of Chicago's water front, freed of any public easement. This was clearly a deprivation of the enjoyment of every right for which said lands were held in trust by the state, as pointed out in the following excerpt from said decision: "The control of the state for the purposes of the trust [that is, the trust for the people of the state that they may enjoy the navigation of the waters, carry on commerce over them and have the liberty of fishing therein free from interference of private parties] can never be lost, except as to such parcels as are used in promoting the interests of the public therein, *or can be disposed of without any substantial impairment of the public interest in the lands and waters remaining.* * * * It is grants of parcels of lands under navigable waters, that may afford foundation for wharves, piers, docks and other structures in aid of commerce, and grants of parcels which, being occupied, do not substantially impair the public interest in the lands and waters remaining, that are chiefly considered and sustained in the adjudged cases as a valid exercise of legislative power consistently with the trust to the public upon which such lands are held by the state." (Italics supplied.)

[18, 19] With full knowledge of the subject, the Legislature found that there was nothing in the drilling and operation of oil wells conducted in the manner provided by the statute that would substantially impair the paramount public interest in the lands and water remaining, and upon a consideration of the case we find nothing that would justify us in holding that the finding of the Legislature, which is conclusive in such matters (People v. California Fish Co., 166 Cal. 576, 138 P. 79), is not fully supported by the facts. To justify an interference by courts with the right of the Legislature to alienate tide or submerged lands, it must appear that such grants do or will impair the power of succeeding Legislatures to regulate, protect, improve, or develop the public rights of navigation and fishing. Oakland v. Oakland Water Front Co., 118 Cal. 160, 50 P. 277. It cannot be seen that the legislation in the instant case will embarrass immediate or remote legislation.

By the provisions of the act the state reserves a supervisory control over the entire subject-matter and ample provision is made for a cancellation of the lease or privilege upon a violation of any of its numerous terms designed for the protection of the state. But aside from the precautionary steps taken by the state to safeguard the public's interests, the law vouchsafes ample protection to the paramount rights of the public in the absence of express statutory provisions on the subject.

[20, 21] "The words of the Constitution are to be considered as incorporated in the grant or patent [granting tide lands] the same as if inserted therein. They become a part of it and qualify it, so that the estate granted is limited to the permitted uses." Forestier v. Johnson, 164 Cal. 24, 127 P. 156. So, in the instant case, should said permittees offer any substantial interference incompatible with navigation, fishing, or commerce, the state and federal government would have the unquestionable right to abate it. The license or privilege or leasehold by which the permittees are granted the right to explore and mine for gas and oil does not constitute a grant or sale of tide lands in the sense that those terms are used in the prohibitory provisions of article 15, § 3, state Constitution. In San Pedro, etc., R. R. Co. v. Hamilton, 161 Cal. 610, 119 P. 1073, 37 L. R. A. (N. S.) 686, it was held that a lease made to a corporation by the city of San Pedro of tide lands was valid and did not come within the inhibitory provisions of the Constitution forbidding the granting or sale to private persons, partnerships, or corporations of tide lands within two miles of any incorporated city or town and fronting on any harbor, estuary, bay, or inlet used for the purpose of navigation. The relations of the state with its permittees or lessees in the instant case do not create a superior estate in said tide lands than was created by the lease entered into by the city of San Pedro and said corporation.

The surveyor general is constituted the agent of the state by the act under consideration, as he is made its agent in numerous acts providing for the sale of salt marsh, tide, and other public lands, to carry out and accomplish the purposes of the act and to that end he may make all rules and regulations not in conflict or inconsistent with the provisions of said act. His powers in the way of regulation and administration are many, and the legislation conferring them is to be given full force and effect when enacted according to the constitutional mandate and when not in conflict with the express provisions of said act. By chapter 227, Statutes and Amendments 1923, p. 452, the Attorney General, the chairman of the state board of control, and surveyor general are constituted a commission to lease to the highest responsible bidder any land belonging to the state of California and dedicated to a public use where such lands contain, in the judgment of said commission, oil, gas, and other hydro-carbons in commercial quantities. The act is but another illustration of the policy of the state with respect to the extraction of its minerals from state lands and was unquestionably passed to remove the obstacle pointed out in McNeil v. Kingsbury, 190 Cal. 406, 213 P. 50. In that case McNeil applied for a writ of mandate in this court to compel the surveyor general to issue to him a prospecting permit, under the provisions of the identical act attacked by respondent surveyor general, to prospect for oil upon the grounds of the Norwalk State Hospital for the Insane at Norwalk, Cal. The petition was denied on the grounds that it was not intended by the Legislature that said act should apply to lands already devoted to a public use.

[22] A copy of a photograph taken January 23, 1928, twenty-four hours after high tide, showing the section of the ocean shore line upon which the tide lands in controversy abut, is appended to the briefs of Boone and Shudde. That the photograph is a true representation of the situation is admitted. It shows a precipitous, mountainous upland facing in crescent shape the open sea. A number of oil derricks are erected upon the highlands and several derricks and other structures appear to be erected upon the beach near the point where the surf extends its flow under normal conditions. The beach which skirts the shore is very narrow. The narrow shelf of the beach at the foot of the cliffs is occupied by the tracks of the Southern Pacific Railroad. Paralleling the railroad is the state highway, which for a considerable distance is built over tide lands upon a causeway. There is no wharf or landing structure of any kind erected in the vicinity. The court is invited to and will take judicial notice of the coast lines within the state and will also resort to publications issued by the department of commerce describing and delineating the United States coast and geodetic surveys. The coast in question is not a harbor, or haven, nor does it afford natural facilities for the landing of vessels. It is asserted, and not contradicted, that the record of the rise and fall of the tide at this point shows that

the tide ebbs upon occasions a distance of seven hundred or eight hundred feet from the mean high-tide line and the sea is too heavy for small vessels to weather and too shallow to float large ones. It may be said of the situation that the coast line at the point in question is an unnavigable portion of a vast body of navigable water, and the use to which the state proposes to devote the soil, from a practical point of view, would not be incompatible with, or in "derogation of its governmental trust to preserve needed navigable waters for the benefit of its people." Bolsa Land Co. v. Burdick, 151 Cal. 254, 90 P. 532, 12 L. R. A. (N. S.) 275. No claim is made that the shallows, shoals or depths of the area in question are valuable for fishing purposes.

[23] No uncertainty can exist as to the rights of the state to absolutely alienate its tide and submerged lands when they are unfit for navigation, are useless as aids of commerce and possess no substantial value as fishing grounds. The policy of this state is and has always been to encourage its citizens to devote waste and unused lands to some useful purpose. The power of the state to absolutely alienate lands perpetually covered by water has been upheld by all courts of the nation, state and federal, where the land so covered was severed from the main body by harbor and other improvements in such manner as to leave the remaining waters of no substantial use to navigation or commerce. It is only in those cases where the reduction of the water area amounts to a substantial interference with navigation and commerce or the fisheries that the absolute power of alienation by the sovereign and its control and dominion over said lands can be questioned.

In Eldridge v. Cowell, 4 Cal. 80, this court had before it the rights of an owner of a water lot, which he held, as did many other owners of lots similarly situated, under an alcalde grant and by the act of the Legislature of this state passed in March, 1857. Said lots were a part of a water district which had been cut off from the main waters of the San Francisco Bay by the construction of harbor improvements and sold into private ownership. The area known as the water district composed a large portion of the business district now lying north of Market street and east of Montgomery street. The plaintiff Eldridge was the owner of one of said water lots. He brought an action to enjoin the defendant from obstructing the navigation to his lot by mooring and anchoring store ships and making embankments in front of his lot. The defendant was the owner of the lot upon which the store ship was anchored. In denying plaintiff relief, this court said: "She [the state] holds the complete sovereignty over her navigable bays and rivers, and although her ownership is, by the law of nations, and the common and civil law, attributed to her for the purpose of preserving the public easement, or right of navigation, there is nothing to prevent the exercise of her power in certain cases to destroy the easement, in order to subserve the general good, which, when done, subjects the land to private proprietorship."

The rule to be kept in mind, and which is recognized by every case bearing on the subject, including Illinois Central R. R. v. Illinois, supra, the case chiefly relied upon by the surveyor general, and from which we freely quote, is that the state has the unquestionable right to alienate its tide and submerged lands subject to the "trust in which they are held for the people of the state that they may enjoy the navigation of the waters, carry on commerce over them, and have liberty of fishing therein free from the obstruction or interference of private parties."

In the case last cited the question was, as stated by the author of the opinion, Mr. Justice Field, "whether the legislature was competent to thus deprive the state of its ownership of the submerged lands in the harbor of Chicago [comprising a considerable portion of Lake Michigan], and of the consequent control of its waters; or, in other words, whether the railroad corporation can hold the lands and control the waters by the grant, against any future exercise of power over them by the state." The extent of the submerged lands conveyed in fee to a private corporation, comprising 1,000 acres, is especially emphasized; the court observing that the harbor is of immense value to the people of the state of Illinois in the facilities it affords to its vast and increasing commerce. The area of the submerged area proposed to be ceded to the private corporation embraced more than three times the area of the outer harbor, and not only included all of that harbor but embraced adjoining submerged lands which, in all probability, would be included in the harbor. The arrivals and clearings of vessels at the port of Chicago is commented upon and the shipping and tonnage of vessels is shown to be enormous. As stated in the opinion, the ownership of the navigable waters of the harbor and of the lands under them was a subject of public concern to the whole people of the state. The opinion holds that such a vast area, including practically the whole of an important state harbor, could not be alienated by the state and placed in the hands of a private corporation created for a purpose not compatible with the trust for which it was held. But the opinion does recognize the alienability of such lands "in those instances mentioned of *parcels* used in the improvement of the interest thus held, or when *parcels* can be disposed of without *detriment* to the public interest in the lands and waters remaining." (Italics supplied.) It was the passing of practically the entire acreage of the lands of the harbor covered by tide waters, quite a portion of which is perpetually submerged, into private ownership to be devoted to a use that would be wholly inconsistent with and an impairment of the interest of the public in said lands and the use of the remaining waters for any uses which the law forbade. "Grants of parcels of lands," the opinion observes, "under navigable waters, that may afford foundation for wharves, piers, docks and other structures in and of commerce, and grants of parcels, which being occupied, do not substantially impair the public interest in the lands and waters remaining" are "sustained in the adjudicated cases as a valid exercise of legislative power consistent with the trust to the public upon which such lands are held." The opinion states that no instance exists where, as by the case presented, the harbor of a great city and its commerce have been allowed to pass into the control of any private corporation.

The rights of the several states as to the ownership of and control over tide and submerged lands within their borders is thus stated in the Illinois Central Railroad Case: "* * * The ownership of and dominion and sovereignty over lands covered by tide waters, within the limits of the several states, belong to the respective states within which they are found, with the consequent right to use or dispose of any portion thereof, when that can be done without substantial impairment of the interest of the public in the waters, and subject always to the paramount right of Congress to control their navigation so far as may be necessary for the regulation of commerce with foreign nations and among the states."

[24] The state cannot abdicate its trust over property in which the whole people are interested, like navigable waters and soils under them, so as to leave them entirely under the use and control of private parties, except in the case of parcels used in promoting the interest of the public therein, or when parcels can be disposed of without impairment of the public interest in what remains.

Nothing is said in Illinois Central R. R. v. Illinois that would indicate that the uses to be made of the tide lands in the instant case by the agents or permittees of the state in extracting oil minerals from the ocean beds under its control and regulation would substantially impair the public interest in or use of the vast remaining area of the ocean.

The trust in which tide and submerged lands are held does not prevent the state from reclaiming tide and submerged lands from the sea where it can be done without prejudice to the public right of navigation and applying them to other purposes and uses. As said in Ward v. Mulford, 32 Cal. 365: "There are large tracts of salt marsh lands, of which the land in suit is an example, which are covered and uncovered by the flow and ebb of the neap tides, and therefore belong to the state by virtue of her sovereignty, which are of no possible use for the purposes of navigation, but may be valuable for agricultural or other purposes if reclaimed from the tides. Such lands the state may undoubtedly grant in private ownership for the purposes of reclamation and use, for by such a course no right of the public to their use for the purposes of navigation would be prejudiced. On the contrary, the right of navigation, in many cases, might be subserved by such reclamation."

Shively v. Bowlby, 152 U. S. 1, 14 S. Ct. 548, 38 L. Ed. 33, a more recent case than the Illinois Central Railroad Case, in making a most profound review of all the leading cases of the federal courts on the subject, quotes approvingly from Hardin v. Jordan, 140 U. S. 371, 11 S. Ct. 838, 35 L. Ed. 428, as follows: "With regard to grants of the government for lands bordering on tide water, it has been distinctly settled that they only extend to high water mark, and that the title to the shore and lands under water in front of lands so granted enures to the state within which they are situated, if a state has been organized and established there. Such title to the shore and lands under water is regarded as incidental to the sovereignty of the state—a portion of the royalties belonging thereto, and held in trust for the public purposes of navigation and fishery—and cannot be retained or granted out to individuals by the United States. Such title being in the state, the lands are subject to state regulation and control, under the condition, however, of not interfering with the regulations which may be made by congress with regard to public navigation and commerce. The state may even dispose of the usufruct of such lands, as is frequently done by leasing oyster beds in them, and granting fisheries in particular localities; also, by the reclamation of submerged flats, and the erection of wharves and piers and other adventitious aids of commerce. Sometimes large areas so reclaimed are occupied by cities, and are put to other public or private uses, state control and ownership therein being supreme subject only to the paramount authority of congress in making regulations of commerce, and in subjecting the lands to the necessities and uses of commerce. This right of the states to regulate and control the shores of tide waters and the land under them is the same as that which is exercised by the Crown in England. In this country the same rule has been extended to our great navigable lakes, which are treated as inland seas; and also, in some of the states, to navigable rivers, as the Mississippi, the Missouri, the Ohio, and, in Pennsylvania, to all the permanent rivers of the state; but it depends on the law of each state to what waters and to what extent this prerogative of the state over the lands under water shall be exercised."

The court, after closing the quotation, continued:

"In the yet more recent case of Illinois

Central Railroad v. Illinois, (1892), which also arose in Illinois, it was recognized as the settled law of this country that the ownership of and dominion and sovereignty over lands covered by tide waters, or navigable lakes, within the limits of the several states, belong to the respective states within which they are found, with the consequent right to use or dispose of any portion thereof, when that can be done without substantial impairment of the interest of the public in such waters, and subject to the paramount right of congress to control their navigation so far as may be necessary for the regulation of commerce. 146 U. S. 387, 435-437, 465, 474 [13 S. Ct. 110, 111, 112, 126].

* * * * * * * *

"Notwithstanding the dicta contained in some of the opinions of this court, already quoted to the effect that congress has no power to grant any land below high water mark or navigable waters in a territory of the United States, it is evident that this is not strictly true."

The principle announced by the federal courts is reaffirmed in Oakland v. Oakland Water Front Co., 118 Cal. 160, 50 P. 277. It was held in that case that as a general proposition the state has full power to alienate lands into private ownership which are covered by the daily flux and reflux of the tides subject only to the paramount public rights where capable of reclamation without detriment to the public right, but that the town of Oakland had no power to alienate its entire water front into private ownership unless such power was conferred by the Legislature, and that the act of the Legislature ratifying and confirming the ordinances of the town of Oakland applied exclusively to the local laws of the town and not to ordinances which were mere grants or attempted grants of the lands of the corporation, which were in effect attempted conveyances of the property interest of the town in its waterfront lands. In other words, the intent to alienate did not appear. The right of the state to alienate its tide and submerged lands by statute where the intent of the statute is clearly expressed or necessarily implied was again reaffirmed by this court in People v. California Fish Co., 166 Cal. 576, 597, 138 P. 79, 88, wherein it is said: "When the state, in the exercise of its discretion as trustee, has decided that portions of the tide lands should be thus excluded from navigation and sold to private use, its determination is conclusive upon the courts; but statutes purporting to authorize an abandonment of such public use will be carefully scanned to ascertain whether or not such was the legislative intention, and that intent must be clearly expressed or necessarily implied. It will not be implied if any other inference is reasonably possible. And if any interpretation of the statute is reasonably possible which would not involve a destruction of the public use or an intention to terminate it in violation of the trust, the courts will give the statute such interpretation."

Upon an examination of the numerous decisions of the American courts holding that lands covered by navigable waters are held in aid of and for the promotion of commerce, navigation, and fishing, it will be found that superadded to the uses of commerce, navigation, and fishing, when the uses in the case at hand to which the lands are to be devoted are not strictly within the narrow definition of any or all of said terms, said decisions employ such phrases as uses for the "public welfare," "parcels of land as are used in promoting the interests of the public," suggesting that when great public interest may be subserved by the alienation of parcels of tide and submerged lands the state's determination of the question in favor of alienation will not be disturbed by the courts.

In the instant case the state does not part with title to its lands, but withholds them from sale and also reserves an interest in said minerals mined on shares. No part of the lands from which said minerals are extracted is alienated into private ownership, nor is any legal right of the littoral owner invaded. No harm can come to fisheries under the protective provisions of the act, as it must be presumed that the provisions of the act will be observed, and, if not observed, the general laws enacted for the protection of fish and sea life against the pollution of waters by penalizing persons or corporations, who cause or are responsible for deleterious substances escaping into the public waters of the state, are amply sufficient to protect sea life against serious injury or destruction.

Nor is there any substantial cause of alarm lest the 1200 miles of our sea coast will be barricaded by "a forest of oil derricks," which will interfere with commerce or navigation. The state may at any time remove structures from the ocean erected by its citizens, even though they have been erected with its license or consent, if it subsequently determines them to be purprestures or finds that they substantially interfere with navigation or commerce. People v. California Fish Co., 166 Cal. 576, 138 P. 79; Illinois Central Railroad v. Illinois, supra.

[25] But aside from this it is a matter of common knowledge that gas and oil strata exist in but a few sections of the state, and the geological indications are easily recognized by geologists and those familiar with the subject. It is not probable that those who are financially able to bear the heavy expense of drilling oil wells and meeting the other heavy expense attendant upon prospecting for oil and gas will be so inane as to engage in expensive experiments except in those localities where oil and gas will probably be found in commercial quantities. It is also a matter of common knowledge, to which our attention has been called by all parties to these proceedings, that the state has already granted permits to private persons or corporations to prospect for oil and gas in the waters of the Pacific Ocean near the locality where the lands in question are situated, and that oil wells are now and for some years past have been in full operation. No serious, if any, complaint of improper operation to the detriment of commerce, navigation, or the fisheries has been made to the state or federal government. It is presumed that the operation of all wells for which permits are herein sought will be operated in as efficient and scientific manner as those now in operation. The Legislature before adopting the act before us fully considered all questions of fact and policy germane to the subject, and found that oil wells could be operated in the soil of the ocean without substantially impairing any of the rights which said lands are held in trust for the benefit of the state.

In concluding, it may be helpful to observe that Florida, Texas, Louisiana, Oklahoma, and other states have adopted statutes strikingly similar to our statute, in recognition of the public benefit that will accrue to the commonwealth by the developing of the phosphates, gas, oil, and other mineral wealth which lie beneath submerged lands, and in no instance have such statutes conferring the same powers upon private parties and corporations as our act confers been condemned upon the constitutional grounds which are here urged against our state statute. A few of the cases which are somewhat illuminating are: State v. Board of Phosphate Commissioners, 31 Fla. 558, 12 So. 913; State v. Black River Phosphate Co., 32 Fla. 82, 13 So. 640, 21 L. R. A. 189; State v. Gerbing, 56 Fla. 603, 47 So. 353, 22 L. R. A. (N. S.) 337; Smith v. Wixie Oil Co., 24 Fla. 691, 101 So. 24; Wemple v. Eastham, 150 La. 247, 90 S. E. 637; State v. Black Bros., 116 Tex. 615, 297 S. W. 213, 53 A. L. R. 1181; Taylor v. Commonwealth of Virginia, 102 Va. 759, 47 S. E. 875, 102 Am. St. Rep. 865.

[26] We are satisfied that the state act under consideration is a valid exercise of a right which inheres in the state by virtue of its sovereign power. It does not impinge upon the state or federal Constitutions and is not in conflict with any act of Congress or the state of California.

Its provisions are reasonable, easily understood, and no injustice will result if they are in good faith complied with. The reasons upon which respondent surveyor general based his refusal to grant a prospecting permit to K. E. Boone, case No. S. F. 12707, being deemed insufficient, and no good cause being otherwise shown why the writ should not issue as prayed for, the prayer of petitioner Boone is granted, and the surveyor general is commanded to issue to said petitioner Boone a permit to prospect the lands described in his petition, provided said Boone has kept his tender good and stands ready to comply with the provisions of said act as herein construed.

A similar order is made as to H. E. Shudde, case No. S. F. 12708, as is directed to be entered in the Boone case. As to Charles M. Workman, No. S. F. 12728; Hickey Bros. Company et al., S. F. 12729; R. W. and Thelma Harthorn et al., No. S. F. 12730; Harry A. Chamberlin, S. F. 12743; and Kittie C. Ballard et al., No. S. F. 12766—applicants for permits to prospect the submerged lands described in the Boone and Shudde applications, respectively, none of said applicants having shown a right superior or prior to that of Boone and Shudde, said petitions, except the petitions of Boone and Shudde, are hereby denied and the proceeding in each case is dismissed. A separate order will be filed in each case.

We concur: WASTE, C. J.; RICHARDS, J.; CURTIS, J; PRESTON, J.; LANGDON, J.

SHENK, J. I dissent. The statute declared valid by the majority opinion throws open the entire sea coast of California (with the exception of limited areas adjacent to municipalities) for exploration and possession for the development of oil and gas by private parties. This means that from Mexico to the Oregon line a strip of tide and submerged land 3 miles in width and nearly 1,200 miles in length, including the tide and submerged lands along the harbors, bays, estuaries, coves, inlets, and navigable streams and surrounding the coastal islands, is made available for one of the purposes contemplated by the statute. In my opinion the act, in its operation as to all of said lands, is inconsistent with the trust on which the state holds title to the same for the benefit of all of the people of the state for navigation and fishery. The effect of the main opinion is to compel the surveyor general to issue a prospecting permit and subsequent lease to any qualified person, association, or corporation upon compliance with the formalities prescribed in the act. The 1923 statute (Stats. 1923, pp. 593–595) sought ineffectually to vest in the surveyor general a discretion to refuse a permit when in his judgment the prospecting or development work would cause injury or damage to property near the land applied for, and littoral owners are, by the judgment in this case, relegated to the trial courts to adjust their rights in the first instance. This latter circumstance may be of minor importance, but it indicates the mischief engendered by the act in provoking litigation. My objection to the statute is placed on broader grounds.

It is the firmly established law of this state that the title to lands lying between the lines of ordinary high and low tide, as well as the lands within any bay and harbor and covered by its waters, is in the state, in trust, however, for the public purposes of navigation and fishery. In the early case of Ward v.

Mulford, 32 Cal. 365, 372, this court said: "The land which the state holds by virtue of her sovereignty, as is well understood, is such as is covered and uncovered by the flow and ebb of the neap or ordinary tides. Such land is held by the state in trust and for the benefit of the people. The right of the state is subservient to the public rights of navigation and fishery, and theoretically, at least, the state can make no disposition of them prejudicial to the right of the public to use them for the purposes of navigation and fishery, and whatever disposition she does make of them, her grantee takes them upon the same terms upon which she holds them, and of course subject to the public rights above mentioned." This doctrine was again declared and emphasized in the case of People v. California Fish Co., 166 Cal. 576, 138 P. 79, and the series of cases in the same volume dealing with the subject. In People v. California Fish Co., supra, at page 584, this court quoted with approval from Illinois C. Ry. Co. v. Illinois, 146 U. S. 452, 13 S. Ct. 118 (36 L. Ed. 1018), defining the title held by the state in trust, as follows: "It is a title held in trust for the people of the state that they may enjoy the navigation of the waters, carry on commerce over them, and have liberty of fishing therein freed from the obstruction or interference of private parties. * * * The control of the state for the purposes of the trust can never be lost, except as to such parcels as are used in promoting the interests of the public therein, or can be disposed of without any substantial impairment of the public interest in the lands and waters remaining." The law of this state, as to the nature of the state's title in and to tide lands, is so definitely settled as to render unnecessary a review or citation of cases from other jurisdictions.

I am in accord with the contentions of the respondent that the proposed use of such lands is not a public use and is inconsistent with the trust under which the title to the lands is held by the state. The petitioners contend that the right to determine whether the particular use is compatible with the public right is a matter for legislative determination. I deny the right of the Legislature finally to determine that all of the tide and submerged lands along the Pacific Coast of California may be used for any private purpose requiring the building of structures which would impede the free access of water craft, large or small, to the shore line, or which would prevent the free use of the shores of the sea and its adjacent waters for the purpose of fishery. I am convinced that the statute in question is in excess of the powers of legislative control over such trust property. There are many authorities to the effect that in the proper exercise of legislative control limited areas of tide and submerged lands may be set apart from the public domain in aid and promotion of the trust purposes, and even for private purposes, upon proper segregation. If it could reasonably be said that the Legislature has granted to these particular petitioners the permits applied for, it might follow that the court would be bound by the implied legislative finding that the proposed use of the lands in question would not be inconsistent with the public trust. But I am unable to accede to the claim that the court is bound by an alleged implied finding of the Legislature to the effect that, with no substantial impairment of the public right, all of the tide and submerged lands of the state may be used for this private purpose, which of necessity involves the building and maintenance of structures and obstructions on such lands. It is not a sufficient answer to say that the oil and gas bearing tide and submerged lands of the state are confined to very limited areas. Future development may disclose otherwise. And if all of this trust property may be set apart for one private purpose, why may it not for another? I am not impressed with the argument that if the applicants for the permits and leases do not extract the oil and gas from the state's tide and submerged lands, the littoral owners may do so, and the state's treasury thus be deprived of the modest royalty of 5 per cent. In my opinion the state should not engage in a wholesale surrender of this particularly protected public right for any such consideration or for any reason not involving a public emergency.

The tide and submerged lands of the state constitute a great public highway, whose use for navigation and fishery is analogous to that of the ordinary vehicular highway for public travel. The use of the latter is open to all with well-known guaranties against obstruction for private purposes. The former should be equally available to all for navigation and fishery, excepting, of course, that where not useful for the public purpose it may be altered to meet changing conditions and in a way not inconsistent with the trust. As to the right of fishery, no one may successfully maintain that the tidal waters will not be contaminated by the proposed operations and the fish be driven to deeper channels. The statute does not contemplate that the waters of the ocean will not be so despoiled. The act only requires that the permittees and lessees "use all reasonable precautions to prevent waste of oil or gas developed in the land." It is argued that the necessary structures to be built upon the trust property will not prevent reasonable access to the leased lands by those members of the public who may desire to navigate the waters over the leased lands or to fish therein. If this be true, it is so from a theoretical standpoint only. From a practical standpoint I believe that the occupation of lands under such a lease and operations thereunder would effect a substantial deprivation of the public right of navigation and fishery, just as an obstruction in a public highway would impede public travel.

It is claimed that, because of the expanse of the state's coast line, the applications for permits involved herein are of relative unimportance. The answer is that the main opinion establishes the rule as to all of the tide and submerged lands held by the state. My objection goes to what may be done under the statute and to relegating the entire question to one of legislative policy.

On Petition for Rehearing.

PER CURIAM. The petitions for rehearings herein are denied. The record herein as presented by the pleadings and by the briefs of the parties to these several proceedings shows that every question of law involved in each and all thereof was finally submitted to this court for decision and has been properly decided; that as to any issues of fact which have arisen in the course thereof the determination of those depended upon matters of record in the offices of state officers, or were matters of which the court could take judicial knowledge without the necessity of a reference, and that the decision in all of these matters was embraced in the order of submission herein, and has been properly and fully determined by the decision heretofore filed herein. We are satisfied that the decision on the question of littoral rights, wherein such rights were made an issue in the respective petitions, conforms to and follows, the decisions of the United States Supreme Court and our own court on said question. This question was argued and given full consideration in our opinion.

---

95 Cal. App. 270

CITY OF OAKLAND v. DE GUARDA et al. (Civ. 6401.)

District Court of Appeal, First District, Division 2, California. Jan. 3, 1929.

1. Municipal corporations ⟹348—City suing on street improvement contractor's bond as trustee for property holders need not allege how it became trustee.

If city is trustee for property holders within assessment district, it became such by reason of statute under which it instituted suit as such on street improvement contractor's bond, and hence was not required to allege in what manner it became trustee.

2. Municipal corporations ⟹348—Property holders need not be named, nor amounts of their assessments specified, in complaint of city suing for breach of street improvement contractor's bond (Code Civ. Proc. §§ 369, 382).

City being only party entitled to sue for breach of street improvement contractor's bond, under which it is only obligee by reason of statute and bond itself, in absence of statute giving such right to property owners, it was not necessary to join them as parties plaintiff, under Code Civ. Proc. §§ 369, 382, nor to name them or specify amount of respective assessments and amount to which each is entitled in complaint alleging that city was suing on their behalf.

Appeal from Superior Court; Alameda County; T. W. Harris, Judge.

On petition for rehearing. Petition denied, and last paragraph of former opinion (272 P. 779) stricken out.

Leon E. Gray, former City Atty., Preston Higgins, City Atty., and Homer W. Buckley, Deputy City Atty., all of Oakland, for appellant.

Heller, Ehrman, White & McAuliffe and F. Whitney Tenney, all of San Francisco, for respondents.

PER CURIAM. [1] The appellant has asked for a rehearing, complaining particularly of that portion of the opinion heretofore filed which states that the complaint is uncertain in that it does not state in what manner the city became trustee for the property owners, and that portion of the opinion which intimates that the complaint should be amended so as to state the names of the various property holders, together with the amounts of their assessments and the amounts which they would be entitled to receive from the respondent. The portions of the opinion referred to were not necessary to the decision. If the city is correct in its theory that it is a trustee for the property holders within the assessment district, it became such by reason of the statute under which the proceedings were instituted, and it was not necessary for the pleader to allege matters of law. As the city is the only obligee under the bond, both by reason of the statute and by reason of the wording of the bond itself, the city is the only party entitled to sue for a breach of the bond, unless by statute this right has been given to the property owners. No statute conferring such privilege upon the property owners has been called to our attention.

[2] It is therefore of no concern of the surety company as to who are the legal owners of the property within the assessment district, as to the amount of their respective assessments, or as to the amount that they would individually be entitled to receive from the surety company. It was not necessary to join the property owners as parties plaintiff (sections 369, 382, Code Civ. Proc.), and the allegation that the city was suing on behalf of the legal owners of the property within the assessment district is an allegation of a matter of the public record which may be ascertained by the surety company upon a search of the public records. It would serve no purpose to have these parties named in the complaint, and it would be equally futile to require the city to specify the amount of the respective assessments and the amount which the individual owners would be entitled to receive under the judgment.

The petition for rehearing is therefore denied, but all the last paragraph of the opinion heretofore filed, commencing with the words "But as a matter of abundant caution," and closing with the words "on the second cause of action," is stricken out.

96 Cal. App. 84

KROLL et al. v. RASIN. (Civ. 6254.)

District Court of Appeal, First District, Division 1, California. Dec. 31, 1928.

1. Trial 🔑260(8)—In death action, refusal of instruction, substantially covered by instructions given, held not ground for reversal.

In action for death resulting from automobile accident, refusal of instruction, denying plaintiff's recovery if death was just as likely to have been occasioned by negligence of third party, *held* not ground for reversal, where substance of such requested instruction was fully covered by instructions given.

2. Evidence 🔑505—Witness' testimony in automobile accident case, as to whether appearance of radiator indicated violent impact, held properly excluded.

In automobile accident case, refusal of trial court to permit examination of witness, as to whether appearance of radiator indicated blow of great violence, on ground that question called for conclusion of witness, *held* not error, especially where damage sustained by car was not confined to radiator, and where witness was permitted to state actual condition of radiator.

3. Witnesses 🔑275(6)—Disclosure on direct examination of defendant as adverse witness, that he had used intoxicants, held not to warrant cross-examination whether he was intoxicated, where plaintiff made no such claim (Code Civ. Proc. § 2055).

In automobile accident case, in which there was no contention that defendant was under influence of liquor at time of collision, trial court did not err in refusing to permit his own counsel to cross-examine him as to whether he was under influence of liquor, though on defendant's direct examination, when called as an adverse witness under Code Civ. Proc. § 2055, it appeared that he had taken two drinks of whisky on the day of the accident.

4. Appeal and error 🔑216(2)—Failure to present additional instructions to trial court, or indicate desire for clearer instructions, precludes complaint on appeal that instructions were inadequate.

Party who desires fuller and more elaborate instructions should prepare them and present them to the trial court, or indicate his desire that further instructions be given, and, on failure to do so, cannot complain for the first time on appeal that the instructions were inadequate.

Appeal from Superior Court, Alameda County; Warren V. Tryon, Judge.

Actions by Alva Bell Kroll and others against Emil Rasin. Judgments for plaintiffs, and defendant appeals. Affirmed.

Myrick & Deering and Scott, of San Francisco, for appellant.

Hadsell, Sweet & Ingalls, of San Francisco, for respondents.

KNIGHT, J. Henry Bell, aged 62 years, and his wife, Alma Bell, aged 54 years, were run down and killed while walking across East Fourteenth street, Oakland, and their children, all of whom but one had attained majority prior to the happening of the accident, joined in bringing two actions for damages on account of the death of each parent. The two cases were tried together before a jury, and a verdict of $7,500 was rendered in each case, but on motion for a new trial each verdict was reduced to $3,750, and, from the judgments entered for those amounts, the defendant has appealed.

The accident happened about 7 o'clock in the evening on East Fourteenth street at its intersection with Thirty-Eighth avenue. Mr. and Mrs. Bell started from the north curb of East Fourteenth street to walk southerly across the street in the regular pedestrian path, but soon after leaving the curb they were struck simultaneously by an automobile traveling westerly along East Fourteenth street. Mrs. Bell's body was hurled upon or near the street car tracks in the middle of the street, and Bell's body was found some 25 or 30 feet distant westerly.

There are four different automobiles referred to in the evidence, and the testimony as to the manner in which the accident happened and as to which of two of the automobiles first struck Bell and his wife is in sharp conflict. Two witnesses testified that it was a Ford sedan, which the defendant Rasin admittedly was driving, that first struck the couple. The testimony of one of these witnesses was to the effect that as the sedan struck the couple a woman screamed, and he saw the woman's body roll over toward the car tracks, and that the man's body seemed to drop off the left fender of the Ford. The other witness testified that he also saw the Ford sedan strike them, and that, although he did not pay so much attention to what became of the woman's body after the impact, he heard the scream and saw Bell's body fall off the fender or the bumper on the front of the Ford sedan. These two witnesses further testified that after the impact the Ford sedan pulled into the curb and stopped about 75 feet or more beyond the point of the collision. Two other witnesses testified that Bell and his wife were struck by a large touring car traveling at a high rate of speed, which hurled Mrs. Bell off to the left between the rails of the street car track and carried Mr. Bell forward on the bumper for a short distance when he dropped to the pavement; that as Mrs. Bell lay between the car tracks another automobile apparently accompanying the first sped along and ran over her body; and that, while Bell was trying to raise himself from the ground, the defendant Rasin came along in his Ford sedan and ran over him.

The evidence further shows without dispute that following closely behind the Ford was another automobile, a Chandler car, which was being driven by one Harris, and that before Harris could stop his car he also ran over the body of Bell. Harris was joined as a party defendant to the actions, but at the opening of trial the actions as to him were dismissed.

Defendant Rasin testified in effect that he did not know that he had struck any one. He admits, however, that his lights were lit at the time, and that he could see clear across the street both ways. He also testified that he did not hear any scream, and that the reason he pulled into the curb and stopped was that he felt his car "shimmying," and that when he alighted from his car he saw a man lying on the pavement some distance to the rear of his car, close to the curb. The evidence further shows that the front end of Rasin's sedan suffered considerable damage. The radiator was bent in and broken, and there was a trail of water on the pavement extending from the rear of the sedan to the place where the impact occurred. The bumper was bent back an inch at a point about six inches to the left of the center and thrown out of alignment about four inches to the left. The left headlight was bent backward, and the hose between the radiator and engine was ruptured. On the left-hand side of the hood and on the radiator, directly under the radiator cap, there were finger smears, and there were small fibres of clothing on the tip of the left front fender.

[1] In view of the foregoing conflict in the evidence, defendant proposed two instructions, designated in the record as defendant's proposed instructions 53 and 54, to the effect that, if from the evidence it was "uncertain" as to whether the death of Mr. and Mrs. Bell was caused by the negligence of the defendant or of some unknown automobile driver, or if it was "just as likely" to have been occasioned by the negligence of one as the other, defendant was entitled to a verdict. The court refused to give said instructions, and its refusal is assigned as error. Plaintiffs urge several objections to the form of both instructions which may have more or less merit, but, aside from such objections, we find no cause for reversal in the refusal of the court to give said instructions for even assuming that they correctly stated the law, the substance thereof was covered by two other instructions proposed by defendant, which the court gave. They are designated in the record as instructions numbered 38 and 39, and read as follows:

"If you find from the evidence that Mr. and Mrs. Bell, the father and mother respectively of the plaintiffs in this action, were struck by an automobile which preceded that driven by the defendant Rasin, and were hurled to the roadway directly in front of Mr. Rasin's machine, and that in the exercise of ordinary care Rasin did not see the body of either of them, and unwittingly ran over one or more of them, and that in so doing he was acting in good faith and the exercise of such care as an ordinary prudent person would exercise, then your verdict must be in favor of said defendant."

"You are instructed that upon the question as to whether the defendant should or should not have seen Mr. Bell, the father of the plaintiffs, when he was lying prostrate upon the ground and endeavoring to arise therefrom, if you find such to be the fact, you are not at liberty to indulge in any speculation or conjecture but in determining whether or not he, the defendant, was in the exercise of ordinary care, you must rely solely upon the evidence produced in this case, and if you find that there is not evidence showing that he failed to exercise ordinary care, that is the care of a reasonably prudent man, then your verdict must be in favor of the defendant."

Moreover, in addition to the foregoing instructions, the jury was fully instructed upon the subjects of burden of proof and preponderance of evidence. Therefore all of the elements contained in said instructions numbered 53 and 54, which were refused, were embodied in the court's charge.

[2] The defendant called as a witness an automobile repair man who, after testifying that he examined the condition of the Ford sedan some time following the accident, was asked the following question: "Can you state from the appearance of the radiator whether or not any blow of great violence had been struck it?" Plaintiffs objected to the question as calling for the conclusion of the witness and as being incompetent, irrelevant, and immaterial. The objection was sustained, the court stating that the question called for the conclusion of the witness; and, commenting further upon the matter, the court said that the witness would be permitted to state the condition in which he found the radiator, "whether it was jammed back or in what condition," but that the question as to whether or not it had been struck a blow of great violence was one for the jury. Following the suggestion of the court, the witness was then asked to state in detail the condition in which he found the radiator, which he did. Defendant assigns the ruling sustaining the objection as error, contending that "it was important for the defendant to show that the injury done to the Ford was not such as could be anticipated had the Ford run into the two people and hurled one to the left and carried the other forward," as testified by plaintiffs' witnesses. We find no merit in the point, for the reason that the undisputed testimony shows that all of the damage sustained by the Ford was not confined to the radiator, and, in any event, the question of the anticipated injury which a Ford might sustain by striking two people as described by plaintiffs' witnesses was, as the trial court stated, to be determined by the jury.

[3] Plaintiffs called defendant as an adverse witness, under section 2055 of the Code of Civil Procedure, and during the direct examination it was developed that about 4:30 o'clock on the day of the accident he had taken two drinks of whisky. On cross-examination he was asked by his own counsel: "Were you at all under the influence of liquor at the time?" The court, on objection of plaintiffs, ruled that the question was not permissible. We find no error in the ruling. It was not charged in the complaint, nor asserted at the trial, so far as our attention has been called, that defendant was under the influence of liquor at the time of the collision, the only testimony on that point having come from the defense, which was to the effect that the defendant was sober. Moreover, and in any event, the question of defendant's sobriety would relate only to the issue of the negligent operation of his automobile, and he makes no point on this appeal as to the sufficiency of the evidence to sustain the conclusions reached by the jury on that issue.

[4] Further contention is made that, in view of the fact that all of the plaintiffs but one were adults at the time of the happening of the accident, the instructions to the jury as to the measure of damages were too broad in their meaning. An examination of the instructions will show, however, that they are in the usual form, and, if the defendant desired fuller and more elaborate instructions on this subject, he should have prepared and presented the same to the court, or in some manner made known to the court his desire for clearer and more definite instructions; and, having failed to do so, he cannot complain for the first time on appeal. Townsend v. Butterfield, 168 Cal. 564, 143 P. 760. Moreover, defendant makes no claim that the amount of damages finally awarded, and for which judgment was entered, is excessive.

The judgments are affirmed.

We concur: TYLER, P. J.; CASHIN, J.

UNITED STATES FIDELITY & GUARANTY CO. v. MATTHEWS et al.★

(Civ. 3662.)

District Court of Appeal, Third District, California. Dec. 29, 1928.

Rehearing Denied Jan. 28, 1929. Hearing Granted by Supreme Court Feb. 25, 1929.

1. Subrogation 🔑7(4)—Administrator's surety paying debt owing by administrator to estate became subrogated to remedy of estate against administrator who was heir (Civ. Code, § 2848).

Under Civ. Code, § 2848, entitling surety satisfying principal's obligation to enforce every remedy which creditor then has against principal to extent of reimbursing surety for expenditures, surety of administrator paying debt owing by administrator to estate became subrogated to every remedy estate had against administrator who was heir.

2. Executors and administrators 🔑294—Administrator's debt to estate may be set off against share in estate.

Indebtedness owing to estate by administrator may be set off against administrator's distributive share of estate on distribution.

3. Descent and distribution 🔑84—Heirs of estate, in absence of will, may contract respecting estate or convey same subject to administrator's possession for administration purposes (Civ. Code, § 1384).

Under Civ. Code, § 1384, heirs of estate, in absence of will, may enter into contracts with respect to estate or convey interest therein subject to possession of administrator for purposes of administration.

4. Descent anud distribution 🔑119(1)—Heirs take title to property of estate subject to liens of administration covering debts, family allowances, funeral, and administration expenses (Civ. Code, § 1384).

Under Civ. Code, § 1384, heirs of estate, in absence of will, take title to property subject to liens of administration which cover payment of debts and funeral expenses and family allowances and expenses of administration.

5. Judgment 🔑785(1)—Subrogation 🔑36—Lien of assignee for value of administrator's share in estate held superior to lien of subsequent judgment against administrator paid by his surety or to surety's right of subrogation to rights of estate against administrator.

Where administrator assigned interest in estate to bank at time when there was no showing that any portion of debt owing by administrator to estate was in existence, and assignee paid valuable consideration therefor in ignorance of any indebtedness by administrator if then existing, lien of assignee on distributive interest of administrator in estate was superior to lien of subsequent judgment against administrator paid by surety on administrator's bond or to any right resulting to surety by subrogation of right of estate against administrator to set off debt against administrator's distributive share.

6. Limitation of actions 🔑167(1)—Lien created by assignment of administrator's share in estate held not barred by limitation, where assignee sued on note secured by assignment before note was barred by limitations.

Where assignee of administrator's distributive share in estate brought suit on promissory note to secure which assignment was made before running of statute of limitations against note, limitations did not run against lien existing by virtue of assignment.

7. Limitation of actions 🔑167(1)—Lien is not extinguished by lapse of time so long as principal obligation is kept alive.

A lien is not extinguished by lapse of time so long as principal obligation is kept alive.

Appeal from Superior Court, Lassen County; H. D. Burroughs, Judge.

★Superseded by opinion of Supreme Court 279 P. 655.

Action by the United States Fidelity & Guaranty Company against N. G. Matthews, personally and as administrator of the estate of Thomas W. Wilson, deceased, and another. Judgment for defendants, and plaintiff appeals. Affirmed.

Horace W. B. Smith and P. R. Lund, both of San Francisco, for appellant.

J. E. Pardee, of Susanville, for respondents.

JAMISON, Justice pro tem. This case was brought up on the judgment roll alone. The facts, which are not disputed are briefly these: Thomas W. Wilson died intestate on June 18, 1920, in Lassen county, leaving as his heirs three children, including George W. Wilson. On August 2, 1920, the said George W. Wilson was appointed administrator of deceased's estate. He qualified and gave bond with Cady and Spaulding as sureties. On March 3, 1921, said George W. Wilson borrowed from the Growers' Bank of San José $2,600, and as security for its payment gave his promissory note to said bank and an assignment of all his interest in said estate and all fees and commissions accruing to him as such administrator, the note being made payable six months after date. A copy of this assignment was filed in the superior court of Lassen county with the papers of said estate on October 27, 1921.

On September 12, 1921, the sureties, Cady and Spaulding, on application therefor, were released from said bond, and said administrator filed a new bond with appellant as sole surety thereon.

On June 27, 1922, the said Growers' Bank assigned to defendant Bank of Lassen County the said note and assignment of interest of said George W. Wilson in said estate, and on September 25, 1922, the said last-named assignment was filed in said superior court with the papers of said estate.

On January 8, 1924, on the application of said Bank of Lassen County, George W. Wilson was removed as said administrator, and defendant N. G. Matthews was appointed administrator of said estate in his stead. On April 9, 1924, said Matthews, as said administrator, began an action against George W. Wilson for an accounting of his administration of said estate, and as a result of that action judgment was rendered against said Wilson for the sum of $637.39 on his first bond and for $2,249.77 on his second bond. Appellant paid said last-named amount and took an assignment of said judgment from the said administrator.

Appellant seeks by this action to have the court adjudge that it is entitled to the priority and preference in the payment of its said assigned judgment, out of the distributive share of said George W. Wilson. Therefore the matter presented for determination by this appeal is whether, upon the distribution of said estate, appellant, by virtue of its assigned judgment, shall first be paid out of the distributive share of said George W. Wilson, or whether the respondent, by virtue of the assignment of the distributive share of said Wilson, shall first be paid out of same. It is conceded that the distributive share of said Wilson will not be more than sufficient to pay one or the other of said claims.

[1, 2] Section 2848 of the Civil Code provides that a surety, upon satisfying the obligation of the principal, is entitled to enforce every remedy which the creditor then has against the principal to the extent of reimbursing what he has expended. By the payment of this debt owing by the said heir, George W. Wilson, to said estate, appellant became subrogated to every remedy the said estate had against the said George W. Wilson, by virtue of said debt. Appellant contends that the estate, or rather the administrator acting for the estate, has the right to set off this indebtedness owing to the estate by the administrator, against the distributive share of the said George W. Wilson, upon the distribution of said estate. The authorities generally support this conclusion, and such has been decided to be the law of this state by recent decisions of the Appellate and Supreme Courts.

In the case of In re Clary's Estate, 253 P. 778, Plummer, J., in a decision rendered by the appellate court, Third district, reviewing the authorities bearing on this question, said, "The right of retainer or set-off is recognized as applicable upon distribution in this state;" and upon a rehearing in the Supreme Court, 264 P. 242, the Supreme Court adopted and affirmed the said decision of the appellate court. No question of priorities was involved in this case. If, therefore, there were no priorities to be determined, it is apparent that appellant would be entitled to have its said judgment retained out of the distributive share of the said George W. Wilson upon the distribution of said estate.

Appellant maintains that by reason of the fact that, during his administration of the estate of said Thomas W. Wilson, the said George W. Wilson became indebted to said estate by withholding funds belonging to said estate, the right of the estate to retain or set off such funds so withheld, from or against the distributive share of said George W. Wilson, takes precedence over all liens or assignments of said distributive share. Appellant cites no decision of the courts of this state in support of this proposition. The only case that has been brought to the attention of this court that deals directly with this proposition is that of In re Smith, 108 Cal. 115, 40 P. 1037, cited in respondent's brief. In that case Smith died leaving a will devising his property to his children and grandchildren. Two of his sons, John A. and William R., were appointed executors of his will. John A. died pending the administration, and at the time of his death he had in his hands $247.15 belonging to said estate. Upon distribution of the estate the court did not deduct this sum from the distributive share of the said John A. The administrator appealed from the decision of the trial court. In the course of its opinion in that case the court said: "John A. held the estate's money as trustee, and upon his death, being indebted to his beneficiary, the estate, its position became no better than that of any other creditor, unless it was able to pursue the precise trust fund." While that portion of this decision, to the effect that the sum owing by the deceased executor, could not be set off against, or retained from his distributive share as an heir of the estate, has been overruled in Re Clary's Estate (Cal. App.) 253 P. 778, the part quoted has not since been passed upon either by the Supreme or Appellate Courts of this state.

[3, 4] Section 1384 of the Civil Code provides that both real and personal property of deceased, where there is no will, passes to the heirs of an estate, subject to the control of the probate court and to the possession of the administrator for the purposes of administration. And they may enter into contracts with respect thereto, or convey same subject to the possession of the administrator for the purposes of administration. Cal. Jur. vol. 9, p. 478. The heir takes the title to the property subject to the liens of the administration which cover the payment of the debts and funeral expenses, the family allowances and expenses of administration. Cal. Jur. vol. 9, p. 472. That no lien exists against the distributive share of the heir growing out of his indebtedness to the estate was declared in the case of Estate of Polito, 51 Cal. App. 752, 197 P. 976. In that case the administratrix sought to have a judgment recovered by the estate against an heir, set off or deducted from the heir's distributive share. It appeared that a prior judgment had been rendered in favor of a creditor of the heir. The trial court decision was in favor of the judgment creditor, from which the administrator appealed. In its opinion the appellate court said: "It would seem that the trial court acted correctly in refusing to accede to the petition of appellant herein, since it appears from the record herein that the respondent, Sarah A. McCurdy [the judgment creditor], had obtained and duly docketed a judgment against said John L. Polito [the heir], for the sum of $4,452.45, which had thus become a first lien upon the interest of said John L. Polito in such real estate, and that this lien was prior to the lien which the estate had acquired upon said interest by its judgment thereafter obtained. We are directed to no provision of law and to no decision of the courts of this state which purport to give to an estate in the course of its administration a lien upon the undivided interest of the heirs or devisees in the real property of said estate arising out of the fact that such heir or devisee may be indebted to said estate."

Appellant, in its brief, has cited cases from other jurisdictions which it claims supports its contention that it is entitled to priority in the distributive share of George W. Wilson upon distribution of the estate. One of the cases relied upon by it to sustain this contention is that of In re Baily's Estate, 156 Pa. 634, 27 A. 560, 22 L. R. A. 444, but in that case the obligation of cosureties toward each other and contribution between cosureties was involved, and it was mainly because of the relationship that existed between them as cosureties that the court held that a debt due the estate from one of them was entitled to priority over an assignment by that one of his interest as one of the heirs of the estate. Another case largely relied upon by appellant is the case of Clapp v. Meserole, 1 Abb. Dec. (N. Y.) 362; Id., 38 Barb. (N. Y.) 661. In this case it appears that two of the heirs were appointed executors of the estate of their deceased father, and that the father had made an advancement to each of $10,000, and, in addition, they were indebted to him upon a mortgage. The will provided that the advancements were to be deducted from the distributive share of each. Some six years after their appointment as executors they assigned their distributive shares to the plaintiff Clapp. He necessarily took the assignment with knowledge of the provisions of the will and the existence of the mortgage. Upon the final accounting it was found that the distributive share of each of the two sons was less than the advancements, and upon this state of facts the court affirmed the judgment giving priority to the estate. Nor does the case of Ford, Administrator, v. O'Donnell, 40 Mo. App. 51, also cited by appellant, support his contention. In that case the administrator sought to have a debt owing by the son to his father set off against the distributive share of the son in his father's estate. The court held in that case that the debt owing by the son to his father had priority in the distribution of the sons' distributive share, over an assignment by the son of such share, but based its reason for so holding upon the fact that the debt was in existence at the time of the assignment.

[5] In the case under consideration there is no showing that any portion of the debt owing by George W. Wilson to the estate of his father was in existence at the date he made the aforesaid assignment. George W. Wilson was appointed administrator of his father's estate on August 2, 1920, and the assignment of his interest in the estate was made on March 3, 1921. On October 28, 1921, the said George W. Wilson filed his annual account of his administration and same was allowed and approved, and it was not until his final account was presented in 1924 that it was discovered that he was indebted to the estate.

The trial court found that of the indebtedness of George W. Wilson to said estate, $637.39 accrued against him during the period of his first bond, that is, during the period commencing August 2, 1920, and ending November 10, 1921; but there is no showing that any portion of this debt accrued prior to the assignment by George W. Wilson of his interest in the said estate. Apparently the assignor of respondent bank took the assignment from George W. Wilson in good faith, paid valuable consideration therefor, in ignorance of any indebtedness owing by said Wilson to said estate, if in fact such indebtedness existed at that time, of which no proof had been offered.

The trial court found that the lien of respondent on the distributive interest of George W. Wilson in said estate is prior and superior to the lien of plaintiff's judgment, or of any right that may have resulted from subrogation, and, in the opinion of this court, it was justified in so doing.

[6, 7] In its reply brief the appellant raises the point that the lien of respondent is extinguished by the provisions of section 2911 of the Civil Code. However, appellant admits that, prior to the running of the statute of limitations against the promissory note, to secure which the assignment was made, respondent bank commenced an action against the said George W. Wilson for the collection of said note. This being true, limitation would not have run against the lien existing by virtue of the assignment. A lien is not extinguished by lapse of time so long as the principal obligation is kept alive. Worth v. Worth, 155 Cal. 599, 102 P. 663; Weinberger v. Weidman, 134 Cal. 599, 66 P. 869.

The judgment is affirmed.

We concur: HART, Acting P. J.; PLUMMER, J.

---

96 Cal. App. 145

GALLY v. WYNNE et al. (Civ. 6369.)

District Court of Appeal, First District, Division 2, California. Jan. 5, 1929.

1. Contracts 🔑167—All applicable laws in existence when agreement is made necessarily enter into and form part thereof.

All applicable laws in existence when an agreement is made necessarily enter into it and form part of it as fully as if they were expressly referred to and incorporated in its terms.

2. Sales 🔑116, 391(5)—On seller's breach of sale contract buyer had right to rescind and recover amount paid thereon, notwithstanding provision for damages; "extinguished" (Civ. Code, § 1688).

On seller's breach of contract for sale of fixtures, good will, and lease of premises, buyer had right to rescind and recover amount paid thereon, without regard to provision of agreement for a deduction of certain amount from purchase price in case of seller's violation of agreement, since under Civ. Code, § 1688, in case one party rescinds the other party may also rescind and contract is thereby "extinguished," which means to put out, quench, stifle, as to extinguish a fire or flame.

[Ed. Note.—For other definitions, see Words and Phrases, First, Second and Third Series, Extinguish.]

3. Good will 🔑7—Evidence held to sustain finding that seller breached provision of agreement relative to conduct in selling merchandise after sale of fixtures and good will.

In action to recover money paid as part of purchase price for fixtures, good will, and lease of premises, evidence *held* to sustain finding of seller's breach of contract whereby they agreed in conducting sale of merchandise not to use the terms "going out of business" or "quitting business."

Appeal from Superior Court, City and County of San Francisco; J. O. Moncur, Judge.

Action by E. Gally against M. K. Wynne and another. Judgment for plaintiff, and defendants appeal. Affirmed.

A. S. Newburgh, of San Francisco, for appellants.

Herbert Choynski and Sidney Rhein, both of San Francisco, for respondent.

STURTEVANT, J. The plaintiff, as assignee of M. Berman, commenced an action against the defendants to recover a judgment for moneys had and received. The defendants answered, and a trial was had before the trial court sitting without a jury. The trial court made findings of fact in favor of the plaintiff, and from a judgment entered thereon, the defendants have appealed under section 953a of the Code of Civil Procedure.

Heretofore the defendants were the lessees and were conducting a drygoods store at 111 Powell street. Being desirous of going out of business, they arranged to conduct a sale of their merchandise and at the same time they entered into a contract with M. Berman, under the terms of which they agreed to sell, and M. Berman agreed to buy, the "fixtures, good will and the lease of the premises." The purchase price was $3,500, of which $750 was paid down when the agreement was entered into March 1, 1927. Attached to the agreement was an inventory. Two or three days after the agreement had been executed the defendants executed a writing in which they agreed that in conducting their sale they would not use "the terms going out of business or quitting business but to use substantially the following: Lease and fixtures sold. Every garment in this shop must be sold by March 31st. In the event I violate any part of this agreement I agree to deduct $500 from the purchase price of $3,500." The latter paper was also dated March 1, 1927, but the evidence shows it was executed and delivered a few days subsequent. It was the contention of the plaintiff that almost immediately after delivering the writings above mentioned the defendants proceeded to place on their store large signs having thereon such expressions as, "Positively closes April 15th"; that thereby they greatly reduced, if they did not destroy, the value of the good will; that on April 6th the plaintiff therefore served notice of rescission and demanded the return of the $750 theretofore paid by him on the purchase price; that the deposit was not repaid and that the plaintiff is entitled to sue therefor.

[1, 2] The defendants call attention to the fact that the several writings related to the same matters between the same parties and were made as part of substantially one transaction and are to be taken together. Thereupon they call attention to the fact that the paper last executed contained a provision that, if the defendants violated its terms, they agreed to deduct $500 from the purchase price. The defendants then argue that the remedy of the plaintiff was to proceed and comply with all of the terms of the contract and deduct $500 from the purchase price. They do not cite any authority supporting their contention. The covenant that $500 might be deducted from the purchase price was not a covenant authorizing the defendants to breach their contract. True it is that in the papers executed by the parties they expressly inserted a provision for liquidated damages. It is well-settled law that all applicable laws in existence when an agreement is made necessarily enter into it and form a part of it as fully as if they were expressly referred to and incorporated in its terms. 13 C. J. p. 560; Marshall v. Wentz, 28 Cal. App. 540, 542, 543, 153 P. 244. Therefore it is patent that the statutes regarding the measure of damages are implied terms in many contracts. No reason appears why expressly inserting a clause regarding damages would have any different operation than the implied insertion of a clause on that subject. Where, as here, one party to a contract admittedly breaches it, the other party is entitled to treat the vendor's breach as an abandonment and himself abandon the contract and sue at law to recover what he has paid in an action for money had and received. Glock v. Howard & Wilson Colony Co., 123 Cal. 1, 10, 55 P. 713, 43 L. R. A. 199, 69 Am. St. Rep. 17. In other words, if one party rescinds the other party may also rescind, and when a rescission has thus been made the contract is "extinguished." Civ. Code, § 1688. That word means, "To put out, quench, stifle, as to extinguish fire or flame." Cent. Dict. If the contention of the defendants is sound, it would seem to follow that the right to rescind never exists.

[3] It is further contended by the defendants that they did not breach the contract. However, they candidly state that the testimony is conflicting, nevertheless they proceed to state as they claim the evidence as favorable to the plainfiff as his testimony will permit. True it is that the oral testimony was not very direct nor satisfactory, but photographs of the signs used were introduced in evidence. One sign was "Fixtures and lease sold, positively closes Friday night, April 15th." Moreover, there was evidence that that particular sign was put up after the plaintiff had rescinded and that other signs had theretofore been put up and supplanted from time to time. The record as made does not warrant this court in disturbing the findings made by the trial court. We find no error in the record.

The judgment is affirmed.

We concur: KOFORD, P. J.; NOURSE, J.

---

95 Cal. App. 762

Ex parte HENNESSY. (Cr. 1491.)★

District Court of Appeal, First District, Division 1, California. Dec. 26, 1928.

Rehearing Denied Jan. 10, 1929. Hearing Denied by Supreme Court Jan. 24, 1929.

1. Health ⚷21—Public health ordinances will be upheld unless unreasonable and discriminatory as to persons concerning whom no reasonable basis of discrimination exists.

Ordinances enacted to promote public health will be upheld as valid exercise of police power if requirements are not unreasonable and provisions do not discriminate in favor of or against particular persons or classes as to whom no reasonable basis of discrimination exists.

2. Municipal corporations ⚷626—Classification in municipal police ordinance must have reasonable basis of discrimination (Const. art. 1, §§ 11, 21; art. 11, § 11).

City in enacting police regulations pursuant to authority given by Const. art. 11, § 11, may not make arbitrary classification of different persons or classes unless some reasonable basis of discrimination exists, under article 1, § 21, providing that no citizen or class of citizens shall be granted privileges not granted all citizens upon the same terms, though Const. art. 1, § 11, in regard to uniformity of laws, does not apply to municipal ordinances.

3. Statutes ⚷64(1)—Void exception to act does not invalidate general provisions unless all provisions are so related that Legislature would not have enacted law without proviso.

General provisions of statute are not invalidated by invalidity of proviso in the nature of

---

★Rehearing denied. Hearing denied by Supreme Court.

an exception to the act, unless it clearly appears that the provisions of the exception are so intimately connected with the general provisions that the legislative body would not have enacted the general provisions without the exception.

4. Municipal corporations 🔑111(4)—General provisions of ordinance requiring closing of butcher shops Saturday evenings and Sundays to prevent sale of meat without inspection held not invalidated by void provision permitting sales by Kosher markets (Const. art. 11, § 11; St. 1921, p. 1269).

Invalidity of special provision of ordinance permitting Kosher meat markets to keep open Saturday evenings and Sunday mornings *held* not to render invalid general provisions of ordinance enacted pursuant to Const. art. 11, § 11, and St. 1921, p. 1269, requiring butcher shops to close on Saturday evenings and Sundays, so as to prevent sale of meat without inspection by public authority.

Application by Alfred J. Hennessy for writ of habeas corpus, prayed to be directed to the Chief of Police of the City and County of San Francisco, Cal., to secure the release of Harry Gatsios from custody on the charge of violation of an ordinance regulating the sale of meat. Writ denied, and prisoner remanded.

Alfred J. Hennessy and Virgil J. Garibaldi, both of San Francisco, for appellant.

John J. O'Toole, City Atty., Henry Heidelberg, Deputy City Atty., Matthew Brady, Dist. Atty., Isidore Golden, and August L. Fourtner, Deputy Dist. Attys., and Leo A. Cunningham, all of San Francisco, for respondent.

PER CURIAM. Harry Gatsios is the proprietor of a butcher shop in the city and county of San Francisco, where meat, inspected by authorized inspectors under the inspection laws and regulations, is sold. He was taken into custody upon the complaint that he had violated ordinance No. 6157, new series, of the municipality, in that on Saturday, December 3, 1927, between the hours of 7 and 8 o'clock p. m., he sold and offered for sale at his shop certain uncured and uncooked meats, contrary to the provisions of the ordinance, which reads as follows:

"Section 1. It shall be unlawful for any person, firm, partnership, association or corporation, within the city and county of San Francisco, to sell or offer for sale any uncured or uncooked meats from any established place of business in the city and county of San Francisco for the purpose of sale and delivery to dealers or consumers or for the purpose of any delivery, or to keep open for business any place of business where any uncured or uncooked meats are sold or offered for sale, or permit such place to be kept open for business, or to receive at such place of business, any uncured or uncooked meats, except between the hours of 7 o'clock a. m. and 6 o'clock p. m. on days other than Sunday, New Year's day, Washington's birthday, Decoration day and Christmas day, or to sell or offer for sale within the city and county of San Francisco any uncured or uncooked meats, except at and from an established and fixed place of business at which said meats are regularly inspected by state and municipal inspectors; provided, however, that in case of a holiday falling on Saturday, the place of business hereinabove defined may be kept open between the hours of 7 o'clock a. m. and 12 o'clock noon.

"And provided further that any place of business where strictly Kosher meats are sold or offered for sale may be kept open on Saturdays from sundown until 10 o'clock p. m., and on Sundays from 7 o'clock until noon. And be it further provided that all emergency cases be left to the discretion of the Health Officer of the city and county of San Francisco.

"Section 2. Every person, partnership, association, firm or corporation violating any of the provisions of this ordinance or by doing any act or thing herein declared to be unlawful shall be deemed guilty of a misdemeanor, and upon conviction thereof shall be punished by a fine of not less than fifty dollars, nor more than two hundred dollars, or by imprisonment in the city prison for not more than six months, or by both such fine and imprisonment."

It is contended on behalf of the prisoner that the ordinance is unconstitutional and void for the reason that the proviso therein "that any place of business where strictly Kosher meats are sold or offered for sale may be kept open on Saturdays from sundown until 10 o'clock p. m. and on Sundays from 7 o'clock a. m. until 12 noon" creates as against those who do not sell or offer for sale Kosher meats at their places of business (his shop being of that class) an arbitrary and unreasonable discrimination.

The ordinance attempts to discriminate between "places where Kosher meats are sold or offered for sale" and places where such meats are not on sale; and, according to its provisions, dealers in Kosher meats may sell between sundown and 10 o'clock p. m. on Saturdays and between 7 o'clock a. m. to noon on Sundays; while other dealers must close their shops from 6 o'clock p. m. on Saturday until 7 o'clock on Monday morning.

[1] The state law governing the slaughter of animals and the inspection of meat (Stats. 1921, p. 1269) gives to the director of agriculture general supervision of slaughter houses within the state, the object being to insure a supply of wholesome meat, and for this purpose he is authorized to employ competent inspectors. Notwithstanding that general superintendence in such matters is given

the director of agriculture, the statute also permits cities and counties to provide by ordinance for local supervision and to make inspection by their own inspectors. Slaughtering on Sundays and legal holidays is prohibited except by special permit, the work on other days being confined between the hours of 7 o'clock a. m. and 8 o'clock p. m., but no attempt is made by the statute to regulate the hours of business of markets. The purpose of such ordinances as the one in question is the protection of public health, and the provision thereof regulating the hours of business of shops and markets where the products sold are subject to inspection by public authority, is to prevent evasion of the law during the hours when such inspectors are not on duty. An ordinance of this character will be upheld as a valid exercise of the police power if its requirements are not unreasonable and its provisions do not discriminate in favor of or against particular persons or classes of persons as to whom no reasonable basis of discrimination exists.

The first objection does not obtain here, but the ordinance by the exception noted above does discriminate between meat called Kosher, that is, the flesh of animals killed according to the Hebrew ritual, and the flesh of animals not so killed. It appears that according to the ritualistic practice mentioned, slaughtering is intrusted to those skilled in the handling of the instruments used for that purpose and instructed in Jewish laws and usages in the same connection, the object being to prevent as far as possible the distribution of meat considered ceremonially unclean as well as that which by reason of disease is unfit for human consumption. The latter purpose is accomplished for the whole community by the inspection laws; and it is not contended that greater protection to health is afforded by the Kosher method than by that followed in the preparation of other meats, both being designed to remove from the carcass of the animal as much of the blood as possible, the difference in practice between the two being that by the Kosher method the arteries of the neck are severed while the animal is yet conscious, and by the other the same arteries are severed after the animal has been rendered unconscious.

As stated, the ordinance divides butcher shops into two classes, viz., those where "strictly Kosher meats are sold or offered for sale" (this classification by implication including shops were both Kosher and other meats are sold), and those where only meats other than Kosher are sold or offered for sale. Those forming the first class are permitted to do business on Saturday nights and Sundays, while to the second class this privilege is denied, notwithstanding that no material difference in the quality of the meats or the conditions under which the same are prepared or distributed is claimed to exist.

[2] The source of the power of municipalities to enact ordinances of this character is found in section 11 of article 11 of the Constitution; and while the provisions of section 11 of article 1 of the Constitution in regard to the uniformity of laws does not apply to municipal ordinances (Hellman v. Shoulters, 114 Cal. 146, 44 P. 915, 45 P. 1057; In re Zhizhuzza, 147 Cal. 328, 81 P. 955), nevertheless the power conferred is limited by section 21 of the latter article, which reads: "No special privileges or immunities shall ever be granted which may not be altered, revoked, or repealed by the Legislature, nor shall any citizen, or class of citizens, be granted privileges or immunities which, upon the same terms, shall not be granted to all citizens." As was said by the court in the case of In re Blois, 179 Cal. 291, 176 P. 449: "This latter section * * * has been given direct application to * * * ordinances" by "which attempts have been made to discriminate in favor of or against particular persons or classes of persons as to whom no reasonable basis of discrimination can be seen to exist; and in all such cases the courts * * * have uniformly held such attempted legislation to be void."

As held in Martin v. Supreme Court, 194 Cal. 93, 227 P. 762, the classification must not be arbitrarily made for the mere purpose of classification, but must be based upon natural or constitutional distinctions.

[3, 4] In the present case the facts shown furnish no reasonable basis for the classification attempted to be made, and the result is the granting of a privilege to one class from which the other is arbitrarily excluded. The invalidity of the exception, however, does not necessarily affect the validity of the remaining portion of the ordinance. The supervisors had the power to adopt as a police measure an ordinance closing meat markets on Sunday and after nightfall on Saturday. Aside from the exception the ordinance is complete, is not unreasonable and applies without discrimination to all shops where uncured or uncooked meats are sold. It is the rule that when a proviso in the nature of an exception to an act is invalid the general provisions of the statute are not invalidated thereby unless it clearly appears that the provisions of the exception are so intimately and inherently related to and connected with the general provisions to which the exception relates that the legislative body would not have enacted the former without the latter. People v. Monterey Fish, etc., Co., 195 Cal. 548, 234 P. 398, 38 A. L. R. 1186. The evident object of the board was to regulate for inspection purposes the hours during which the business of selling uncured and uncooked meats might be carried on, which object is accomplished without the invalid exception. The latter was not so intimately or inherently connected with the general provisions of

the act nor did it enter so entirely into its scope and design as to indicate the intention that the general provisions should not be effective or would not have been adopted without it. Under such circumstances, though the exception be treated as a nullity, the balance of the act, under which the prisoner is held in custody, is not affected. Ex parte Gerino, 143 Cal. 412, 77 P. 166, 66 L. R. A. 249.

It is ordered that the writ be discharged, and that Harry Gatsios be remanded to the custody of the chief of police of the city and county of San Francisco.

---

96 Cal. App. 179

FINANCIAL INS. CORPORATION v. BROCKTON et al. (Civ. 5544.)

District Court of Appeal, Second District, Division 1, California. Jan. 8, 1929.

1. Replevin ⚷100(1)—Where court found plaintiff not entitled to possession in claim and delivery, it was unnecessary to settle rights as between plaintiff and named defendant.

In action of claim and delivery of automobile, brought against named defendants and fictitious defendants, judgment for one answering as fictitious defendant *held* not erroneous on ground that there was no disposition of case as between plaintiff and defendant originally named, since any relief to which plaintiff might be entitled depended upon right of possession, and findings were against it in that regard.

2. Replevin ⚷23—In claim and delivery, court may render judgment for one answering as defendant sued under fictitious name without obtaining leave to intervene.

Court *held* to have jurisdiction to enter judgment in action of claim and delivery in favor of one who answered as defendant sued under fictitious name, as against contention that such defendant was not original party to action and had not obtained leave to intervene, especially where no objection was made at trial.

3. Replevin ⚷107—Money judgment without alternative of delivering automobile held not erroneous in claim and delivery, where parties stipulated delivery could not be had.

In action of claim and delivery of automobile, judgment for payment of money without ordinary alternative of delivery of automobile *held* not erroneous, where parties stipulated on commencement of action that automobile was sold and delivery could not be had and that judgment should be certain sum in lieu of delivery.

4. Replevin ⚷106—In claim and delivery, judgment for defendant for stipulated value of automobile held not erroneous, notwithstanding partial payment by another.

In action of claim and delivery of automobile, awarding judgment to one defendant for stipulated value *held* not error, notwithstanding that, owing to partial payment having been made to it by another, it may not actually have been out such amount of money in transaction.

Appeal from Superior Court, Los Angeles County; John L. Fleming, Judge.

Action of claim and delivery of an automobile, brought by the Financial Insurance Corporation against Robert C. Brockton and various fictitious defendants, in which the A. I. Lasker Corporation answered as one of the fictitious defendants. Judgment for the Lasker Corporation, and plaintiff appeals. Affirmed.

George W. Fenimore, of Los Angeles, for appellant.

D. M. Potter and A. J. Getz, both of Los Angeles, for respondents.

HOUSER, J. This appeal relates to the ownership of an automobile which, so far as is here involved, originally belonged to a distributing company known as Don C. Smith, Incorporated. On June 20, 1924, the Sunset Moon Company, which was a dealer in automobiles, without being the owner or in possession of the automobile in question, entered into a conditional sale contract of the automobile with Brockton, one of the defendants herein. On the same day the Sunset Moon Company assigned its interest in the conditional sale contract to Financial Insurance Corporation, a corporation, the plaintiff herein. On application made to the division of motor vehicles by the Financial Insurance Corporation, accompanied by a report of sale of the automobile by the Sunset Moon Company, the division of motor vehicles issued its certificate of ownership of the automobile to Financial Insurance Corporation and Brockton. Four days later, to wit, on November 24th, the Sunset Moon Company orally agreed with the A. I. Lasker Corporation (one of the defendants herein) to the effect that the latter corporation purchase the automobile for cash from Don C. Smith, Incorporated (which latter corporation before that time had never parted with either the ownership or the possession of the automobile), and that thereupon the Sunset Moon Company would purchase it on a conditional sale contract from the A. I. Lasker Corporation—which agreement was carried out and the automobile was first delivered by Don C. Smith, Incorporated, into the possession of the Lasker Corporation, which latter corporation thereupon delivered it to the Sunset Moon Company, and which last-named company in turn delivered it to Brockton. On the same day an application for certificate of ownership of the automobile was made to the division of motor vehicles by the Lasker Corporation, accompanied by a report of sale of same by Don C. Smith, Incorporated; the result being that a certificate of ownership was also issued by the division of motor vehicles to the Lasker Corporation. Brockton having failed to make payment for the automobile as provided in the conditional sale contract entered into between him and the Sunset Moon Company, which contract had been assigned to the plaintiff, Financial Insurance Corporation, an action in claim and delivery was brought by the latter corporation against Brockton and various fictitious defendants for the recovery of the automobile; or, in the event that its delivery could not be had, for its value. The Lasker Corporation answered the complaint as one of the fictitious defendants named therein. On the trial it was stipulated that on the commencement of the action, under process issued by authority of the court, the Financial Insurance Corporation had taken possession of the automobile, sold it to some one not a party to the action, and that the value of the automobile was $1,200. Judgment was rendered in favor of defendant Lasker Corporation and against the plaintiff Financial Insurance Corporation for the sum of $1,200, and the appeal herein is from such judgment.

[1] Appellant's contention that the judgment is erroneous because it makes no disposition of the case as between the plaintiff and Brockton is completely met by the facts that the action was for claim and delivery; that any relief to which the plaintiff might be entitled necessarily depended upon its ownership or right of possession of the automobile; and, as the findings of the trial court were against the plaintiff in that regard, it was unnecessary for the court, in that kind of an action, to settle the respective rights as between the plaintiff and Brockton.

[2] Appellant also suggests that the Lasker Corporation was not an original party to the action, and, as it had not obtained leave to intervene therein, the trial court was without jurisdiction to render the judgment of which complaint is made. However, the record herein shows that by the complaint "Richard Roe Company" was made a fictitious defendant; and the answer of the Lasker Corporation shows that it appeared in the action, answered the complaint, and demanded affirmative relief as the defendant sued under the said fictitious name. In addition thereto, until the appeal herein was taken, no objection of any sort was ever made by the plaintiff to the appearance made by the Lasker Corporation in the manner in which it did appear, and the case was tried on the theory that the decision of the controversy depended entirely upon a determination of whether the plaintiff or the Lasker Corporation was the legal owner of the automobile. In such circumstances, appellant's contention is without merit.

[3] A further claim is presented by appellant to the effect that as the judgment was for the sum of $1,200, without the ordinary alternative of a delivery of the automobile to the Lasker Corporation, the judgment is void. On the trial of the action the parties stipulated that on the commencement of the action the automobile had been delivered by the sheriff of Los Angeles county to the plaintiff; that the plaintiff thereupon sold the automobile; that delivery thereof could not be had; and that in case judgment should be against the plaintiff, in lieu of delivery of the automobile the judgment should be in the sum of $1,200—the stipulated value of the automobile at the time it was taken by the sheriff. It is therefore clear that at this time appellant is in no position to complain of the form of the judgment in that regard.

[4] Appellant also urges the point that the evidence was insufficient to support the several findings made by the trial court to the effect that the Lasker Corporation, and not the plaintiff, was the owner and entitled to the possession of the automobile. It would serve no useful purpose to herein set forth the evidence upon which such findings were made. Suffice it to say that, in the opinion of this court, the findings to which attention has been directed are amply supported by the evidence adduced on the trial of the action. Such being the conclusion by the trial court, its further action in awarding a judgment to the Lasker Corporation for the stipulated value of the automobile was without error, notwithstanding the fact that owing to a partial payment having been made to it by the Sunset Moon Company the Lasker Corporation may not actually have been out of pocket that amount of money in the transaction.

Appellant's final contention that the Lasker Corporation was guilty of negligence in the purchase of the automobile is equally without merit. The evidence satisfactorily shows that at the time it purchased the automobile it had no knowledge or notice of any fact sufficient to put it on inquiry as to the position occupied by the plaintiff in the matter. On the other hand, as shown by the evidence, the negligence of plaintiff was clearly established.

The judgment is affirmed.

We concur: CONREY, P. J.; YORK, J.

96 Cal. App. 18

STREFF v. GOLD MEDAL CREAMERY CO.

GOLD MEDAL CREAMERY CO. v. STREFF et al.

(Civ. 3637.)

District Court of Appeal, Third District, California. Dec. 27, 1928.

1. Sales 🔑89—Buyer accepting milk after expiration of contract held liable for contract price.

Buyer continuing to accept deliveries of milk after expiration of contract, without suggesting change in terms or price, impliedly agreed to extension of contract, and hence was liable for contract price, not merely market value, of milk thereafter delivered.

2. Sales 🔑441 (2)—Conflicting testimony as to oral agreement to furnish milk of certain quality warranted finding that there was no warranty.

Conflicting testimony as to oral agreement, contemporaneous with written contract for sale of milk, to furnish milk of certain quality, justified finding that there was no warranty.

3. Sales 🔑437 (2)—Where express warranty is pleaded, evidence of implied warranty is inadmissible.

Where an express warranty is pleaded, evidence of an implied warranty will not be permitted.

4. Appeal and error 🔑1056 (5)—Exclusion of testimony as to bacteria tests and value of milk as delivered and warranted held not prejudicial, where court found on sufficient evidence that there was no express warranty.

Where the court found on sufficient evidence that there was no express warranty of grade of milk sold, exclusion of testimony as to bacteria tests and value of milk as delivered and warranted was not prejudicial, especially where buyer admitted that milk was merchantable.

5. Sales 🔑272—Implied warranty of merchantability does not require goods of first or even average quality (Civ. Code, § 1768).

Implied warranty of merchantability under Civ. Code, § 1768, does not require that goods sold be of first quality or even as good as average.

6. Sales 🔑288 (2)—Buyer accepting deliveries for over five months, with knowledge that milk was not as guaranteed, cannot prevail in defense based on such guaranty in action for price.

Buyer accepting deliveries of milk for over five months, with knowledge that it did not meet requirements of alleged guaranty of quality, cannot prevail in defense based on such guaranty in action for price.

Appeals from Superior Court, Los Angeles County; F. C. Valentine, Judge.

Action by F. C. Streff against the Gold Medal Creamery Company, which filed counterclaims and a cross-complaint against plaintiff, individually, and plaintiff and another as copartners, doing business under the name of California Dairy. From a judgment for plaintiff and cross-defendants, defendant and cross-complainant appeals. Affirmed.

John G. Munholland, and Lane & Lane, all of Long Beach, for appellant.

Denio, Hart, Taubman & Simpson, of Long Beach, for respondent.

TUTTLE, Justice pro tem. This is an action upon a written contract to recover $1,780.30, alleged to be due on account of 4,685 gallons of milk sold defendant. Judgment went for plaintiff in the sum of $1,764.72, and this appeal is prosecuted therefrom.

The complaint is in the ordinary form for milk sold and delivered between the dates of October 1, 1924, and November 8, 1924. The answer denies the allegations, and then proceeds, in 14 pages, to set up three counterclaims. The first of these sets up an express and agreed warranty as to the quality of the milk sold. It is alleged that between June 1, 1924, and November 8, 1924, plaintiff delivered milk to defendant which was not in accord with the terms of said warranty, and that defendant was thereby damaged in the sum of $1,929.81. The second counterclaim is based upon a breach of the contract in reference to the delivery by plaintiff of the names of certain customers to defendant. It is stated that plaintiff refused to deliver such names, and that he continued to solicit the business of said customers after the sale of the good will of the business to defendant. $1,800 is asked on account of this item. The third counterclaim is in reality a cross-complaint. The claim is made that plaintiff, after the sale of the good will of his milk business to defendant, continued to solicit his old customers, and started up, in the City of Long Beach, a rival concern under a fictitious name. There is a prayer for judgment in the sum of $2,432.81, and for an injunction restraining plaintiff from soliciting said customers.

The court found against defendant upon all the issues raised in his answer and cross-complaint. We are of the opinion that these findings are supported by the evidence.

A brief statement of the facts will shed considerable light upon the situation. On May 31, 1924, while plaintiff was the owner of a dairy and milk route, he entered into the following contract with defendant:

"Frank G. Streff and wife, Lou E., agrees to sell and Gold Medal Creamery Company agrees to buy the following described property:

"A bill of sale of all equipment of the Streff dairy at 1737 Temple avenue, together with the good will of said dairy, consisting of 3 milk routes, all bottles and cans and cases, all machinery and property (except

---

residence), also 1 Dodge truck A42494, and 1 Reo truck 81389, for the sum of $2,750.00, payable as follows:

"Escrow deposit 6—3—24, $1,375.00; additional cash, $1,375.00 on or before 30 days, and when you can deliver bill of sale to purchaser of above equipment.

"Said note to contain a bonus clause of ——— days, unaccrued interest.

"The seller intends to auction his stock of cows now at the above address and purchaser agrees to remove the buildings and fences conveyed within 60 days after the auction sale of said cows.

"Fire insurance transferred to

"The above referred to certificate of title or continuation shall be issued by a title company in its usual form and be record title only, and the Marine Commercial and Savings Bank shall not be liable for secret defects of title not appearing of record, including forgery and false personation, either as to the instruments of record or those handled in this escrow. If seller deposits his papers as herein set forth, and purchaser fails to make further cash deposit, the Marine Commercial and Savings Bank is authorized to use the deposit for the expenses of this escrow and pay the remainder to the seller without further instructions.

"Possession of milk routes on June 1st, 1924, and seller hereby agrees to sell all milk to purchaser until date of sale of cows at 38c per gallon in bottles f. o. b. at dairy. Purchaser to furnish all bottles.

"Search as to municipal liens is hereby waived as far as the bank is concerned.

"Taxes for ——— are to be paid by ———.

"Regular escrow charges to be paid by ———.

"Commission of $——— to be paid by seller to ———.

"Commission of $——— to be paid by purchaser to ———.

"Dated 5—31, 1924.

"Frank C. Streff,
"1737 Temple Avenue, Seller.
"Gold Medal Creamery Co.,
"By J. H. Chamnes, Pres.,
"Purchaser."

On June 1st defendant took possession of said dairy, and plaintiff commenced to deliver the milk referred to in said contract, and continued to deliver the same up to November 8th. It is admitted that the contract expired upon October 1st, but defendant continued to accept deliveries of said milk in the usual manner until November 8th. Upon that date defendant refused to pay plaintiff for the milk delivered after October 1st, and plaintiff thereupon ceased to make further deliveries.

[1] The court allowed plaintiff the *contract price* for the milk delivered after the expiration of said contract, and defendant contends that only the *market value* of said milk should have been allowed. While the contract may have expired upon October 1st, defendant continued thereafter to accept deliveries without any suggestion of a change in the terms or price, and under such circumstances we hold that the trial court was justified in finding that the contract price should prevail, even though the contract had expired. While no formal extension of the contract was entered into, by the undisputed acts and conduct of the parties, such an extension was put into effect, and impliedly agreed upon.

[2, 3] At the trial defendant was permitted to introduce testimony upon an oral agreement between the parties, contemporaneous with said written contract, to the effect that plaintiff agreed to furnish milk of a certain quality, to wit, grade A. Plaintiff denied that there was any such conversation or agreement. Upon this testimony the court was justified in finding, as it did, that there was no warranty of any character. Furthermore, where an express warranty is pleaded, evidence of an implied warranty will not be permitted. Kullman, Salz & Co. v. Sugar, etc., Co., 153 Cal. 725, 96 P. 369.

[4, 5] Certain rulings of the court are attacked in respect to proof of bacteria tests of the milk to establish its grade. The court having found, upon sufficient evidence, that there was no express warranty, the question as to whether or not the milk was class A is utterly immaterial, and no prejudice resulted from the ruling. Furthermore, defendant admitted in open court that the milk was merchantable. There was nothing in the contract to show that any special grade or quality of milk was to be furnished. The requirement of merchantability, assuming there was an implied warranty as to merchantability under section 1768 of the Civil Code, does not require that the goods be of first quality, or even that they shall be as good as the average of goods. Kenney v. Grogan, 17 Cal. App. 527, 120 P. 433, quoting Williston, Sales.

Error is predicated upon the refusal of the court to admit testimony showing the value of the milk as delivered and as it would have been, had it complied with the warranty set up by defendant. As the court found there was no express warranty as pleaded by defendant, no prejudice could result from such ruling.

[6] Other points are raised by appellant, but they are of minor importance and without merit. The crux of the whole matter is that defendant accepted deliveries of this milk for over five months. During all this time it had knowledge of the fact that the milk did not meet the requirements of their alleged guaranty. Such conduct should and does preclude them from prevailing in their defense which is based upon such guaranty, assuming that the existence of the same had

been upheld by the trial court. 22 Cal. Jur. 983, § 60; Union Oil Co. v. Purissima Oil Co., 181 Cal. 479, 185 P. 381.

The judgment is affirmed.

We concur: FINCH, P. J.; HART, J.

LANE et al. v. SAN DIEGO ELECTRIC RY. CO. (Civ. 3649.)★

District Court of Appeal, Third District, California. Dec. 29, 1928.

Rehearing Denied Jan. 28, 1929. Hearing Granted by Supreme Court Feb. 25, 1929.

1. Municipal corporations ⟹671(9)—Finding, that maintenance of street car tracks on sidewalk in front of plaintiff's property did not interfere with access to property, held not sustained by evidence.

In action to enjoin maintenance of street car tracks, finding, that plaintiffs were not prevented from having free ingress or egress over their property by reason of construction of tracks, *held* not sustained by evidence showing car tracks seriously interfered with access to plaintiffs' lot, and showing damage by running of street cars over sidewalk in front of plaintiffs' business house.

2. Highways ⟹85—Abutting owner on highway has private rights arising from ownership of property, regardless whether he owns fee of highway.

Abutting owner on highway has public right enjoyed in common with other citizens, and private rights arising from ownership of property contiguous to highway not given to public generally, regardless whether fee of highway is in him or not.

3. Eminent domain ⟹85—Abutting landowner on public highway has easement, which cannot be damaged or taken away without due compensation.

Abutting landowner on public highway has special right of easement and user in public road for access purposes, which is property right which cannot be damaged or taken away from him without due compensation.

4. Municipal corporations ⟹669, 670—Abutting landowner on street can disturb street and sidewalks, if necessary and done in reasonable manner.

Abutting landowner on public highway in municipality has limited right to disturb highway and sidewalks by reason of business or household exigencies, but such use must be necessary and reasonable, and obstruction cannot exist for long periods each day.

5. Municipal corporations ⟹669—Obstruction of abutting owner's access to public street constitutes "private and public nuisance" (Civ. Code, §§ 3479–3481).

Under Civ. Code, §§ 3479–3481, obstruction of abutting owner's access to public street constitutes "private" as well as "public nuisance."

[Ed. Note.—For other definitions, see Words and Phrases, First, Second, and Third Series, Private Nuisance; Public Nuisance.]

6. Municipal corporations ⟹671(1, 5)—Abutting owner may sue in damages, or for injunction, for impairment of private easement in street in front of property (Code Civ. Proc. § 731).

Under Code Civ. Proc. § 731, injury to use of street, which impairs abutting owner's private easement in street in front of, and adjacent to, his property, amounts to injury giving one right to maintain action for damages, or for injunction.

7. Eminent domain ⟹106—Street railroad held not justified in taking plaintiff's property without compensation, by constructing tracks over sidewalk, seriously affecting access to property.

Street railroad *held* not justified in taking plaintiff's property without compensation, by construction of loop tracks in front of plaintiff's property, resulting in running of street cars over sidewalk in front of property, seriously affecting access to property and causing damage thereto.

8. Municipal corporations ⟹671(7)—That continued use of street car tracks, obstructing access to abutting property, would ripen into prescriptive right, entitled owner to injunction against maintaining tracks, regardless of present damage.

That continued use of street car tracks in front of abutting landowner's property, obstructing access to property, would eventually ripen into prescriptive right, *held* sufficient to entitle abutting owner to enjoin maintenance of tracks, regardless of present damage.

9. Municipal corporations ⟹671(7)—Maintenance of street car tracks, obstructing access to abutting landowner's property, held private nuisance, entitling owner to injunction against maintaining tracks where no great public or private mischief would ensue.

Maintenance of street car tracks in front of abutting landowner's lots, obstructing access thereto and destroying special easement for purpose of ingress and egress to lots, and operation of street cars over sidewalk in front of owner's property, constituted private nuisance unreasonable and unlawfully interfering with owner's access to lot, entitling him to enjoin maintenance of tracks where violation of right was substantial, and issuance of injunction would not produce great public or private mischief.

Appeal from Superior Court, San Diego County; S. M. Marsh, Judge.

Action by John Beach Lane and another against the San Diego Electric Railway Company. Judgment for defendant, and plaintiffs appeal. Reversed with directions.

Luce & Swing, of San Diego, for appellants.

Morrison, Hohfeld, Foerster, Shuman & Clark, of San Francisco, V. F. Bennett, of San Diego, and Read G. Dilworth, of Coronado (C. Coolidge Kreis, of San Francisco, of counsel), for respondent.

FINCH, P. J. The plaintiffs have appealed from the judgment herein denying their ap-

---

★Rehearing denied. For opinion of Supreme Court adopting opinion of the District Court of Appeal in part, see 280 P. 109.

plication for a permanent injunction, restraining the defendant from maintaining its car tracks and operating its cars across the sidewalk and the street immediately adjacent thereto in front of their building.

The defendant owns lots 1, 2, 3, 4, 5, and 6, block 38, La Jolla Park, in the city of San Diego. The plaintiffs own the adjoining lots 7 and 8. All the lots face west on Fay street, with uniform frontage of 25 feet, except lot 1, which has a frontage of 24 feet. The defendant operates a single-track electric street railway along Fay street, but maintains a double track in front of block 38, the westerly track being "intended as a holding track * * * upon which cars could be spotted, or placed," the double track being at the northerly terminus of the line. Prior to any controversy between the parties, the defendant erected a substantial passenger depot on its said lots. In June, 1924, it commenced the construction of a loop consisting of an extension of the easterly track in a right-hand curve around the depot and back to the easterly track at the intersection thereof with the south line of lot 8 extended. The plaintiffs made seasonable objection to the construction of the loop in front of their property during the progress of the work, and they commenced this action prior to the completion thereof, but the defendant proceeded to complete the loop, and has thereafter used it for the purposes intended. Following the loop in the reverse order of that stated, it leaves the easterly track at the southerly line (extended) of lot 8, and, curving to the right, the right-hand rail intersects the curb in front of lot 7 at a point 5½ feet south of the north line (extended) of lot 7, and continues in such a course across the sidewalk that the side of a street car moving over the loop passes within 3½ feet of the corner of that lot, the overhang of the street car around the curve being about 3 feet to the right of the right-hand rail. The defendant constructed a culvert over the gutter at the curb in front of lots 6 and 7, the southerly end thereof extending to about the middle of the curb line in front of lot 7. The sidewalk is 14 feet in width, and the distance from the east rail of the main track to the curb is about 17 feet.

On the plaintiffs' lots, occupying the whole of the front thereof on Fay street, is a one-story brick and tile building used as a garage, the entrance thereof for vehicles being immediately south of the dividing line between lots 7 and 8. There is a door in the northwest corner of the building, opening on Fay street. The building was so planned that the front part thereof, on lot 7, "could be rented as a separate small store." It was constructed of sufficient strength "to carry two additional stories in the front part."

The evidence shows without contradiction, and a map introduced in evidence, which respondent concedes "correctly shows the situation," demonstrates that an average automobile or truck cannot be parked in front of lot 7 while a street car is passing over the loop in front of that lot. Defendant's engineer of maintenance and construction testified that, even if the southerly end of the loop were connected with the west track directly west of the present connection, it would not be possible to park an automobile of greater length than 10 feet in front of lot 7 during the passage of a car over the loop. The defendant introduced evidence to the effect that, at the time of the trial, cars passed over the loop at half-hour intervals, but there appears to be nothing to prevent the use of a greater number of cars in the future. In so far as it lies within its power, the city of San Diego has authorized the maintenance of the loop in its present location. The court found: "It has not been established by the evidence that either plaintiffs, or any lessees, or patrons of plaintiffs, are prevented from having free ingress, egress or regress to, on or from the property or buildings upon the property of plaintiffs by reason of the construction of said electric street railway turn-out track or the operation of electric street cars thereover."

[1] It is clear from what has been stated that this finding is contrary to the uncontradicted evidence, which demonstrates that access to lot 7 is substantially and seriously interfered with by the operation of cars over the loop, and it appears, not only from the uncontradicted testimony of the witnesses, but also from the application of common knowledge to the physical facts shown by the map referred to, that the maintenance of the loop in its present location, and the operation of cars thereover, will substantially depreciate the market value of plaintiffs' property. It requires no proof beyond the bare statement of the situation to show that the regular running of street cars over the sidewalk in front of a business house will cause damage.

[2, 3] "An abutting owner has two kinds of rights in a highway, a public right which he enjoys in common with all other citizens, and certain private rights which arise from his ownership of property contiguous to the highway, and which are not common to the public generally; and this regardless of whether the fee of the highway is in him or not. * * * An abutting landowner on a public highway has a special right of easement and user in the public road for access purposes, and this is a property right which cannot be damaged or taken away from him without due compensation." 29 C. J. 547; Fairchild v. Oakland & Bay Shore Ry. Co., 176 Cal. 629, 169 P. 388; Cushing-Wetmore Co. v. Gray, 152 Cal. 123, 92 P. 70, 125 Am. St. Rep. 47; Smith v. Southern Pacific R. Co., 146 Cal. 164, 79 P. 868, 106 Am. St. Rep. 17; Eachus v. Los Angeles, etc., Ry. Co., 103 Cal. 614, 37 P. 750, 42 Am. St. Rep. 149; McLean v. Llewellyn Iron Works, 2 Cal. App. 346, 83 P. 1082, 1085.

[4] "An abutter has a limited right to obstruct the roadway and sidewalks in a municipality by reason of his business or household exigencies, as, for example, by teams and vehicles permitted to stand in front of his property for a reasonable time. * * * And an abutting owner may use the street as for the purpose of loading and unloading goods or merchandise, or transporting his goods or other portable articles to and from his property, but such uses must be necessary and reasonable and the abutting owner cannot obstruct the street for long periods each day." 44 C. J. 956.

"The owner of a lot abutting upon a public street has by reason of such ownership a special easement in such street for the purpose of ingress and egress which is property as fully as the lot itself." Cushing-Wetmore Co. v. Gray, supra.

[5, 6] "Anything which is * * * an obstruction to the free use of property, so as to interfere with the comfortable enjoyment of life or property, * * * is a nuisance." Civ. Code, § 3479. "A public nuisance is one which affects at the same time an entire community or neighborhood, or any considerable number of persons." Civ. Code, § 3480. "Every nuisance not included in the definition of the last section is private." Civ. Code, § 3481. The obstruction of an abutting owner's access to a public street constitutes a private as well as a public nuisance. Cushing-Wetmore Co. v. Gray, supra. "An action may be brought by any person whose property is injuriously affected, or whose personal enjoyment is lessened by a nuisance, as the same is defined in section thirty-four hundred and seventy-nine of the Civil Code, and by the judgment in such action the nuisance may be enjoined or abated as well as damages recovered therefor." Code Civ. Proc. § 731. "Any injury to the use of the street which impairs plaintiff's private easements in the street in front of and adjacent to his lot amounts to an injury giving plaintiff, as an abutting owner, the right to maintain an action for damages or for an injunction." Strong v. Sullivan, 180 Cal. 331, 333, 181 P. 59, 60 (4 A. L. R. 343); Sala v. City of Pasadena, 162 Cal. 714, 717, 124 P. 539; Wilcox v. Engebretsen, 160 Cal. 288, 299, 116 P. 750; Danielson v. Sykes, 157 Cal. 686, 691, 109 P. 87, 28 L. R. A. (N. S.) 1024; Williams v. Los Angeles Ry. Co., 150 Cal. 592, 594, 89 P. 330. Respondent relies on a few decisions from other jurisdictions. It is deemed sufficient to say that such decisions are in conflict with the California cases cited herein, and that the latter appear to be in harmony with the great weight of authority. In Fairchild v. Oakland & Bay Shore Ry. Co., supra, it is said that an abutting property owner's right of action for any special or peculiar damage caused by obstruction in a street, not suffered by other property owners, "is precisely one of those rights of action for the damaging of property which, if it did not exist before, came into existence by virtue of our constitutional amendment granting a recovery for the damage as well as for the taking of property for public use."

[7, 8] In Frost v. City of Los Angeles, 181 Cal. 22, 31, 183 P. 342, 346 (6 A. L. R. 468), it is said, quoting 2 Beach, Injunctions, § 1067: "When an injunction to restrain a nuisance will produce great public or private mischief, a court of equity is not bound to grant it merely for the purpose of protecting a technical unsubstantial right." In this case the plaintiffs' right is neither technical nor unsubstantial, but a valuable property right. Neither will the issuance of an injunction "produce great public or private mischief." It does not appear that it would be at all difficult or would involve great expense to so locate an equally serviceable loop as to avoid damage to the plaintiffs' property. But, whatever its necessities were, it was not justified in taking the plaintiffs' property without compensation. Smith v. Southern Pacific R. Co., supra. No public mischief would be produced, even by the abandonment of the southerly connection of the loop, because such change would merely necessitate the switching of the trolley for the return trip, or once every half hour. The fact that the continued use of the southerly end of the loop will eventually ripen into a prescriptive right is a sufficient ground, regardless of any question of present damage, to entitle the plaintiffs to an injunction. Danielson v. Sykes, supra.

[9] Findings numbered 20, 21, 22, 23, 24, 25, 26, and 28, made by the trial court, are vacated and stricken out, and the following finding is hereby made by this court and substituted for and in the place of those stricken out: "The plaintiffs, by reason of their ownership of said lots 7 and 8, have a special easement, for the purpose of ingress and egress to and from said lots by themselves, their lessees and patrons, in that part of the east half of Fay street which lies in front of their said lots; and the maintenance of said turnout track in front of said lots, in the location now occupied by it, and the operation of street cars thereover constitute a private nuisance injuriously affecting said lot 7 and unreasonably and unlawfully interfering with such ingress and egress to and from said lot, and the continuance thereof will ripen into a prescriptive right and title unless such maintenance and operation be enjoined."

The conclusions of law made by the trial court are vacated and set aside, and the following conclusion is drawn and substituted in the place of those set aside: "The plaintiffs are entitled to judgment as prayed for in their supplemental complaint."

The judgment is reversed, and the trial court is directed to enter judgment, on the findings as herein amended and modified, in favor of the plaintiffs for the relief prayed for in their supplemental complaint.

We concur: SHIELDS, Justice pro tem.; PLUMMER, J.

96 Cal. App. 183

PEOPLE v. PEREA. (Cr. 1741.)

District Court of Appeal, Second District, Division 1, California. Jan. 8, 1929.

1. Criminal law 🔑576(1)—Code, providing criminal cases should be set 30 days after plea, and continuance shall not be granted for longer time than necessary, held directory merely (Pen. Code, § 1050, as added by St. 1927, p. 1036).

Pen. Code, § 1050, as added by St. 1927, p. 1036, providing court shall set criminal cases for trial not later than 30 days after entry of plea, and that no continuance shall be granted for longer time than necessary, *held* directory merely, and not mandatory.

2. Criminal law 🔑576(1)—Code, requiring dismissal of prosecution not tried within 60 days after information, unless trial was postponed on defendant's application, held mandatory (Pen. Code, § 1382).

Pen. Code, § 1382, requiring dismissal of prosecution, if defendant, whose trial has not been postponed on his application, is not brought to trial within 60 days after finding of indictment or filing of information, is mandatory, and would entitle defendant, not tried within 60 days after filing information, to reversal, except where trial was postponed on defendant's own application within such period.

3. Criminal law 🔑811(5)—Requested instruction to receive testimony of witness with caution held properly refused as instruction on credibility of particular witness.

Requested instruction, calling attention specifically to particular witness, directing jury that under circumstances it should receive his testimony with great caution, *held* properly refused, where no objection to court's instructions on credibility of witnesses was made; defendant not being entitled to instruction as to credibility of particular witness.

Appeal from Superior Court, San Bernardino County; F. A. Leonard, Judge.

Thomas Perea was convicted of selling intoxicating liquor, and he appeals. Affirmed.

H. E. Thompson, of San Bernardino, for appellant.

U. S. Webb, Atty. Gen., and Frank Richards, Deputy Atty. Gen., for the People.

CRAIL, Justice pro tem. The contention of appellant is that he was not accorded a speedy trial to which he was entitled under article 1, § 13, of the Constitution, nor a trial within the time provided in sections 681a, 1050 (added by St. 1927, pp. 1045, 1036), and 1382 of the Penal Code.

Section 681a is general in its terms and directory merely. It requires that all proceedings in criminal cases shall be had and determined at the earliest possible time.

Section 1050 reads as follows: "The court shall set all criminal cases for trial for a date not later than thirty days after the date of entry of the plea of the defendant. No continuance of the trial shall be granted except upon affirmative proof in open court, upon reasonable notice, that the ends of justice require a continuance. No continuance shall be granted for any longer time than it is affirmatively proved the ends of justice require. Whenever any continuance is granted, the court shall enter in its minutes the facts proved which require the continuance. Criminal cases shall be given precedence over civil matters and proceedings. If any court is unable to hear all criminal cases pending before it within thirty days after the respective defendants have entered their pleas, it must immediately notify the chairman of the judicial council."

Section 1382 reads as follows: "The court, unless good cause to the contrary is shown, must order the prosecution to be dismissed in the following cases:

"1. When a person has been held to answer for a public offense, if an indictment is not found or an information filed against him, within thirty days thereafter.

"2. If a defendant, whose trial has not been postponed upon his application, is not brought to trial within sixty days after the finding of the indictment, or filing of the information."

[1] If section 1050 is mandatory the defendant is entitled to a reversal and a dismissal of the case. If it is directory merely, then the failure to comply with its terms does not entitle him to such relief. We are of the opinion that the section is directory merely. The reasoning in Gillis v. Superior Court (Cal. App.) 265 P. 360, is applicable and convincing in this regard.

[2] Section 1382 is mandatory, and defendant would be entitled to a reversal thereunder for failure to bring him to trial within 60 days after the filing of the information, except that the trial was postponed upon his own application within that period. Therefore he is entitled to no relief under that section.

The defendant is not entitled to relief under article 1, § 13, of the Constitution, under the authority of In re Matter of Tirey L. Ford on Habeas Corpus, 160 Cal. 334, 116 P. 757, 35 L. R. A. (N. S.) 882, Ann. Cas. 1912D, 1267.

[3] Finally, the appellant contends that the trial court erred in refusing to give an instruction, which is set out on page 28 of the clerk's transcript. He makes no mention of this point, however, in his argument. The proposed instruction calls attention specifically to a particular witness, calling him by name, and directs the jury that under certain circumstances it should receive his testimony with great caution. There is no claim that the trial court did not properly instruct the jury in its general instructions on the

credibility of witnesses; and the defendant was not entitled to have an instruction as to the credibility of a particular witness. Jones v. Southern Pacific Co., 74 Cal. App. 10, 239 P. 429; Thomas v. Gates, 126 Cal. 1, 58 P. 315. No merit in the appeal.

Judgment affirmed.

We concur: HOUSER, Acting P. J.; YORK, J.

96 Cal. App. 183

PEOPLE v. NYE. (Cr. 1718.)

District Court of Appeal, Second District, Division 2, California. Jan. 8, 1929.

1. Criminal law 🔑300—Refusing change of plea of not guilty to set up insanity held not abuse of discretion on affidavit containing only hearsay (Pen. Code, § 1016 as amended by St. 1927, p. 1148).

Denial of motion to change plea of not guilty to plea of not guilty by reason of insanity *held* not abuse of discretion, under Pen. Code, § 1016, as amended by St. 1927, p. 1148, where affidavit on which motion was based was composed entirely of hearsay, and no physician testified as to defendant's sanity or furnished affidavit regarding it; hearsay statement of one person not constituting sufficient prima facie evidence of insanity.

2. Criminal law 🔑311—All persons are presumed sane until contrary is proved.

General rule is that all persons are presumed to be sane until the contrary is proved.

3. False pretenses 🔑7(1)—Conviction for grand theft of loan held sustained as to defendant procuring deeds by fraud and subsequently obtaining loan under false claim of title.

In prosecution for grand theft, evidence, that defendant procured deeds by fraudulently representing to grantor that they were leases, and thereafter obtained loan by placing incumbrance on the property under false claim of title, justified conviction of defendant for grand theft, as to count based on taking property of corporation from which loan was obtained and to which deed of trust was given.

4. Larceny 🔑5—Deeds procured by fraudulent representations held worthless and not to sustain conviction for grand theft of deeds.

Count of information, charging grand theft of grant deeds, *held* not sustained by evidence, that defendant obtained deeds by fraudulently representing to grantor that they were leases, since, under such circumstances, there was no delivery, and deeds were worthless, and were not subject of larceny.

5. Criminal law 🔑800(1)—Instructions defining fraud held not erroneous as isolated or unwarranted in prosecution for grand theft, where court required proof that loan was obtained by false representations.

In prosecution for grand theft, based on defendant's procurement of loan under false claim of title, instructions defining fraud and false pretenses *held* not erroneous as isolated or unwarranted, where court required state to prove beyond reasonable doubt that defendant procured loan under false representations.

6. Criminal law 🔑878(4)—Conviction under count charging grand theft of loan obtained under false claim of title held not void as repugnant to conviction on count on fraud in procuring deeds.

In prosecution for grand theft, in which first count of information charged grand theft as to deeds procured by defendants by fraud, and second count charged grand theft as to proceeds of loan obtained by giving trust deed, as security under false claim of title, counts *held* not repugnant, so as to render void conviction returned under second count.

Appeal from Superior Court, Los Angeles County; Elliot Craig, Judge.

Ora Nye was convicted of grand theft, and he appeals. Reversed in part and affirmed in part.

Ralph W. Eckhardt, of Los Angeles, for appellant.

U. S. Webb, Atty. Gen., and Frank Richards, Deputy Atty. Gen., for the People.

CRAIG, J. Certain real property in the county of Los Angeles, which admittedly belonged to one Anna B. Dorn, was deeded by her to Jean Harvey, who thereafter borrowed $4,000, giving a promissory note secured by deed of trust upon one of the parcels thereof. It appearing that Jean Harvey and the defendant were one and the same person, she was charged by information, consisting of two counts, with having committed grand theft, in that, on or about March 16, 1928, the defendant unlawfully took away two deeds of the total value of $14,000, personal property of Anna B. Dorn, and that on or about the same date she unlawfully took $4,000 of the personal property of the Title Guaranty & Trust Company and Mary White. Appellant was convicted upon both counts, and, a motion for new trial having been denied, she appealed from the judgment and from the ruling upon said motion.

The people having confessed error as to the first count, we shall first consider the second count of the information. It appears that Mrs. Dorn had agreed to lease certain real property to appellant, who presented herself under the name of Jean Harvey, and introduced to the owner a young man, who gave the name of J. Harvey, as her son; that Jean Harvey and the purported son prepared and obtained Mrs. Dorn's signature upon two deeds which they stated to her were an original and copy of the proposed lease. Said deeds were recorded, and at appellant's solicitation a broker obtained for her a loan from Mary White of $4,000 which was placed in escrow with the Title Guaranty & Trust Company with a promissory note and deed of trust signed "Jean Harvey," and "J. Harvey." The trust company's check for $4,000, less the expenses of the escrow and other charges, was delivered to appellant, payable to Jean Harvey, and appellant indorsed it and signed a receipt therefor, in the same name. The check passed through the usual channels of exchange, and was paid. Following the filing of criminal charges, appellant appeared and furnished bail, but, when the trial was called she was not present, and, a continuance then being granted, her bail was forfeited, and a bench warrant issued for her arrest. She was thereafter located in the state of Michigan and returned to Los Angeles by officers.

[1, 2] After a plea of "not guilty" was entered, the defendant, upon motion for permission to change it to "not guilty by reason of insanity," presented the affidavit of her attorney, wherein it was averred that she had been considered by relatives to be insane, and that a reputable physician expressed his opinion that, upon the facts, subject to verification by personal observation and examination, reasonable grounds were presented for believing Ora Nye probably insane. The trial court heard the motion and affidavit, but denied the motion upon the ground that there was "no showing of any insanity in the affidavit." Appellant's first asserted ground for reversal is that this latter ruling was erroneous.

Section 1016 of the Penal Code, as amended in 1927 (St. 1927, p. 1148), provides that the court may, for good cause shown, allow a change of plea in such a case. The affidavit was composed entirely of hearsay, and no physician testified as to the defendant's sanity or furnished affidavit in that respect. "Good cause" is not defined by the statute, but it has been held that the court may in its sound legal discretion determine whether or not good cause is shown by the evidence before it. Ex parte Bull, 42 Cal. 196; Christensen v. Anderson, 24 Tex. Civ. App. 345, 58 S. W. 962; People v. Sessions, 10 Abb. N. C. 192, 62 How. Prac. [N. Y.] 415. In at least one instance it was said to be exclusively within the discretion of the trial court. Kendall v. Briley, 86 N. C. 56. Since all persons are presumed to be sane until the contrary is proved (People v. Williams, 184 Cal. 590, 194 P. 1019; People v. Loomis, 170 Cal. 347, 149 P. 581), we think it would constitute grave injustice to hold the hearsay statement of one person sufficient prima facie evidence of insanity, without proof to the contrary.

[3] It is contended by appellant that the judgment is not supported by the evidence. From the evidence heretofore recited, and many other facts and circumstances adduced by the people, much of which is uncontradicted by the defendant, who did not testify, it appears that she falsely claimed title to real property upon which she and a confederate placed a lien as security for the repayment of $4,000. Jean Harvey, or J. Harvey, identified as Ora Nye by the people, appears by oral and documentary evidence to have obtained from Mary White said sum of money by placing in escrow with the title company a promissory note and deed of trust constituting a lien upon the property of Anna B. Dorn, who was 82 years of age. It further appears from the testimony of a deputy district attorney that the defendant before her commitment freely and voluntarily made a statement to him in the presence of witnesses, who also testified, as follows: "She stated that she and her son had gone out to Mrs. Dorn, that the lady she had spoken of as Mrs. Dorn was really the old lady Mrs. Dorn, that they had talked to her about leasing this property for six months; that they had written two deeds, one for the property at 240 North Burlington and one for the property at the beach—I think it was Hermosa Beach. That they had taken these two * * * deeds to Mrs. Dorn, representing to her that one of them was an original lease and one was a copy of the lease; that Mrs. Dorn had signed both of the deeds and that they had later placed an incumbrance on the Burlington street property, receiving $5,000; and then I showed her a lease that had a torn piece where the signature was on the righthand side of the lower portion. * * * I asked her who wrote this signature where the torn place is, and she said her son had written the name of Mrs. Dorn there. I asked her if this wasn't delivered back to her so that Mrs. Dorn would have no suspicion about being deeds on the place, and she said that was the reason." We think that the evidence amply supports the verdict and judgment upon the second count of the information.

[4] In the first count of said information it was charged that the defendant committed the crime of grand theft by unlawfully taking away from Anna B. Dorn a certain grant deed covering real property in the city of Los Angeles of the value of $12,000, and a certain grant deed covering real property in the city of Hermosa Beach of the value of $2,000. Upon the record before us it is at once obvious that the deeds were obtained by fraud, and hence that there was no "delivery," and title did not pass. In such event the deeds were worthless, and could not be made the basis of a charge of grand theft. People v. Sewall (Cal. App.) 265 P. 1040. The verdict and judgment upon the first count are therefore without foundation, and the judgment and order denying motion for new trial must to that extent be reversed.

[5] It is argued that two instructions were given which were isolated and "without any attempt to connect them with the crimes charged," and that this was reversible error. They read as follows:

"The court instructs the jury that deception deliberately practiced for the purpose of gaining an unfair advantage of another is fraud. Goods obtained by such practices are obtained by fraud. One deprived of his property by such means is defrauded."

"The court instructs the jury that a false pretense is such a fraudulent representation of an existing or past fact, by one who knows it not to be true, as is adapted to induce the person to whom it is made to part with something of value; and such pretense need not be such as cannot be guarded against by common prudence. And such pretense need not be in words, but may be gathered from acts and conduct of the party."

Appellant insists that there was no evidence warranting the giving of the instruction first quoted, and that the error was intensified by the giving of the latter. We do not construe the instructions referred to by appellant as being isolated or unwarranted. The trial court instructed at appellant's request, as follows: "The court instructs you that the people are required to show beyond a reasonable doubt, in order to convict the defendant under count two of the information, that the defendant procured such alleged loan of $4,000 upon representations which she knew to be false; and if the evidence fails to show beyond a reasonable doubt that the security which she tendered and which was accepted for said loan was fictitious and valueless, and unless the evidence further shows beyond a reasonable doubt that the defendant knew that such security was fictitious and valueless, and unless the evidence further shows beyond a reasonable doubt that the defendant represented such security as being true and genuine, your verdict must be not guilty under count II."

The jury having found from the evidence that the defendant fraudulently, by deliberate deception and fraud, obtained money, as alleged in the information, upon security which she knew to be fictitious and valueless, representing it to be true and genuine, we are cited to no authority requiring a reversal upon a record such as that here presented.

[6] Finally, it is appellant's contention that counts I and II of the information are repugnant, and that both verdicts are void, because verdicts upon counts I and II would be repugnant. The first count charged a theft of the deeds from Mrs. Dorn, and the second count charged theft of the $4,000 from the trust company and Mary White. It is argued that the deeds being void, because the apparent grantor did not intend to part with the title, appellant received nothing, and hence could not be guilty of theft of more than worthless paper. The fact that the deeds were worthless, and were known to the defendant to be of no value, was amply supported by the evidence, and was so found by the jury. Such fact in itself, as we have observed, does not constitute legal grounds for prosecution in such a case. This being true, there is no conflict or repugnancy between two valid counts, but there is, for that reason, strong legal and evidentiary foundation for a conviction upon the charge of theft of the money, as charged in the second count.

The judgment and order appealed from are reversed as to the first count, and affirmed as to the second count of the information.

We concur: WORKS, P. J.; THOMPSON, J.

---

96 Cal. App. 76

GRIMES v. MERCED COUNTY.★

(Civ. 3413.)

District Court of Appeal, Third District, California. Dec. 29, 1928.

Rehearing Denied Jan. 28, 1929.

1. Levees and flood control 🔑32—Statute relating to refund of balance remaining in annual fund of water protection district held inapplicable in action for repayment of assessment, because project was abandoned (Protection District Act, §§ 17, 20½).

Protection District Act (Deering's Gen. Laws 1923, Act 6174) § 20½, relating to refund of balance remaining in annual fund of water protection district, where there are annual assessments under section 17, *held* inapplicable in action in assumpsit for repayment of an assessment levied by water protection district, on ground that project was abandoned.

2. Taxation 🔑537—Where consideration for levying tax has failed, absence of statute will not deprive claimant of remedy to recover assessment (Pol. Code, § 4468).

Where consideration for levying of tax has wholly failed, absence of statute applying to subject-matter will not deprive claimant of remedy for recovering assessment paid, since under such circumstances common-law rule furnishes relief, under Pol. Code, § 4468.

3. Levees and flood control 🔑32—Members of board of water protection district hold its funds as trustees for taxpayers.

Members of board of water protection district, who are authorized to organize and operate protection district, levy, collect, and expend funds for improvements therein, are mere agents for that district, and hold its funds as trustees for property owners and taxpayers who have contributed to cause.

4. Limitation of actions 🔑95(1)—Statute of limitations will not bar recovery of assessment for water district improvements within reasonable time after knowledge of abandonment.

Statute of limitations will not bar a recovery of an assessment for water protection district, where improvements contemplated are abandoned and recovery is sought within rea-

---

★Rehearing denied.

sonable time after knowledge of abandonment is acquired.

5. Levees and flood control 🔑26—Property owner could recover her proportion of assessment remaining, where purpose for which water protection district was organized was abandoned.

Where purpose for which water protection district was organized and for which assessment was levied was abandoned, consideration for creation of fund raised by assessment failed and property owner could recover her proportion of money remaining in treasury of district.

6. Taxation 🔑541—Payment of assessment enforced by means of forced sale of property will be deemed to have been made by duress.

Payment of assessment which has been enforced by means of forced sale of property for delinquent taxes will be deemed to have been made by duress.

7. Taxation 🔑542—Where assessment is collected by duress, it may be reclaimed, though not paid under protest.

Where assessment is collected by duress, it may be reclaimed, even though it was not paid under protest.

8. Trial 🔑396(6)—Where plaintiff was entitled to repayment of assessment in assumpsit, finding that plaintiff complied with provisions of inapplicable statute was immaterial (Protection District Act, § 20½).

Where plaintiff was entitled to repayment of water protection district assessment, in action of assumpsit where project was abandoned, finding that plaintiff complied with provisions of Protection District Act (Deering's Gen. Laws 1923, Act 6174) § 20½, which was inapplicable, in filing her claim for refunding of assessment, was immaterial.

9. Appeal and error 🔑1071(5)—Where judgment is supported by findings on material issues, other findings on unessential issues become harmless, though erroneous.

Where judgment is adequately supported by findings on material issues, other findings on unessential issues become harmless, and, even though they be erroneous, will furnish no ground for reversal of judgment.

10. Levees and flood control 🔑26—In action for repayment of water protection district assessment on abandonment of project, defendant county could not have credit for money illegally expended in employment of labor without advertising for bids as required (Protection District Act, § 26).

In action for repayment of water protection district assessment on abandonment of project, where board of supervisors had expended $2,292.65 in employment of day labor for purpose of clearing land in district, without having advertised for bidders as required by Protection District Act (Deering's Gen. Laws 1923, Act 6174) § 26, expenditure was illegal and could not avail to credit defendant county.

Appeal from Superior Court, Merced County; J. C. Needham, Judge.

Action for repayment of water protection district assessment by Lydia M. Grimes against the County of Merced. From a judgment for plaintiff, defendant appeals. Affirmed.

F. M. Ostrander, Dist. Atty., and Stephen P. Galvin, Deputy Dist. Atty., both of Merced, for appellant.

F. W. Henderson, of Merced, for respondent.

THOMPSON, Justice pro tem. This is an appeal from a judgment in favor of plaintiff in a suit in assumpsit for the repayment of an assessment levied by a water protection district of Merced county, on the ground that the proposed improvements for which the district was organized and the purpose for which the assessment was levied were abandoned.

Prior to 1920 the board of supervisors of Merced county organized the Bear Creek protection district of that county, pursuant to the protection district statutes of California of 1895, and subsequent amendments thereto (Deering's General Laws 1923, p. 2488), for the purpose of improving the natural water courses therein. July 18, 1920, an assessment was regularly levied on all the property within this district, by means of which $7,588 was collected, and paid into the county treasury and assigned to the special Bear Creek protection district fund. The respondent owned lands within the limits of this district, upon which she was assessed the sum of $357.58, which thereupon became a lien upon her property. For failure to pay this tax the property was sold in June, 1921, to the state for the delinquent assessment. In September, 1925, respondent redeemed this property from sale, paying the previous assessment, with costs and penalties, amounting in the aggregate to $684.73. This sum was paid into the Bear Creek protection district fund. Immediately upon levying said assessment in 1920, the board adopted plans and specifications for improving the water courses in said district. Advertisements for bids for the performance of the proposed work were twice published, but no bids were received. The board was therefore unable to make any contract for the proposed work. The assessment fund of $7,588 proved inadequate. It would have required $20,000 to execute the plans for which the assessment was levied. The board, however, proceeded to cut brush and clear some of the land by the employment of day labor, for which it expended the sum of $2,292.65. The entire project was abandoned and for nearly four years nothing further was done to carry out the plans for which the district was organized and the assessments collected. The sum of $5,295.35 still remains in this trust fund of the Bear Creek protection district.

Respecting the abandonment of the proposed project Mr. Pebley, chairman of the board, testified as follows:

"Q. Was the work done? * * * A. No, sir. * * *

"Q. * * * I believe you said you advertised twice and got no bids? A. Yes, sir. * * * The reason there were no bids received was * * * (because) they could not do the work for the amount of money that was appropriated. * * * (It would cost) in the neighborhood of $20,000.00. * * *

"Q. Has there been, at any time since (then) an attempt to go on with the work? * * * A. No, sir, there has not, for the reason * * * that the work could not be done for that (amount). It would mean considerable hardship upon the taxpayers of that district. * * *

"Q. That fund has been inactive since April, 1922? A. I presume that is so.

"Q. The reason (for that) is, that the board plans to do no work in that district? A. Yes. * * *

"Q. The board has done nothing since? A. No, sir."

September 5, 1925, the respondent filed a verified claim with the board for the refunding of the assessment which she paid to redeem her property. This claim was rejected January 5, 1926, and this suit was commenced March 26, 1926. Upon trial the court found that the project had been abandoned, as follows: "That by reason of the inadequacy of said fund for said purpose, said board * * * did * * * wholly abandon * * * all work and * * * proposed improvements within said protection district." Thereupon judgment was rendered in favor of the respondent for the sum of $684.73.

The appellant contends that (1) the findings and judgment are contrary to law and are not supported by the evidence; that (2) the respondent failed to comply with provisions of section 20½ of the Protection District Act (Deering's Gen. Laws 1923, Act 6174), or with section 3804, Political Code; and (3) that the statute of limitations has barred her action.

[1] Section 20½ of the Protection District Act of California provides: "Assessments levied and collected under the terms of this act, if unused, and unapplied for a period of one year after the day on which said assessments become due and payable, may be refunded by the board of supervisors in the manner provided by law for the refund of state and county taxes." The ordinary method of procedure for procuring the refund of state and county taxes is found in section 3804 of the Political Code, which provides: "Any taxes, penalties or costs * * * paid more than once, or * * * erroneously or illegally collected, or * * * in excess of the actual cash value of the property," or erroneously assessed upon "improvements on real estate not in fact in existence, * * * may * * * be refunded by the county treasurer. * * * No order for the refund of taxes, penalties or costs under this section shall be made except upon a * * * claim therefor, verified by the person who has paid said tax, * * * which * * * claim must be filed within three years after the making of the payment sought to be refunded." It is apparent that neither of these sections apply to the present case. This action was not tried upon the theory, nor was there any evidence to support the contention that the assessment in question was illegally or erroneously levied or collected, or that the respondent sought to recover an unused portion of an annual fund which was required to be expended within the period of a year. Section 17 of the act does authorize the board of supervisors to provide for the levying and expenditure of annual assessments, when the total amount required is too large to be raised in a single year. Evidently section 20½ does contemplate the refunding of any balance remaining in such annual fund; but the evidence clearly shows that no such plan was ever adopted by the board in the present case. The section is therefore not applicable. Upon the contrary, this suit was evidently maintained upon the theory that the respondent was forced to contribute her assessment to a trust fund which was collected pursuant to statute and held for the specific purpose of improving the water courses in the Bear Creek protection district, which project, together with all work and improvements thereon, was wholly abandoned. The complaint alleged and the court found that, by reason of the inadequacy of the fund provided, the board wholly abandoned all work and improvements within the district.

[2-5] There is no statute in California with respect to the authority or procedure for recovering an assessment erroneously held under such circumstances as this case presents. Where a statute exists which prescribes the procedure for recovering taxes or assessments which have been illegally levied and collected, or withheld from the owner, that statute prevails; but, where the consideration for the levy has wholly failed, the absence of a statute applying to the subject-matter will not deprive the claimant of his remedy. Under such circumstances the common-law rule furnishes relief. Section 4468, Pol. Code. The members of the board who are authorized to organize and operate a protection district, levy, collect, and expend funds for improvements therein, like the trustees of a reclamation district or a swamp and overflow district, are the mere agents of that district and hold its funds as trustees for the property owners and taxpayers who have contributed to the cause. They are bound to expend this money so intrusted

to them only in the manner and for the purposes authorized by law. Miller & Lux v. Batz, 142 Cal. 447, 450, 76 P. 42. Nor will the statute of limitations bar a recovery which is sought within a reasonable time after knowledge of the abandonment is acquired. Miller & Lux v. Batz, supra; Bradford v. Chicago, 25 Ill. 349. Since the purpose for which the district was organized and for which the assessment was levied was abandoned, the consideration for the creation of the fund failed, and the respondent is therefore entitled to recover her proportion of the money which remains in the treasury of the district. Bradford v. Chicago, supra; McConville v. St. Paul, 75 Minn. 383, 77 N. W. 993, 43 L. R. A. 584, 74 Am. St. Rep. 508; Strickland v. City of Stillwater, 63 Minn. 43, 65 N. W. 131; Valentine v. St. Paul, 34 Minn. 446, 26 N. W. 457. In the case of Bradford v. Chicago, supra, it was held that a special assessment which had been levied and collected for the purpose of opening and improving a street was subject to recovery by the owner of the fund in an action in assumpsit, when the work was abandoned and the consideration had failed. It was there said: "The money raised by them is held in trust * * * to be devoted to the particular purpose of benefit intended. It does not become a part of the general revenue, and may not be diverted from the improvement in view. * * * It is clear, therefore, that if the [sole] object in view should be abandoned, an action for money had and received would lie to recover back the money on the assessment." In the case of State v. Holmes, 162 Minn. 173, 202 N. W. 440, it is said: "When money is taken under a special assessment and the improvement not made and the money is kept, there is a failure of consideration."

[6-9] The appellant has cited a number of cases in support of the well-recognized rule that a voluntary payment of taxes which have been illegally levied or collected precludes the right of recovery. These authorities, however, have no application, for the reason that the assessment in the present case was neither illegally levied nor illegally collected. Upon the contrary, a different rule is invoked, to wit: The abandonment of the project and the failure of consideration. The question of voluntary payment is not involved. When the purpose of an assessment is abandoned and the consideration fails, the owner of money which constitutes a part of the trust fund is entitled to recover his proportion, whether it was voluntarily or involuntarily paid. Morover, the authorities are fairly uniform to the effect that a payment which has been enforced by an officer armed with legal process, or by means of forced sale of property for delinquent taxes, will be deemed to have been made by duress. 25 R. C. L. 456, § 412. When an assessment is collected by duress, it may be reclaimed, even though it was not paid under protest. 3 Cooley on Taxation (4th Ed.) 2584, § 1297; Newberry v. Detroit, 184 Mich. 188, 150 N. W. 838. While it is true that the immediate consideration for the payment of the assessment in the present case was to secure a reconveyance of title, nevertheless the sale of the property to the state, in the first instance, was conducted pursuant to the statutory process of enforcing the payment of the assessment. The district obtained the benefit of this sale. The money was paid into the district fund. On account of the abandonment of the project it was not expended, but remains on hand for no purpose whatever. The trust failed through no fault of respondent. The money belongs neither to the state, the county, nor the district. It would be a denial of justice to hold that the owner of this money is without a remedy merely because she was forced to pay it through duress. Since, in the absence of a statute to the contrary, this remedy of an action in assumpsit lies at common law, it is immaterial that the court also found that the respondent complied with the provisions of section 20½ of the act in filing her claim for the refunding of the assessment. When the judgment is adequately supported by findings upon the material issues, other findings upon unessential issues become harmless, and, even though they be erroneous, will furnish no ground for a reversal of the judgment. 2 Cal. Jur. 1028, § 612.

[10] The appellant contends that under no consideration may the respondent recover more than her pro rata of the $5,295.35 which remained in the district treasury after the payment of $2,292.65 which was expended in the employment of day labor for the purpose of clearing the land. Regarding this amount which was expended for day labor, Mr. Pebley, the chairman of the board, testified:

"Q. Following the failure of the board to receive bids, * * * did the board attempt to do any work in the channel of Bear creek? A. We did.

"Q. And what was that? A. They cut willows and burned brush.

"Q. Was that done by day's work? A. Yes (it was done by) day's labor.

"Q. What is the total amount paid for cutting willows? (Mr. Ostrander, attorney for appellant, answering): A. The amount is the difference between the sum collected ($7,588) and the sum now in the fund."

The appellant, however, was not entitled to credit for the sum of $2,292.65, for the reason that it was illegally expended and wrongfully diverted from the district fund, contrary to the provisions of the statute. Section 6 of the Protection District Act provides that: "All work which shall exceed an estimated cost of $1,000.00, shall be advertised and let to the lowest bidder." Section

26 of that act specifies the procedure required for contracting for the work, including the publication of notices and the awarding of bids to the lowest responsible bidder. A contract for the clearing of the land was not so awarded, and since the cost exceeded the limitation prescribed by statute for the performance of day labor, this expenditure was illegal and may therefore not avail to credit the appellant in this action.

For the foregoing reasons, the judgment should be affirmed, and it is so ordered.

We concur: HART, Acting P. J.; PLUMMER, J.

---

96 Cal. App. 102

PEOPLE v. HECTOR. (Cr. 1509.)★

District Court of Appeal, First District, Division 1, California. Dec. 31, 1928.

Hearing Denied by Supreme Court Jan. 28, 1929.

1. Criminal law ⟹1134(3)—Question of law held not presented for review because inference of innocence might be reasonably drawn from the circumstances reasonably justifying jury's inference of guilt.

Where the circumstances are such as to reasonably justify the inference of guilt, as found by the jury, the fact that an inference of innocence might likewise be reasonably drawn therefrom does not present a question of law for review.

2. Homicide ⟹244(1), 248—Conviction of assault with deadly weapon, as against defenses of shooting at a dog, and shooting in self-defense, held justified by the evidence.

Conviction of assault with deadly weapon, in order to escape from officers when they discovered defendant about to commit a theft, and informed him of their identity, as against defenses that he shot only at a dog, and that he shot at the officers in self-defense, believing he was about to suffer serious bodily injury as the victim of a robbery by them, *held* justified by the evidence.

Appeal from Superior Court, Alameda County; Leon E. Gray, Judge.

Andrew H. Hector, charged as Ed Hector, was convicted of assault with a deadly weapon, and he appeals. Affirmed.

A. A. Montagne, of Oakland, and Russell Scott and Scott & Pioda, all of Oakland, for appellant.

U. S. Webb, Atty. Gen., and Lionel Browne, Deputy Atty. Gen., for the People.

KNIGHT, J. The appellant, Andrew H. Hector, was charged by information with having committed the crime of an assault with a deadly weapon with intent to murder, and with two prior convictions for burglary. Besides admitting the prior convictions, he entered two pleas, not guilty and not guilty by reason of insanity. The trial upon the first issue resulted in a verdict of guilty of an assault with a deadly weapon, and, upon the trial on the issue of his sanity, the jury found him "sane at the time the offense charged in the information was committed." The appeal is taken from the judgment of conviction, and no point is made in appellant's briefs with regard to the trial on the issue of sanity.

The crime of which appellant was convicted is alleged to have been committed on H. O. Fisher, who was a police officer. Appellant admits having fired a shot from the loaded revolver he was carrying on his person, but claims, first, that he shot at a dog which was about to attack him; and secondly, that, even though he shot at the officer, the circumstances under which the shooting took place justified him in shooting in self-defense.

The essential facts appearing from the evidence in support of the verdict are as follows: Fisher and a fellow officer named Tice, who were in civilian clothes, were patrolling the streets in an automobile, and, while driving slowly along Twentieth street near Franklin street in Oakland on May 29, 1928, at about 10:15 o'clock at night, saw two men, who afterwards proved to be appellant and a companion named Shepherd, on the south side of Twentieth street between Franklin and Broadway, feeling the handles of the automobiles parked along there and looking inside of them. Tice got out at Franklin street and watched them, walking toward them. In the meantime Fisher turned around and came back up the street to Twentieth and Franklin, and, as he did so, the two men crossed Twentieth street to the north side thereof behind Fisher's automobile, and went over to the northwest corner of the intersection of Franklin and Twentieth streets, and then crossed diagonally to a parking station which was situated on the east side of Franklin street about 50 feet south of Twentieth. Fisher picked up Tice and drove into the parking station, and turned his headlights on the two men, who were standing by a small car in the station. As the lights fell on the men, they ran to the front of the small car, and Officer Tice jumped out of the police automobile and said: "Throw up your hands, boys, and stand still—I am a police officer," or words to that effect. He walked towards them, and appellant started to run between the cars. Tice called to him to stop, and instantly Shepherd tried to draw a pistol, but Tice took it away from him and placed him under arrest. In the meantime Tice called to Fisher that appellant was running toward the back of the lot and to go after him; whereupon Fisher got out of the car and took up the pursuit of appellant, firing a shot at him as he ran. Appellant, then being about 25 feet from a fence in the back of the lot, fired back. He kept running toward the fence and Fisher fired another shot at him, and, just as appellant

---

★Hearing denied by Supreme Court.

made his escape over the fence, he fired a second shot at Fisher. Thereupon Fisher returned to the automobile, and with Tice and Shepherd started to find appellant. They overtook him on Nineteenth street, and he crossed to and went down Alice street. The officers drove near the curb and flashed their spotlight on him, and he dodged behind an automobile parked there and drew his pistol. Having Shepherd with them, the officers proceeded on to the nearest telephone to report the matter to the Central Station and call for assistance. Thereafter a search was made in the vicinity for appellant, but he was not found. Later in the evening five police officers, including Tice and Fisher, went to appellant's room in the Eureka Hotel on Seventh street, and one of them knocked on the door. Appellant from within asked "Who is it?" and the officer said: "Some friends that want to talk to you." Appellant replied: "Wait till I put my trousers on and I will open the door." Immediately following this remark Officer Tice, who in the meantime had gone down the hall, saw a figure disappear over the sheds at the rear of the hotel. The officers then forced their way into the room and found that appellant had made his escape through the open window. Subsequently they searched a rooming house on Sixth street, and, although appellant did not room there, he was found lying on a bed in one of the rooms. Upon searching the bed, the police found a pistol which resembled the one used by the appellant earlier that evening. It was in the bed in a position about opposite appellant's knees, and contained four loaded cartridges and one empty. He was thereupon placed under arrest.

Appellant became a witness in his own behalf, and, according to his testimony, the shooting occurred as follows: He stated that he was riding with Shepherd in the latter's automobile, and, that when they reached a point opposite the parking station, they stopped and went in there looking for a lavatory; that, as they reached the rear of the lot, a car drove in from the street and the driver threw the headlights on them; that some one jumped out of the car and said, "Throw up your hands or I will shoot you," or something to that effect, but, on account of the lights, appellant could not see whether or not the men were in uniform. Immediately, he said, he ran for the rear fence, and, as he jumped the fence, two shots were fired in his direction; that, as he landed on the other side of the fence, a large dog raised up in a vicious manner as if to bite him, and that he put his pistol down close to the dog's head and fired one shot, and then ran on. He further stated that he ran away because he believed he was about to be "held up," and that later, when he was overtaken down the street, he tried to get out of the way because he thought the same people were after him who had shot at him in the parking station.

On cross-examination, and by way of impeachment evidence, it was shown that in 1920 appellant was convicted of burglary in San Francisco and served three years in San Quentin; that in June, 1923, he was convicted of burglary in Santa Barbara county and served five years in the same prison; and that during the week preceding his present trial he was convicted in Alameda county of robbery.

It is apparent that three distinct theories were presented by the foregoing evidence: First, that appellant did not shoot at the officer at all; secondly, that, not being a wrongdoer himself, he believed he was about to suffer serious bodily injury as the victim of a robbery, and therefore shot in self-defense; and, third, that he was engaged in the commission of a crime or an attempt to commit one, and that, in order to escape arrest, he shot at the officer who was about to apprehend him.

[1] As said in People v. Martinez, 20 Cal. App. 343, 128 P. 952, afterwards quoted approvingly in People v. Mitsunaga (Cal. App.) 266 P. 1020: "Where the circumstances are such as to reasonably justify an inference of guilt, as found by the jury, the fact that an inference of innocence might likewise be reasonably drawn therefrom does not present a question of law for review by an appellate court any more than does a verdict based upon direct conflicting evidence; * * * and it is only where the evidence obviously does not warrant the inference of guilt that the court will interfere."

[2] Here, the members of the jury, being the sole judges of the facts and of the credibility of the witnesses, doubtless rejected the story told by appellant and found in accordance with the testimony relied upon by the prosecution, and, in our opinion, the evidence is legally sufficient to sustain their conclusion, for, briefly stated, it shows that appellant, at 10 o'clock at night, having been twice convicted of burglary and carrying a loaded pistol, which in itself constituted a felony (Stats. 1923, p. 695), was discovered by police officers in the pursuit of their duty tampering with a number of automobiles parked along a public street, from which it may be fairly inferred that appellant was about to commit a theft; that, after being informed of the identity of the officers, and called upon to halt, he shot at one of them in order to escape. Clearly, under such circumstances, it cannot be successfully maintained that he shot in self-defense.

The judgment is affirmed.

We concur: TYLER, P. J.; CASHIN, J.

96 Cal. App. 152

RICHMOND TERMINAL CORPORATION v. PARR TERMINAL CO. et al.★
(Civ. 6250.)

District Court of Appeal, First District, Division 1, California. Jan. 7, 1929.

Rehearing Denied Feb. 6, 1929.

Venue ⚷22(3)—Complaint, alleging conspiracy in lease of municipal dock to corporation of another county, stated as respected venue cause of action against corporation (Code Civ. Proc. § 395).

Complaint, alleging conspiracy between city officers and corporation of another county to prevent others from using municipal dock pursuant to lease of dock and facilities to such corporation with rights and privileges to do all stevedoring and freight handling thereon, *held* to state a cause of action as against the corporation so as to preclude the transfer of the case, under Code Civ. Proc. § 395, to county wherein city officials resided, particularly in view of probability that any omissions in complaint could be supplied by amendment.

Appeal from Superior Court, City and County of San Francisco; Daniel C. Deasy, Judge.

Action by the Richmond Terminal Corporation against the Parr Terminal Company and others. From an order transferring the case to another county, plaintiff appeals. Reversed.

M. H. Peterson, of San Francisco, for appellant.

T. H. Delap, of Richmond, for respondents Chandler and others.

Morrison, Hohfeld, Foerster, Shuman & Clark, of San Francisco, for respondents Parr Terminal Co. and others.

Thomas M. Carlson, of Richmond, for respondent City of Richmond.

BARNARD, Justice pro tem. This is an action for damages brought against fifteen defendants, consisting of Parr Terminal Company, a corporation, with its principal place of business in the city and county of San Francisco; Fred D. Parr, residing in said city and county; the city of Richmond, a municipal corporation, located in Contra Costa county; and twelve individual defendants, sued both individually and as officers and agents of the said city of Richmond, all being residents of Contra Costa county. The action having been filed in the city and county of San Francisco, a change of venue to Contra Costa county was demanded by the twelve individual defendants resident therein, on the ground that the only defendants resident in the county where the action was filed are Parr Terminal Company, a corporation, and Fred D. Parr, its president; that the two last named are improperly joined as defendants, for the reason that the complaint does not state a cause of action against them, or either of them; that as to them the cause of action attempted to be set up is fictitious and a mere pretense; and that they were joined as defendants for the sole purpose of having the action tried in the city and county of San Francisco. The two San Francisco defendants and the city of Richmond filed their written consent to the change of venue asked for.

This is an appeal, based upon a bill of exceptions, from an order transferring the case to Contra Costa county, holding that the complaint did not state a cause of action against the said Parr Terminal Company, a corporation, or the said Fred D. Parr, and that the action should have been commenced in and should be tried in Contra Costa county.

Under section 395 of the Code of Civil Procedure, if the said Parr Terminal Company, a corporation, and Fred D. Parr, or either of them, were properly made defendants, the order appealed from must be reversed. If they were proper defendants, no other question remains. In the case of McClung v. Watt, 190 Cal. 155, at page 159, 211 P. 17, 19, the court said: "If the complaint in the instant case attempts, in apparent good faith, to state a cause of action against the corporation defendant, the individual defendant, Watt, did not have the right to have the place of trial changed to the county of his residence. The sufficiency of the complaint and the good faith of the pleader are not to be denied, upon a motion for a change of venue, unless, at first blush, it can be clearly seen and said that the allegations of fact concerning the corporation defendant are in nowise related to the facts alleged and relied upon as a cause of action against the defendant, Watt, and would not, in any event, or in any view of the case warrant the inference that the corporation was a party to the fraud. * * *"

The rule being as above, it is apparent from reading the complaint herein, not only that it does not appear from the allegations thereof that the two San Francisco defendants are entirely unrelated to the facts and incidents relied upon as a cause of action against those defendants residing in Contra Costa county, but that it does appear therefrom that an attempt has been made, in apparent good faith, to state a cause of action against them as well as the other defendants.

Briefly, the complaint alleges that the city of Richmond, pursuant to rights given said city by certain acts of the state Legislature, and subject to certain limitations, conditions, and trusts contained in said acts, made certain harbor improvements, including the construction of what is known as Municipal Dock No. 1, together with certain warehouse and trackage facilities; that the same were used for many years for the benefit of the general public until October 18, 1926, the city council of the city of Richmond, by ordi-

---

★Rehearing denied.

nance, and in violation of the trusts imposed by the state Legislature, leased said dock and facilities for a term of years to the Parr Terminal Company, a corporation, with many rights and privileges, including the right to do all stevedoring and freight handling thereon; that on November 8, 1926, the said city council passed an ordinance giving to the Parr Terminal Company the exclusive right to handle all freight on said dock, and directing the chief of police of said city to exclude all persons from said dock or warehouses, except employés of the city and employés of said corporation; that by direction of the city manager of said city, plaintiff was notified of this action and of the date when the operations "so authorized" would begin; later plaintiff was notified that Parr Terminal Company desired to take possession at an earlier date than that named, and still later was informed by the mayor and city manager of said city that plaintiff could not continue its work on said dock, either as consignee of goods, or otherwise, and that Parr Terminal Company was in exclusive control; that for a long time prior to November 8, 1926, plaintiff had been engaged at said dock in the stevedoring and freight handling business, receiving goods consigned to it, and loading them for shipment; that on the morning of November 9, 1926, plaintiff and its employés were forcibly prevented from entering said dock by locked gates and policemen armed with shotguns, and plaintiff was notified by the police captain in charge that no one on behalf of plaintiff would be admitted to the dock for any purpose whatever, without the permission of Parr Terminal Company being first had and obtained; that at said time there was a large quantity of goods on said dock, consigned to plaintiff and requiring its attention; that the said city of Richmond, its said city council, the said Parr Terminal Company, and the said Fred D. Parr have conspired together and taken all possible means to prevent the delivery of goods at said Municipal Dock No. 1 and consigned to plaintiff, and to prevent plaintiff having any access to said dock; and that the said Parr Terminal Company and Fred D. Parr have sought to induce the Southern Pacific Railroad Company not to deliver goods to the Santa Fé Railroad Company for transportation to this dock if said goods were consigned to this plaintiff, and have told shippers that no goods consigned to plaintiffs would be permitted to be handled at said dock, nor would they be handled there unless they were consigned to Parr Terminal Company; that by such and other and similar acts plaintiff's business has been destroyed, with allegations of damage.

The bill of exceptions sets forth certain affidavits used on the hearing of the motion, setting forth the facts as to the residence of the parties as above stated, and alleging on the information and belief of the respective affiants that a good cause of action was, or was not, set up as against the Parr Terminal Company, a corporation, and Fred D. Parr.

Much of the argument of respondent is directed to the proposition that plaintiff cannot finally prevail on the merits of the case. This may or may not be true, but is not in issue here. The ultimate rights of the plaintiff and the Contra Costa county defendants are not involved in this proceeding. Johnson v. Benton, 73 Cal. App. 571, 575, 239 P. 63. The record shows no attack on the sufficiency of the complaint as to those defendants. The only question here is as to the connection, or lack of connection, of the San Francisco defendants with the matters and things alleged in the complaint, in order to determine the proper place of trial of the action on its merits. In this regard, taking the complaint as it now stands, it can hardly be said to appear at first blush therefrom that the Parr Terminal Company and Fred D. Parr had no connection with the incidents alleged as a cause of action. The reasonable inference from the complaint is that those defendants had a not inconsiderable part in the activities complained of.

Assuming, then, as we must for the purpose of this proceeding, that a cause of action is stated against the other defendants, and bearing in mind the rules of law above referred to, we cannot say that the facts alleged show clearly, or at all, that the Parr Terminal Company and Fred D. Parr are in no wise related to, or involved in, any such cause of action so existing. On the contrary, they would appear to be proper parties defendant in order to determine the controversy.

A further proper consideration is the possibility of amendment. As the court further said in McClung v. Watt, supra, at page 160 (211 P. 19): "Conceding these allegations to be faulty in form, and in a measure vague and indefinite and somewhat ambiguous, nevertheless, when considered in conjunction with the remaining allegations of the complaint, even though they be strictly construed, it cannot be said that they are so inherently and utterly devoid of merit as to be radically insufficient upon which to found a cause of action. * * * It is enough, however, upon the hearing and determination of the demand for a change of venue, that the cause of action purported to be stated against the corporation defendant was apparently pleaded in good faith and is not, prima facie, so glaringly and vitally defective as to be beyond correction by amendment." The language of the court, above quoted, might well have been used in the instant case. If it be true, as claimed by respondent, that the "plentiful averments of conspiracy" in the complaint, respecting the defendants Parr Terminal Company and Fred D. Parr, are deficient in that they merely allege attempts by said defendants to drive away and destroy plaintiff's business, and fail to allege that these attempts met with success, still a large part of the injuries complained of may have been caused by such acts of these particular defendants, and it is not unreasonable to suppose the omissions may be supplied by amendment. In our opinion the complaint attempts in good faith to state a cause of action against all the defendants, including those in San Francisco, and it is not so glaringly defective as to be obviously beyond the possibility of correction by amendment. McClung v. Watt, 190 Cal. 155, 211 P. 17; Mills v. Brown (Cal. Sup.) 269 P. 636.

The foregoing makes it unnecessary to consider other points raised.

For the reasons stated the order appealed from is reversed.

We concur: TYLER, P. J.; CASHIN, J.

---

96 Cal. App. 140

WILSON v. BROWN et al. (Civ. 3655.)★

District Court of Appeal, Third District, California. Jan. 4, 1929.

Rehearing Denied Feb. 2, 1929. Hearing Denied by Supreme Court March 4, 1929.

1. Partnership 🔑87—Agreement that portion of partners shall bear all losses of capital is competent.

Parties to partnership may agree that all partners shall participate in profits, but that only a portion of them shall bear the losses of the original capital.

2. Partnership 🔑53—Finding of partnership under defendants' agreement to finance purchase of subdivision, sharing profits with plaintiffs selling lots, held justified (Civ. Code, § 2404).

Finding of existence of partnership for purpose of subdivision of tract and sale of lots *held* justified under evidence of agreement of defendants to finance purchase of property and subdivision, and of plaintiffs to do the work of selling lots, dividing profits, notwithstanding testimony of plaintiff that she had no money to lose in the transaction, since liability for losses fell on all partners under Civ. Code, § 2404.

3. Partnership 🔑108—One partner may sue others for conversion of partnership property without previous accounting.

Where some of partners have excluded another and have appropriated partnership property to their own use, the other partner may treat the matter as a conversion and sue offending partners and recover personal judgment without any accounting or disposition of former partnership assets, in cases where there are no outstanding liabilities of creditors.

4. Partnership 🔑108—Partner held entitled without previous accounting to personal judgment against others refusing plaintiff's share of profits, where partnership debts had been paid.

One partner, on refusal of other partners to share profit realized from plan for subdivision and sale of tract or to recognize his interest, *held* entitled to recover personal judgment against other partners without previous accounting, settlement, and disposition of partnership assets, where debts of partnership had been paid.

5. Partnership 🔑344—Personal judgment against remaining partners held warranted, where unpaid contract for procuring water for subdivision was entered into by defendants after excluding plaintiff from partnership and plaintiff was charged to extent of benefit received.

In suit for partnership accounting, based on defendant's exclusion of plaintiff and withholding of plaintiff's share of profits realized from subdivision of tract and sale of lots, plaintiff's recovery of personal judgment was warranted, notwithstanding unpaid contract entered into by defendants for procuring water supply for subdivision, where contract was made after exclusion of plaintiff from partnership and plaintiff was charged with probable cost to the extent that she benefited by the water system.

6. Evidence 🔑591—Court did not err as to defendants in charging plaintiff, in partnership accounting suit, with share of cost of water system, based on defendant's estimate.

In partnership accounting suit, court's action in charging plaintiff with her full share of cost of water system purchased by defendants for subdivision, based on defendant's own estimate, *held* not improper as to defendants, though testimony of one of defendants indicated that cost of system would exceed that amount.

7. Partnership 🔑78—Plaintiff excluded from real estate partnership held entitled to judgment for reasonable value of lots converted by copartners, though proceeds of sale thereof were not collected.

In suit for partnership accounting, based on defendant's exclusion of plaintiff from her share of profits realized in subdividing tract and selling lots in subdivision, plaintiff, treating defendant's appropriation of partnership property as conversion, was entitled to judgment for reasonable value of lots converted, though proceeds of sale of lots remained in part uncollected.

8. Partnership 🔑78—Members of partnership sued for conversion of lots by excluded partner could not deny price obtained for lots was their reasonable value.

Defendants sued by remaining member of partnership, whom they excluded, for reasonable value of lots in partnership subdivision, converted by defendants, could not complain that price for which they sold the lots was not their reasonable value.

Appeal from Superior Court, Los Angeles County; Albert Lee Stephens, Judge.

Action by C. Myrtle Wilson against Harvey C. Brown, C. A. Clement, and Alexander Hursh. Judgment for plaintiff and defendants, except first-named defendant, appeal. Affirmed.

★Rehearing denied. Hearing denied by Supreme Court.

Kelby & Lawson and Samuel M. Garroway, all of Los Angeles, for appellants.

Daze, Mitschrich & Noll, of Los Angeles, for respondent.

SHIELDS, Justice pro tem. This appeal arose from facts of which the following is a sufficient statement: Plaintiff and the defendant Brown were associated together in various real estate activities. While so associated a tract of land near Elsinore, in the county of Riverside, was called to their notice, and they took an option for the purchase from its owners, each paying one-half of the cost of the option. The defendants Hursh and Clement were copartners engaged in real estate operations. Plaintiff interviewed the latter defendants with the view of having them purchase the Elsinore property held under the above option, and, after conferences and inspection in which all four of the parties participated, the defendants Hursh and Clement purchased the property with the understanding that they were to finance the purchase and subdivision of the tract and that Brown or Brown and plaintiff Wilson were to do the work of selling it. In consideration of their part in the business defendants Hursh and Clement were to have 60 per cent. of the profits, and the defendant Brown, or the defendant Brown and plaintiff, according to the different contention of the parties, was or were to have the remaining 40 per cent. After the enterprise had been well entered upon, but before any of the property had been sold, defendants Hursh and Clement purchased all interest in the enterprise and the property, of the defendant Brown, and denied any interest of the plaintiff in the property, or any right on her part to participate in its sale, or the profits resulting therefrom. She thereupon began this action to have it adjudged that a partnership had existed in the ownership of the Elsinore property and in the business of its sale; that the partnership had been dissolved; claimed that she was a partner therein; that her interest was a one-fifth interest; and asked for an accounting and a division of partnership assets according to the respective interests of the partners. At the trial the court found the existence of the partnership; that the plaintiff was entitled to have it dissolved; that the defendants "did wrongfully, maliciously and without the consent of the plaintiff" apply property of the partnership to their own use; that the defendants Clement and Hursh "did conspire to defraud the said plaintiff of her rightful and proportionate share of said copartnership money and property" in the manner and to the extent set forth in a certain referee's report, which was made a part of the findings of the court, and then proceeded to award the plaintiff a judgment against the defendants for $3,319.97 out of cash and contracts of sale received by defendants; a number of the lots of the partnership tract remaining unsold of the value of $5,230 and "certificates, bonds and deeds" out of securities and contracts taken by the defendant on account of sales of lots by them, amounting to $5,245, making a total judgment in favor of plaintiff of $13,794.97.

[1, 2] On appeal from this judgment appellants contend, first, that the court erred in finding the existence of a copartnership in favor of the plaintiff. This finding is so substantially supported by the evidence that a recital or restatement of it seems unnecessary. But appellants insist that certain testimony of the plaintiff herself renders this finding erroneous. On cross-examination, when interrogated as to what had been the agreement between the parties as to sharing such losses as might be sustained by the business, plaintiff answered:

"Mr. Clement, you know, and Mr. Hursh were financing the proposition, so Mr. Brown and I weren't investing any money, and we had no money to lose in this connection.

"Q. In the event Mr. Clement and Mr. Hursh lost by it? A. It was their loss.

"Q. You were not to lose anything? A. I was not to lose anything."

This testimony is not inconsistent with the existence of a partnership. In partnership agreements it is usual to provide for an equal sharing of profits and losses, "but if parties are so disposed, they are competent to agree that all the partners shall participate in the profits, while a portion shall bear all the losses of the original capital." Gray v. Palmer, 9 Cal. 616, 639.

It will be observed that plaintiff does not say that there was an agreement that she should not be liable for any losses which the partnership might sustain. Her statement amounted to no more than an expression of her opinion as to her liability as a copartner. Had losses been sustained, and the partnership continued, she would have been unpleasantly informed as to the error of her opinion. Section 2404 of the Civil Code provides that "an agreement to divide the profits of a business implies an agreement for a corresponding division of its losses, unless it is otherwise expressly stipulated." As the partnership was sufficiently proven, and as in the agreement out of which it grew it was not "otherwise expressly stipulated," plaintiff's liability for her share of possible losses existed to the degree necessary to sustain the finding of a partnership. 20 Cal. Jur. 692.

[3, 4] Appellants complain that no personal judgment should have been rendered against them until the affairs of the partnership had been settled and the partnership assets had all been disposed of. That is the general rule. Nakamura v. Kondo, 65 Cal. App. 211, 223 P. 425; Clark v. Hewitt, 136 Cal. 77, 68 P. 303. But while "in general a judgment may not be entered against a partner in a suit

for an accounting until all of the assets have been marshaled and made to bear the burden of the copartnership liabilities, in cases where there are no liabilities to settle except as between the partners themselves, such course is not necessary." Shuken v. Cohen, 179 Cal. 279, 176 P. 447. Where, as in this case, some of the partners have excluded another and have appropriated the partnership property to their own use, the latter may treat the matter as a conversion and, without any accounting or disposition of the former partnership assets, sue the offending partners and recover against them a personal judgment in the amount of his damage. Moropoulos v. C. H. & O. B. Fuller Co., 186 Cal. 679, 200 P. 601. In the case before us the record shows that the debts of the partnership had all been paid before the commencement of the suit and that it was a proper case in which to render a personal judgment, provided such judgment was correctly arrived at.

[5] Appellants contend that at the time the personal judgment was rendered against defendants there was an outstanding obligation of the partnership which was not settled and against which the defendants were not protected. They insist that until this obligation was met that a personal judgment was premature. They refer to a contract entered into by the defendants to supply a water system to the partnership subdivision. This contract was made by defendants after they had excluded plaintiff from the partnership and after the same had been thereby dissolved. The contract was made by the defendants, and was their contract, and not that of the partnership. But this contract by the defendants undoubtedly enhanced the value at which lots had been sold and entered into the receipts from which plaintiff was given her partnership share. To the extent that she benefited by it she should have borne its probable cost. This was required of her by the judgment.

[6] Defendants themselves furnished an estimate of the probable cost of the "water system," and placed it at $3,141.80. This sum was deducted by the referee from the proceeds of sale in the hands of the defendants before such proceeds were divided, and thus plaintiff was charged with her full share of it. This estimate was accepted by the referee as the probable cost of the entire "water system" from figures furnished by the defendants themselves, which apparently included not alone the well, but the entire pumping equipment. The sufficiency of the allowance for this item does not appear to be questioned except where the defendant Clement testified that "the estimated cost of the water system will probably exceed the amount of $3,141.80." This is too vague a statement to contradict defendants' own estimates, upon which the court acted in arriving at its judgment.

[7, 8] In making its division of the partnership between the parties hereto it appears that there was a surplus of cash, derived from partnership assets, in the hands of the defendants, and that there were "accounts receivable" in the hands of the defendants derived from the sale of lots theretofore made. These accounts receivable were treated by the court as cash and were counted as such in the calculations by which the court reached the conclusion that the plaintiff was entitled to the cash portion of her judgment for $3,319.97. Appellants complain that this was erroneous, as the sums represented by "accounts receivable" might not be collected, or that their collection might be attended by a loss. This contention cannot be sustained. It was found in this case that defendants had wrongfully and maliciously appropriated property of the partnership, of which the lots represented by these "accounts receivable" were a part. Plaintiff was entitled, therefore, treating this as a conversion, to a judgment for the reasonable value of the lots so converted. Defendants cannot complain that the price for which they had sold them was not their reasonable value.

Other contentions made by the defendants do not seem to require discussion. Through their own acts they precipitated a condition in which it was difficult to define with exactness the respective rights of the parties. The judgment arrived at seems equitable and just, under the facts found, and, as it is without error, it should be affirmed; and it is so ordered.

We concur: HART, Acting P. J.; PLUMMER, J.

---

96 Cal. App. 31

MAYER et al. v. WEST et ux.★

CALKINS et al. v. MAYER et al.

(Civ. 6284.)

District Court of Appeal, First District, Division 1, California. Dec. 28, 1928.

Rehearing Denied Jan. 26, 1929. Hearing Denied by Supreme Court Feb. 25, 1929.

1. Vendor and purchaser ⚷296—Vendor may recover possession in ejectment from purchaser who repudiates contract.

Vendor may recover possession in ejectment from purchaser in possession who repudiates contract, since, even if vendor cannot perform because of failure of title, purchaser cannot retain possession and refuse to perform.

2. Vendor and purchaser ⚷299(3)—Purchaser, relying or equitable defense in vendor's ejectment action, must make out complete equitable title and right to possession in pleading.

When purchaser relies on equitable defense in vendor's ejectment action, his answer

---

★Rehearing denied. Hearing denied by Supreme Court.

or other pleading must make out complete equitable title and right to possession thereunder, equivalent to bill in equity for specific performance.

3. Vendor and purchaser 🔑299(1)—Purchaser, appealing to equity to defend him against legal title to land of which he is in possession must pay or offer to pay price.

Purchaser, who appeals to court of equity to defend him against legal title to land of which he is in possession, must do equity by paying or offering to pay price which he agreed to pay.

4. Vendor and purchaser 🔑170—Purchasers' tender of note and trust deed in accordance with escrow instructions held not full compliance with contract, where vendor was unable to give clear title.

Where vendor was unable to give deed conveying clear title, purchasers *held* not to have fully performed contract on their part by tendering to title company promissory note and trust deed in accordance with escrow instructions, while retaining possession and failing to make payments.

5. Payment 🔑17—Debtor's note, if not paid, does not constitute payment without express agreement.

Note of debtor, if not itself paid, does not constitute payment, unless received by creditor under express agreement to accept it as absolute payment.

6. Vendor and purchaser 🔑299(2)—Vendor held entitled to bring ejectment without tendering deed, where purchaser failed to make payments.

Vendor *held* not prevented from bringing ejectment against purchaser by fact that no deed was tendered, where purchaser in possession failed to make payments.

7. Vendor and purchaser 🔑299(4)—Finding that vendor did not have title held not inconsistent with findings that he was owner in ejectment action against purchaser.

In vendor's action in ejectment, finding that title to property involved was not in vendor *held* not inconsistent with finding that vendor was owner on date of sale contract, and finding that he subsequently conveyed interest in property to another, since latter findings mean actual ownership, as distinguished from record title.

8. Trial 🔑398—Judgment cannot stand, if material findings are inconsistent, but will be affirmed, if they can be reconciled.

Although judgment cannot stand where material findings are inconsistent, it will be affirmed if findings can be reconciled.

9. Appeal and error 🔑1071(1)—In vendor's ejectment action, any error in finding that vendor had conveyed interest to another held immaterial.

In vendor's ejectment action against purchaser any error in making finding that vendor had conveyed interest to another *held* immaterial, where such other was brought into case on suggestion of purchaser's attorney, and purchasers alleged that he had acquired interest with knowledge of contract.

10. Appeal and error 🔑1036(2)—Judgment will not be reversed for misjoinder of parties, unless error was prejudicial.

Judgment will not be reversed on appeal for misjoinder of parties, unless party complaining has been misled to his prejudice, or error otherwise appears to be injurious.

11. Vendor and purchaser 🔑299(4)—Vendor, suing purchaser in ejectment, held entitled to money judgment for amount purchaser had collected as rent (Code Civ. Proc. § 740).

In ejectment, vender *held* entitled to money judgment under Code Civ. Proc. § 740, for amount which purchasers in possession had collected as rent, which amount court found to be value of use and occupancy of property.

Appeal from Superior Court of Los Angeles County; William C. Doran, Judge.

Action by Irene Mayer and another against William Holmes West and wife, in which C. C. Calkins and another filed a cross-complaint against Irene Mayer and others. From the judgment that a certain contract be conceled, cross-defendants William Holmes West and wife appeal; from an order denying a motion for a different judgment, cross-complainants appeal. Affirmed on cross-defendants' appeal. Reversed, with directions, on cross-complainants' appeal.

W. W. Kaye, of Los Angeles, for cross-complainants.

John C. Packard, of Los Angeles, for cross-defendants.

CAMPBELL, Justice pro tem. Two appeals are presented on the record herein, one taken by William Holmes West and Dora May West, cross-defendants, from the judgment adjudging that a certain contract be canceled and annulled, and the other taken by cross-complainants C. C. Calkins and W. W. Kaye from the order denying their motion for an order that another and different judgment be entered, identically the same in form as the one entered, but with the additional provision that the cross-complainants should have and recover from the cross-defendants William Holmes West and Dora May West the sum of $2,000, being the amount fixed by the court as the value of the use and occupation of the premises involved in the action during the time the same were unlawfully withheld from cross-complainants.

On February 26, 1920, Calkins, being the owner of the property involved, entered into an agreement to convey the same to West, at which time an escrow was made with the Los Angeles Title Insurance Company. By this escrow West agreed to pay $3,700 for the property, payable $700 on delivery of a deed by Calkins within 30 days, which amount was deposited in escrow with the title company; $1,200 by trust deed given by West and wife to secure a note for that amount, payable $25 a month, with interest at 7 per cent. per annum; and the balance of $1,800 to be assumed by West in the payment of a mortgage which then covered the property. Calkins was unable to give a deed and certificate of clear title within 30 days, and accordingly, on April 15, 1920, he and West entered into a written agreement, wherein the terms of payment were recited in harmony with the escrow, and wherein it was further stated that an action "was filed on the 16th day of February, 1920, to quiet title to said property, and a certificate of title is to be furnished at the termination of said suit, or as soon thereafter as the said title company can do it, and not later than 15 days after the case was decided by said court." On July 22, 1920, Calkins and West indorsed a further writing upon this agreement limiting the time as follows: "It is further agreed that said agreement relative to last clause set out therein shall not extend beyond April 1, 1921." Subsequent to February 26, 1920, West and wife entered into possession of the property, and thereafter undertook to sell it to Irene Mayer, plaintiff herein, who brought this action for specific performance, or, if such relief were not obtainable, then for damages. She obtained a judgment for damages against West and wife, which judgment has been satisfied, and therefore that phase of the case is not involved on this appeal.

West and wife paid to Calkins the installments of $25 per month to and including February 26, 1921, and also paid interest on the contract to that date. They also paid the interest on the mortgage of $1,800 to and including June 17, 1923, but failed and neglected to make any further payments to Calkins, either of principal or interest, on the purchase price, or to pay any further sums, either as principal or interest, on the mortgage. As a result, an action to foreclose such mortgage was commenced on August 30, 1923. Calkins was unable, as he testified, to deliver a clear deed on April 1, 1922, for the reason that the action to quiet title was still pending, and adverse claims against the property were being asserted until as late as October 30, 1924. Not being able to deliver a clear title to the property as required according to the escrow or within the time extended by the agreement, Calkins demanded of West either that he deliver possession of the property or make payments according to the terms of the contract. In answer to the question why he did not continue to make payments after April, 1921, West stated: "Because the contract calls for him to have the title perfected. Then I paid up until this time, and told him that, any time he would furnish title, I would pay him up and go on with it."

The record shows that in April, 1920, West and wife were put in possession of the property involved by Calkins under the agreement of sale; that the Wests were required to pay $1,900, $700 of which was to be paid upon the furnishing of a certificate of title, and the balance in installments of $25 per month; that Calkins was unable to furnish a certificate of title as agreed upon until October, 1924; that the Wests have not paid the $700, it having merely been deposited with the escrow, and have paid but $200 of installments which matured during the first year; that they failed to make any payments since February, 1921; that they failed to pay the mortgage indebtedness of $1,800, and as a result foreclosure proceedings were instituted; that at the time of the trial, which was more than four years after delivery of possession, Calkins had received but $200 of the purchase price, the Wests claiming that by tendering a note and trust deed to the title company they were excused from further performance; that during a greater portion of the time since the property was delivered West received rent amounting to $50 per month, and failed to apply the same, either in payment of the purchase price or in reduction of the mortgage indebtedness.

The court found that cross-defendants William Holmes West and Dora May West had repudiated their contract, and that cross-complainants C. C. Calkins and W. W. Kaye are entitled to possession of the premises, and that the value of the use and occupation of the premises from March 1, 1922, the date West and wife took possession of the premises from plaintiff Irene Mayer to the date of the trial, is the sum of $2,000. The cross-complaint of Calkins and Kaye states a simple cause of action for the recovery of possession of the property, together with the value of its use and occupancy. The answer of West and wife to such cross-complaint denies that since January 1, 1921, cross-complainants have been or now are the owners of the property described, and alleges as a further defense that cross-defendants have been in the open, notorious, exclusive, uninterrupted, and adverse possession of the property during all the time in such answer mentioned, holding the same adversely to cross-complainants and all other persons for more than five years. They also plead as a defense the statute of limitations, and that another action is pending. This latter defense and the defense of the statute of limitations are not argued in the briefs, and we are therefore not called upon to consider them. People v. Woon Tuck, 120 Cal. 297, 52 P. 833; People v. McLean, 135 Cal. 309, 67 P. 770.

[1-3] It is elementary that a vendor may recover possession in ejectment from a vendee in possession who repudiates his contract. Woodard v. Hennegan, 128 Cal. 293, 60 P.

769; Coates v. Cleaves, 92 Cal. 427, 28 P. 580; Whittier v. Stege, 61 Cal. 241; Hicks v. Lovell, 64 Cal. 14, 27 P. 942, 49 Am. Rep. 679. If a vendor is unable to perform because of failure of title, the vendee cannot retain possession and refuse to perform. Whatever cause of action he may have for the purchase money which he paid is another matter; it constitutes no defense to the present action. Gervaise v. Brookins, 156 Cal. 103, 103 P. 329; Garvey v. Lashells, 151 Cal. 531, 91 P. 498; Worley v. Nethercott, 91 Cal. 512, 27 P. 767, 25 Am. St. Rep. 209; Haile v. Smith, 128 Cal. 415, 60 P. 1032. When a vendee relies upon an equitable defense his answer or other pleading must make out a complete equitable title and right to possession thereunder, equivalent to a bill in equity for specific performance. Wallace v. Maples, 79 Cal. 433, 21 P. 860; Arguello v. Bours, 67 Cal. 450, 8 P. 49; Miller v. Fulton, 47 Cal. 146; Bruck v. Tucker, 42 Cal. 352.

In the present case West and wife by their pleading denied the ownership of Calkins and alleged title in themselves by adverse possession. In Woodward v. Hennegan, supra, the court says: "The defendant having by his answer repudiated the contract, and having refused to pay the balance due, the plaintiff can maintain the present action to recover possession. * * * The defendant could have set up in his answer the agreement to convey, his willingness to perform and offer to perform on his part by paying the balance found to be due, and the court, by its decree, could have, while giving the plaintiff the amount due, also fully protected the rights and equities of defendant." One who appeals to a court of equity to defend him against the legal title to land, of which he is in possession, must do equity by paying or offering to pay the price which he agreed to pay. Hicks v. Lovell, supra; Eastman v. Plumer, 46 N. H. 464. When a vendee abandons his purchase and repudiates his contract, the vendor is not bound to resort to a court of equity for relief, but may sue in ejectment. Keller v. Lewis, 53 Cal. 118.

[4, 5] Appellants West and wife contend that, when Calkins was unable to give a deed conveying a clear title on April 1, 1921, they, by tendering to the title company a promissory note and trust deed in accordance with the escrow instructions, had fully performed the contract on their part. In Gervaise v. Brookins, supra, which was an action in ejectment, where the vendor had conveyed the property prior to the making of the agreement involved, where the purchasers were let into possession and had paid $3,000 on the purchase price of $15,000 before they discovered that their vendor could not give title, and where the balance of the purchase price was made by giving promissory notes payable on or before a certain date for ten consecutive years, the court says:

"Brookins has not unconditionally refused to make the payments. Before the installment of 1904 became due, Lillian M. Book told him that she did not expect him to make further payments until she could secure title or arrange to have the same conveyed to him. He thereupon offered to pay all the notes immediately, upon the condition that he should, concurrently, receive a conveyance of the land transferring to him the title therein, and he refused to make any payment, except upon that condition. Each installment being made payable on or before the date named, at his option, he had the right to declare it all due and to make an offer of full performance at any time. He was entitled to the performance of this concurrent condition and he had a right to make his own offer dependent thereon. Civ. Code, § 1498. * * * His offer was therefore a good offer of performance under the law and the contract, and he is not in default unless he has become so by reason of his retaining possession while refusing to make payments and accept such title as his vendor can give. * * * It appears to be well established that, under such circumstances, the vendee cannot retain possession of the land, while neglecting to pay the price when due, and that the failure of the title does not give him the right to continue in possession by merely keeping good an offer to perform on his part conditioned upon performance by the vendor.

"The reasons for this rule are thus stated by the Supreme Court of the United States in Burnett v. Caldwell, 9 Wall. 293 [19 L. Ed. 712]: 'If the contract stipulates for possession by the vendee, or the vendor puts him in possession, he holds as a licensee. * * * The case comes within the category of a license. In such cases, the vendee cannot dispute the title of the vendor any more than the lessee can question the title of his lessor. * * * Upon default in the payment of any installment of the purchase money, the possession becomes tortious and the vendor may at once begin ejectment.' In that case the court further held that the fact of want of title in the vendor, and the fact that the vendee had paid a large part of the price, were alike immaterial as defenses to an action of ejectment by the vendor. * * * In Rhorer v. Bila, 83 Cal. 54, 23 P. 275, upon similar facts, the court says: 'A purchaser cannot remain in possession of lands under a contract and at the same time refuse to pay the purchase price. * * * So long as the purchaser retains possession he waives all previous objections, whether of defect of title or delay in completing it; and is bound to accept title according to the terms of the contract if offered while he still retains possession.' * * * If, on the other hand, the purchaser chooses not to rescind, but to retain possession under the contract, he can do so only on the condition that he pays the purchase money and interest according to the contract."

In Garvey v. Lashells, supra, the court holds: "If a perfect title was to be conveyed, and the vendor is unable to give such a title, the vendee has appropriate remedies, but he cannot keep both the property and the purchase money." Here West and wife, while retaining possession of the property, failed to pay the $700 and also the payments of principal and interest on the $1,800 mortgage, and also the $25 monthly installments after the first year. The tender of the note and trust deed was not a full compliance with these terms of the contract. Nor does the note of a debtor, if not itself paid, constitute a payment unless received by the creditor under an express agreement to accept it as absolute payment. Menzel v. Primm, 6 Cal. App. 204, 91 P. 754; St. Clair v. Joos (Cal. App.) 265 P. 968.

[6] Cross-defendants West and wife contend that, if the time for delivery of a deed by Calkins should be considered as being extended until the last installment of the $1,200 fell due in December, 1924, yet ejectment would not lie because no deed was tendered. A number of cases are cited to this point, but their facts do not parallel the issues here presented. In Hicks v. Lovell, supra, the court says: "'The refusal of one party to perform his contract,' says the Supreme Court of New York, in Graves v. White, 87 N. Y. 465, 'amounts on his part to an abandonment of it. The other party therefore has a choice of remedies. He may stand upon his contract, refusing assent to his adversary's attempt to rescind it, and sue for a breach, or in a proper case for a specific performance, or he may assent to its abandonment, and so effect dissolution of the contract by the mutual and concurring assent of both parties. In that event he is simply restored to his original position.' * * * Neither party, thereafter, could invoke its terms or protection as against the other; and the plaintiff was at liberty to maintain ejectment to recover the possession of the land to which he had a legal title."

In our opinion the evidence sufficiently supports the findings on this issue, and therefore, under the authorities from which we have quoted, the judgment appealed from by cross-defendants and appellants William Holmes West and Dora May West, adjudging that the contract be canceled and annulled, should be affirmed.

[7, 8] There is no merit in the contention of cross-defendants that finding VIII is inconsistent with findings I and III. Finding VIII finds: "The title to the real property involved in this action was not in the cross-complainants, C. C. Calkins and W. W. Kaye, or either of them. That neither of said cross-complainants C. C. Calkins or W. W. Kaye were at that time in possession, nor could said C. C. Calkins or W. W. Kaye, or either of them, convey to the cross-defendants, William Holmes West and Dora May West, or either of them, or to any other person whomsoever, the said real property until about October 30, 1924, for the reason that the title to the said real estate at said time did not stand of record in the name of either cross-complainants and was the subject of an action to quiet title."

Finding I finds "that on or about the 26th day of February, 1920, the cross-complainant being then the owner of that certain tract of real property (describing the property) entered into an agreement for the sale of the said property to defendant William Holmes West," and finding III finds "that subsequent to the 26th day of February, 1920, the cross-complainant C. C. Calkins conveyed to the cross-complainant W. W. Kaye an undivided one-tenth interest in said property."

It is true, as urged by cross-defendants, that where material findings are inconsistent the judgment cannot stand, but it is also the rule that if the findings can be reconciled the judgment will be affirmed. From a reading of the findings it is apparent that finding VIII, "That the title to the real property involved in this action was not in cross-complainants," has reference to the record title, while finding I, "that on or about the 26th day of February, 1920, the cross-complainant being then the owner of that certain tract of real property," is a finding of actual ownership. In other words, the court found that in February, 1920, cross-complainant Calkins was the owner of the property, although the title did not stand of record in his name, and therefore a clear title could not be conveyed until October 30, 1924, when the action to quiet title was disposed of.

[9, 10] It is true there is no evidence to support the finding that Calkins conveyed a one-tenth interest to Kaye, yet, if there were error in making such a finding, it is not material. Cross-complainant Kaye was brought into the case on motion of plaintiffs and on the suggestion of the attorney for cross-defendants, and in the seventh special defense of cross-defendants it is alleged that cross-complainant Kaye acquired his interest with knowledge of the contract between Calkins and West. Furthermore, there was at most a misjoinder of parties, and it is well settled that a judgment will not be reversed on appeal for such misjoinder, unless the party complaining has been misled, to his prejudice or the error otherwise appears to have been injurious. Asevado v. Orr, 100 Cal. 300, 34 P. 777; Hirschfeld v. Weill, 121 Cal. 14, 53 P. 402.

[11] Cross-complainants C. C. Calkins and W. W. Kaye complain that the court erred in not entering judgment in their favor for $2,000, which the court found to have been collected by William Holmes West and Dora

May West as rent from the time of their entry into possession of the property, and which amount the court found to be the value of the use and occupancy of such property, claiming that the conclusions of law are inconsistent with the findings of fact.

The court found that, at the time cross-defendants William Holmes West and Dora May West entered into possession under the agreement, cross-complainant C. C. Calkins was the owner of the property; that cross-defendants paid to cross-complainant Calkins $200 principal, and no more; that cross-defendant William Holmes West since March 1, 1922, has occupied the premises and that the rental value of the premises from that date to June 1, 1925, was the sum of $2,000; that the value of the use and occupation of the premises from March 1, 1922, to June 1, 1925, is the sum of $2,000; that ever since March 1, 1922, the cross-defendants have held possession of the premises adversely to cross-complainants; that cross-defendants have not performed the terms of the contract under which they held possession excepting that they made payment of the sum of $200, and have made a portion of the payments of the interest on the mortgage indebtedness assumed by them. The conclusions of law which follow these findings determine that the cross-complainants are entitled to a judgment canceling the contract and also a judgment for the recovery of possession of the premises, but such conclusions of law do not adjudge that the cross-complainants are entitled to judgment against the cross-defendants for the recovery of $2,000, found to be the value of the use and occupation of the premises.

In Whittier v. Stege, 61 Cal. 238, the court declares: "When, therefore, the defendants, after they had obtained possession lawfully substituted repudiation of the contract and refusal to comply with its terms, * * * they divested themselves by their wrongful act of the equitable estate which they had acquired under the contract, and became trespassers or tenants at will against whom their repudiated vendors could maintain ejectment." "In an action for the recovery of property, where the plaintiff shows a right to recover at the time the action was commenced, * * * the plaintiff may recover damages for withholding the property." Code Civ. Proc. § 740.

Rents and profits may be recovered by one entitled to possession when claimed in an action in ejectment, being limited to such as accrued subsequent to the ouster alleged, or, in other words, the occupation of the one holding possession against the owner. Young v. Howell, 14 Cal. 468; Hannan v. McNickle, 82 Cal. 122, 23 P. 271. In Sievers v. Brown, 34 Or. 459, 56 P. 173, 45 L. R. A. 644, the court uses this language: "It has been held that a purchaser in possession of real property under the vendor's license cannot be evicted so long as he offers to perform the conditions of his agreement (Whittier v. Stege, 61 Cal. 238); but, if he refuses to comply therewith, the vendor may treat him as a tenant at will (Harris v. Frink, 49 N. Y. 24, 10 Am. Rep. 318), and he thereby becomes liable to the vendor for the reasonable value of the use of the premises for the time during which he continues in possession after he abandons the agreement [citing cases]. The application of this rule would render plaintiff liable to defendant for the reasonable rent of the land from the time the relation of vendor and purchaser was abrogated by the former's refusal to keep his agreement."

Under the findings of the court the conclusion follows as a matter of law that cross-complainants are entitled to judgment for $2,000, found by the court to be the value of the use and occupation of the premises.

The judgment, adjudging that the contract be canceled and annulled, is affirmed, and the order denying cross-complainants Calkins' and Kaye's motion made under section 663 of the Code of Civil Procedure, to vacate the judgment and to enter a judgment identically in the same form, but with the additional provision that cross-complainants have and recover from cross-defendants William Holmes West and Dora May West the sum of $2,000, being the value found by the court of the use and occupation of the premises, is reversed, with direction to the trial court to enter judgment accordingly.

We concur: TYLER, P. J.; KNIGHT, J.

---

96 Cal. App. 157

PEOPLE v. HAMPTON. (Cr. 1748.)

District Court of Appeal, Second District, Division 1, California. Jan. 7, 1929.

1. Criminal law 🔑763, 764(9)—Instruction that law reduces homicide to manslaughter when committed in heat of passion held reversible error as directing conviction for manslaughter under statute making homicide excusable when so committed (Pen. Code, § 195).

In prosecution for homicide occurring during fight whereby deceased was knocked unconscious and died, instruction that, if homicide was committed in heat of passion, excited by quarrel, sudden, and of sufficient violence to amount to adequate provocation, law would reduce crime to that of manslaughter, in effect directed jury to find defendant guilty of manslaughter, and was reversible error under Pen. Code, § 195, providing homicide is excusable when committed in heat of passion or on sudden combat.

2. Homicide ⚷297—**Defendant, knocking deceased to sidewalk, causing death, held entitled to instruction on excusable homicide (Pen. Code, § 195).**

Where evidence showed that defendant struck deceased when reprimanded for his conduct, and knocked deceased down, causing his head to strike sidewalk, from which he died, defendant was entitled to have submitted to jury question whether homicide was excusable when committed in heat of passion on sudden provocation or on sudden combat, within Pen. Code, § 195.

Appeal from Superior Court, Santa Barbara County; Frank C. Collier, Judge.

Frank Hampton was convicted of manslaughter, and he appeals. Reversed.

Shaeffer & Weldon, of Santa Maria, for appellant.

U. S. Webb, Atty. Gen., and James S. Howie, Deputy Atty. Gen., and Clarence C. Ward, Dist. Atty., and Beatrice M. Warner, Deputy Dist. Atty., both of Santa Barbara, for the People.

HOUSER, J. Defendant appeals from a judgment of conviction of the crime of manslaughter.

Briefly, it appears that, as defendant was about to enter a certain pool hall, he "took off his hat, waved it around and let out a yell." A man by the name of Moat, who was standing near the rear of the pool hall, and who remonstrated with defendant on account of his conduct, was struck by defendant on the mouth and nose. Defendant then walked toward a man named Wesley Blake, with whom he was on friendly terms, and who was leaning against a counter about ten feet from the entrance to the pool hall. Blake said to defendant, "Frank, you had no right to hit Moat." After a few hot words had passed between them, possibly accompanied by a threatening attitude on the part of Blake, defendant knocked Blake down. The testimony was conflicting as to whether as Blake was rising, or after he had risen and had advanced toward defendant, and had attempted to and did strike him, defendant again struck Blake. The blow received by Blake at that time knocked him backward out of the front door of the pool hall, where he fell; his head struck the sidewalk, from the effect of which he became unconscious and died on the following day.

On the trial of the action the district attorney made the statement to the court that the prosecution would not attempt to prove defendant guilty of murder in the first degree, but would ask the jury to determine whether defendant was guilty of the crime of manslaughter.

Section 195 of the Penal Code includes the following provision:

"Homicide is excusable in the following cases: * * *

"2. When committed by accident and misfortune, in the heat of passion, upon any sudden and sufficient provocation, or upon a sudden combat, when no undue advantage is taken, nor any dangerous weapon used, and when the killing is not done in a cruel or unusual manner."

Defendant's request for an instruction to the jury as to when or in what circumstances a homicide is excusable in the law was by the court refused. Such requested instruction was as follows:

"Homicide is excusable in the following cases:

"When committed by accident and misfortune in the heat of passion upon any sudden and sufficient provocation or upon a sudden combat when no undue advantage is taken or any dangerous weapon used and when the killing is not done in a cruel or unusual manner, and if you find from the evidence, beyond a reasonable doubt, that the homicide was committed by the defendant at the time and place mentioned in the indictment and that such homicide was committed by the defendants by accident and misfortune in the heat of passion upon any sudden and sufficient provocation or upon a sudden combat when no undue advantage was taken or any dangerous weapon used and the killing was not done in a cruel and unusual manner, then you are instructed that the defendant is excused in the eyes of the law and your verdict should be 'Not guilty.'"

One of the instructions given to the jury (not at the request of defendant) included the following language:

"And when the mortal blow, though unlawful, is struck in the heat of passion, excited by a quarrel, sudden and of sufficient violence to amount to adequate provocation, the law, out of forbearance for the weakness of human nature, will disregard the actual intent, and will reduce the offense to manslaughter. In such case, although the intent to kill exists, it is not that deliberate and malicious intent which is an essential element in the crime of murder."

[1, 2] In the instruction given to the jury it will be noted that the words "struck in the heat of passion, excited by a quarrel, sudden and of sufficient violence to amount to adequate provocation," are nearly identical with certain words occurring in section 195 of the Penal Code to which attention has been directed; but that, instead of advising the jury that where death was the result of such circumstances the homicide might be *excusable* the trial judge instructed the jury that the legal effect was that "the law out of forbearance for the weakness of human nature, * * * *will reduce the offense to manslaughter.*" The gist of such instruction was

---

⚷For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

the direct contrary to that part of the law contained in section 195 of the Penal Code, in that by such statute "homicide is *excusable* * * * when committed * * * in the heat of passion, upon any sudden and sufficient provocation, or upon a sudden combat, when no undue advantage is taken," etc. Considering the evidence in the case, it is apparent that to instruct the jury that, if the homicide in question was committed "in the heat of passion, excited by a quarrel, sudden and of sufficient violence to amount to adequate provocation," merely had the effect of *reducing the crime to that of manslaughter*, to all intents and purposes was a direction to the jury to find the defendant guilty of that crime. Self-defense and excusable homicide constituted the several defenses of defendant to the charge preferred against him; and the statute, as hereinbefore pointed out, enumerates and describes generally what conditions will be sufficient to *excuse* the commission of a homicide. Although the trial court gave to the jury certain instructions relating to the crime of manslaughter generally, as well as to what constituted *justifiable* homicide, in no instruction given to the jury were the rights of defendant attempted to be protected so far as the defense of excusable homicide was concerned. From even the brief summary of the evidence hereinbefore set forth, to say nothing of its amplification as shown by the reporter's transcript of the proceedings had before the trial court, it is manifest that circumstances were present at the time the homicide was committed which would fairly entitle defendant to have submitted to the jury for its determination the question of whether such homicide was *excusable* in the law because possibly committed as described in the statute to which reference has been had. People v. Bushton, 80 Cal. 160, 22 P. 157, 549; People v. Stokes, 11 Cal. App. 759, 106 P. 251.

It appearing that at least in such respect defendant was prejudiced in his substantial rights, it is ordered that the judgment be, and it is, reversed.

We concur: CONREY, P. J.; YORK, J.

---

96 Cal. App. 111

LAGORIO et ux. v. YERXA et al.★
(Civ. 6579.)

District Court of Appeal, First District, Division 2, California. Jan. 2, 1929.

Rehearing Denied Jan. 31, 1929. Hearing Denied by Supreme Court Feb. 28, 1929.

1. Vendor and purchaser 🔑185—Contract, wherein time was of the essence, held breached by purchaser's failure to pay monthly installments required.

Under contract for sale of realty, wherein time was made of the essence, and providing that, if payments in contract should be in default for over a certain period, all moneys theretofore paid should become forfeited and retained by vendor, and that agreement itself should be void, contract was breached by purchaser's failure to pay monthly installments, and hence contract was at an end.

2. Quieting title 🔑37(1)—Purchaser, to defeat forfeiture, because vendor accepted payments after maturity, should specially plead such defenses.

Purchaser, seeking to prevent forfeiture of contract, because vendor accepted payments on purchase price after time fixed by agreement of parties, should have specially pleaded such defense.

3. Abatement and revival 🔑40—Plea of prematurity must be specially pleaded.

Plea, that an action has been prematurely brought, is in nature of a dilatory plea, which must be specially pleaded to be available as a defense.

4. Quieting title 🔑44(2)—Admitting original contract without requiring proof of supplementary agreement held not error, wherein defendants claimed under contract of sale (Code Civ. Proc. § 1854).

In action to quiet title, wherein defendants claimed equitable title under contract of sale, admitting the original contract without requiring plaintiff to offer supplementary agreements between the parties, *held* not error, under Code Civ. Proc. § 1854, since, if there were any supplementary agreements between the parties, they should have been produced by defendants.

5. Usury 🔑18—Land contract held not loan, and hence not usurious, because providing for 24 per cent. interest on taxes, assessment, and insurance which purchasers failed to pay (St. 1919, p. lxxxiii).

That contract for sale of property, when construed under Civ. Code, § 1643, provided for payment of 24 per cent. per annum on taxes, assessments, and insurance, if purchasers failed to pay them, did not make contract usurious under Usury Law (St. 1919, p. lxxxiii), where requirement was simply one of the conditions of the contract under which purchasers agreed to purchase, and since contract did not grow out of a loan or forbearance of money.

Appeal from Superior Court, Alameda County; James G. Quinn, Judge.

Action by Vittorio Lagorio and wife against Thomas E. Yerxa, also known as Thos. E. Yerxa, and others. Judgment for plaintiffs, and defendants appeal. Affirmed.

Dunn, White & Aiken, of Oakland, for appellants.

Girard N. Richardson, Joseph C. Prior, and W. M. Nold, all of Oakland, for respondents.

BURROUGHS, Justice pro tem. This is an action to quiet title to the lands described in the complaint. The defendants answered, denying plaintiffs' ownership and alleging an equitable title in themselves by virtue of a

---

★Rehearing denied. Hearing denied by Supreme Court.

written contract of sale and purchase between plaintiffs and defendants. The action was commenced October 18, 1926, and tried by the court March 3, 1927. Judgment went for plaintiffs, and the defendants appeal.

At the trial plaintiffs offered, and the court received, in evidence conveyances vesting title to the lands in controversy in them. They thereupon rested their case. Over the objection of plaintiffs, counsel for defendants then offered, and the court received, in evidence a letter dated July 16, 1924, written by the plaintiff V. Lagorio to one Theodore Gier, in which the writer stated that the defendant Thomas E. Yerxa, the purchaser under the contract of sale of the lands described in the complaint, was not in default under the terms of said contract. With the reception in evidence of this letter, defendants closed their case. In rebuttal, Girard N. Richardson testified, without objection, that no payments had been made under the contract since June, 1926, and that the payments provided for were $5,000 per month, the total amount due thereon to be paid on or before January 1, 1927, and that at the time of the trial there were 10 monthly payments overdue. He further testified that the total purchase price was $70,000, of which amount the defendants had paid $32,000. Over the objection of the defendants, the court received in evidence the original contract between the parties. The defendants' objection was upon the ground that there were three or four supplemental agreements. In reply to the objection the court said: "They are introducing those they desire. If you want to introduce the others you may do so." Counsel did not take advantage of this offer, merely replying to the court: "I have not the original in my possession."

It is provided in the contract that time is of the essence of the agreement, and, should any sums of principal or interest or any other payments provided for in the contract be in default for a period of 30 days, all moneys theretofore paid shall become forfeited and retained by the first party as liquidated damages for the breach of the agreement, and the agreement itself shall be void.

[1, 2] Appellants' first contention is that, respondents having accepted payments on the purchase price long after the maturity dates recited in the contract, they cannot forfeit the appellants' interest in the property without giving notice of their intention to require strict performance in the future and allowing a reasonable time thereafter to perform before filing suit to quiet title. Stevinson v. Joy, 164 Cal. 279, 128 P. 751; Webber v. Herbert, 46 Cal. App. 83, 188 P. 819.

Under the terms of the contract the total sum of $70,000 was due on or before November 26, 1925. From the testimony of witness Richardson, it appears that payments were accepted as late as June, 1926, but it further appears from the uncontradicted evidence of the same witness, which was admitted without objection, that the amounts and times of payment had been changed to $5,000 per month, and that at the date of the commencement of the action there were 3 unpaid monthly installments. Such being the case, there is no evidence in the record that plaintiff accepted payments after the time fixed by the agreement of the parties, and the claim is therefore not well founded. Furthermore, to have availed themselves of such a defense, it should have been specially pleaded. 32 Cyc. 1316; Pennie v. Hildreth, 81 Cal. 127, 22 P. 398; Price v. Sixth District Agricultural Ass'n, 201 Cal. 503, 258 P. 387; 22 Cal. Jur. § 36, p. 158; Verbeck et al. v. Clymer et al., 202 Cal. 557, 261 P. 1017.

[3] The next error assigned is based upon the claim that, as the full amount was not due under the terms of the contract until January 1, 1927, the commencement of the action on October 18, 1926, was premature. This is answered by our previous holding that the contract was breached by appellants' failure to pay the monthly installments, and therefore the contract was at an end. Furthermore, in Verbeck et al. v. Clymer et al., supra, it is said: "It is well settled that the plea that an action has been prematurely brought is in the nature of a dilatory plea which must be specially pleaded in order to be available as a defense." In the case at bar there is neither pleading nor proof to sustain the claim.

[4] It is next assigned as a ground of reversal that the trial court erred in admitting in evidence the original contract without requiring the respondents to offer certain supplementary agreements between the parties, it being the contention of appellants that the original contract "was a partially superseded fragment of the entire contract instead of the whole contract." The only evidence before the court that there were any other contracts is the testimony of the witness Richardson that the terms of payment were changed to $5,000 per month, the entire sum to be paid on or before January 1, 1927. There was also some conversation between the attorneys which would indicate that there were some other agreements in existence. When the objection was made the trial court stated to counsel for the appellants, "If you want to introduce the others you may do so," to which counsel replied, "I have not the original in my possession." No offer was made to introduce the so-called supplementary agreements. Section 1854 of the Code of Civil Procedure provides as follows: "When part of an act, declaration, conversation, or writing is given in evidence by one party, the whole on the same subject may be inquired into by the other; when a letter is read, the answer may be given; and when a detached act, declaration, conversation or writing is given in evidence, any other act, declaration, conversation, or writing, which is necessary

to make it understood, may also be given in evidence."

We are of the opinion that the court was right in admitting the contract in evidence, and, under the above section of the Code, any supplementary agreements between the parties should have been produced by the appellants, if they were of sufficient importance to have affected the transaction.

[5] It is further claimed that the contract is in violation of what is commonly referred to as the "Usury Law" (Stats. 1919, lxxxiii). This claim is based upon the following provision of the contract: "It is agreed that all taxes and assessments on said real property subsequent to the first instalment of the current fiscal year, to whomsoever assessed shall be paid by said second party, who shall also keep the buildings on said land insured for at least the sum of four thousand ($4,000.00) dollars, payable in case of loss to said first party, and if any of said sums of taxes, assessments or insurance are not so paid by said second party and are paid by said first party, the same shall be repaid by said second party on demand in like gold coin with interest at the rate of two per cent (1%) per month and no deed of said land shall be given until such last named payment shall be made." It will be noted that the written portion of the foregoing provision of the contract provides for 2 per cent. per month interest, and that the figures provide for 1 per cent. per month. It is contended that this ambiguity must be construed in accordance with the rule that, where written words conflict with figures, the presumption is that the figures were typographical errors, and that the written words will control in the absence of a contrary intention. Payne v. Commercial Bank, 177 Cal. 68, 169 P. 1007. Hence, appellants say, this court must construe that the interest provision is at the rate of 24 per cent. per annum and contrary to said law, and, as a necessary sequence, under section 2 of said act, the contract is void as to any provision for interest, and, the full amount under the terms of the contract not being due until January 1, 1927, the action was prematurely brought. But, as we have already held, if the action was prematurely brought, it should have been met by plea in abatement.

We are of the opinion that counsels' contention is disposed of by the opinion in Verbeck et al. v. Clymer et al., supra, where it is held that the Usury Law applies only to cases of a loan or forbearance of money, and does not apply to a bona fide transaction of purchase and sale. This decision cites with approval the following language from 39 Cyc. p. 526: "It is manifest that any person owning property may sell it at such price and on such terms as to time and mode of payment as he may see fit, and such a sale, if bona fide, cannot be usurious, however unconscionable it may be." The case also approves the following principle stated in 27 R. C. L. pages 213, 215: That the first element of a usurious transaction is that there be a loan or forbearance of money, for, if there is neither, there can be no usury. In 39 Cyc. 953, it is said: "When an excessive rate of interest is made payable only in case of default in payment of the principal, the higher rate is not for the use of the money, but imposed as a penalty for nonperformance of the contract. By his own act the debtor may relieve himself of the excess payment. Whether such penalty for the nonperformance of the contract is held enforceable or not, all authorities are agreed that the contract is not usurious, but remains a valid and enforceable obligation against the debtor." In the case at bar, giving full effect to counsels' claim that the contract provides for payment of 24 per cent. per annum on taxes, assessments, and insurance, which, under the terms of the contract, appellants may fail to pay, it is simply one of the conditions of the contract under which defendants agreed to purchase. The contract does not grow out of a loan or forbearance of money, and therefore is within the principle announced in the Verbeck Case, supra. Counsel for respondent also cites section 1643 of the Civil Code, which reads as follows: "A contract must receive such an interpretation as will make it lawful, operative, definite, reasonable, and capable of being carried into effect, if it can be done without violating the intention of the parties." To give effect to the ambiguity, in accordance with the view of counsel for appellants, would do violence to the foregoing section of the Code, and it would seem in the present case that the ambiguity should be interpreted in the light of this section. It appears from an examination of the record that the trial court's attention was not directed to said ambiguity.

We are not unmindful of the fact that this contract, which calls for the payment of some $70,000 of which sum the defendants have paid $32,000, forfeits the money so paid, but courts are not authorized to relieve parties from the harshness of a contract which has been freely and voluntarily entered into. There is nothing in the present case which would authorize the court in setting aside or extending the terms of the contract.

The judgment must be affirmed, and it is so ordered.

We concur: NOURSE, Acting P. J.; STURTEVANT, J.

96 Cal. App. 121

HISS v. MULHOLLAND et ux. (Civ. 5345.)★

District Court of Appeal, Second District, Division 1, California. Jan. 3, 1929.

Rehearing Denied Jan. 24, 1929. Hearing Denied by Supreme Court March 4, 1929.

1. Appeal and error 🔑1010(1)—Rulings involving questions of fact supported by substantial evidence may not be disturbed on appeal.

Rulings involving questions of fact which are supported by substantial evidence may not be disturbed on appeal.

2. Brokers 🔑44—Vendor and purchaser 🔑18(4)—Owner granting option to purchase property and commission if option was exercised could not terminate option nor agreement for commissions before expiration of option.

Under written agreement granting exclusive option to purchase property and providing for payment of commission in event of exercise of option, owner had no right to terminate or repudiate option nor agreement to pay commissions prior to expiration of term of option.

3. Brokers 🔑65(4)—Plaintiff's agency to find purchaser for defendant and agency for others to acquire property held not inconsistent, where plaintiff dealt with defendant at arms' length.

Where plaintiff and defendant dealt at arms' length in fixing purchase price of property under contract granting plaintiff option to purchase and providing for commissions to plaintiff in event of exercise of option, and plaintiff informed defendant that he had client who wished to purchase property in neighborhood, there was nothing inconsistent between plaintiff's agency for others to purchase property and agency for defendant to find purchaser, nor was there any confidence violated sufficient to preclude plaintiff's recovery of commission on exercise of option.

4. Brokers 🔑65(4, 5)—Agent may purchase property for himself or others, where owner authorizes sale at fixed price with right of agent to receive excess.

When owner authorizes sale by agent at fixed price made to him, with understanding that agent shall be entitled to any excess thereover, agent may without violating any trust relationship purchase property on own account or act as agent of others in acquiring property.

5. Brokers 🔑65(4)—Plaintiff granted option to purchase property and commissions if exercising option could recover commissions, though option was assigned as step in procuring purchaser.

Under agreement granting plaintiff exclusive option to purchase property and providing for commissions in event option was exercised, assignment of option to purchase to another, with reservation of right to commissions, as step in procurement of purchaser, *held* not to preclude plaintiff from recovering commissions on ground that defendants were entitled to plaintiff's services and that purchaser was not found until after assignment.

6. Brokers 🔑84(1)—Plaintiff could recover commissions on procuring purchaser, though not proving price set by defendant before any relation existed between parties was fair.

Where defendant fixed own price for property under agreement granting option to purchase and right to commissions if option was exercised, and defendant did not claim confidential relations existed between parties at time option was obtained, defendant could not claim fraud respecting amount of purchase price, and plaintiff was not precluded from recovering commissions on procuring purchaser on ground that no evidence was offered to show purchase price was fair, just, and equitable.

7. Brokers 🔑85(9)—In action to recover commissions for procuring purchaser at price fixed by defendant, evidence that property was worth more was immaterial.

Where defendant fixed own price for property under agreement granting option to purchase and right to commissions if option was exercised, and defendant did not claim confidential relations existed between parties at time option was obtained, evidence by defendant that property was valued in excess of amount stipulated in agreement was immaterial.

8. Appeal and error 🔑1071(3)—That findings on portions of defense were unsupported held not ground for reversal, where finding against indispensable portion of defense was supported (Code Civ. Proc. § 475).

Where finding against portion of defense without which defense must fail was amply supported by evidence, it is not ground for reversal, if findings as to other portions of defense were not supported by evidence under Code Civ. Proc. § 475.

9. Appeal and error 🔑1071(1)—Error in finding against appellant on particular issue is not prejudicial if appellant obtains all relief to which he would have been entitled.

Any error in finding against appellant on particular issue is without prejudice to him if judgment gives him all relief to which he would have been entitled had finding thereon been in his favor.

Appeal from Superior Court, Los Angeles County; Frank C. Collier, Judge.

Action by B. H. Hiss against Gus Mulholland and wife. Judgment for plaintiff, and defendants appeal. Affirmed.

William Ellis Lady, of Los Angeles, for appellants.

Bernard G. Hiss and Wm. P. Boland, both of Los Angeles, for respondent.

CRAIL, Justice pro tem. This appeal is from a judgment in favor of the plaintiff in an action for the recovery of a commission alleged to be due under an agreement between plaintiff and the defendants, involving also an option for the sale of the defendants' real property. The defendants on February 29, 1924, for a consideration of $200 in hand paid, executed a written agreement

---

★Rehearing denied. Hearing denied by Supreme Court.

whereby they gave the plaintiff the exclusive right or option until March 10, 1924, to purchase their property. The agreement further provided that it should inure to the benefit of the assigns of the second party, and provided for a broker's commission as follows: "First party agrees to pay B. H. Hiss as commission in the event of the exercise of the option five (5%) per cent. of the total purchase price to be paid through and at the close of escrow." The plaintiff, on March 3, 1924, assigned the foregoing option to one J. J. O'Regan, reserving to himself the commission to become due in the event of the exercise of the option, and, according to the testimony of plaintiff, this was before the tender of a letter from defendants to plaintiff, which is set out in abbreviated form as follows: "March 3, 1924. I hand you herewith my check for $200, being the amount you handed me on February 29, 1924, in connection with the document signed by me and my wife and I hereby cancel and terminate the relation created at the time of the signing of said document. I do not intend to sell the property and your authority to find a purchaser is hereby terminated and canceled. I likewise rescind said document. I would not care to sell the property for the reason that I feel it is worth much more than $18,000, and inasmuch as you took this document in the form you prepared it but for the purpose of finding a purchaser, I feel you have no right as optionee or as agent now to find a purchaser. I will not transfer the property." Within the time specified in the option J. J. O'Regan notified defendants of his election to purchase the property pursuant to the terms of the option and deposited the purchase price in escrow as therein required, but defendants refused to proceed. Thereupon this action was commenced. The defendants filed an answer in which, after denying several allegations of the complaint, they set up a special defense, as follows: That on February 29, 1924, while plaintiff became and was the agent of defendants as aforesaid, plaintiff induced the defendants to execute said option at the sale price of $18,000, whereas at the time the property was worth $30,000, of which fact defendants were not aware until the 2d or 3d of March, 1924; that thereupon they inquired of plaintiff if he had taken any steps to exercise the option, who said that he had not and that he had not found a purchaser; that thereupon defendants rescinded the option, giving the plaintiff the letter above set out; that the agency created by said option was for no definite period of time and that they terminated it before plaintiff exercised it or found a purchaser; that the option and the contract for a 5 per cent. commission were not severable. There was another affirmative and separate defense set out in paragraph V of defendants' answer, but the trial court found against the defendants on all the allegations set up in said paragraph.

This is a companion case to Hiss v. Sutton (Cal. Sup.) 264 P. 748. The plaintiff is the same in both cases, the defendants are owners of adjoining properties, and the options and contracts for fees are similar.

[1] Appellants set out 16 grounds for reversal of the judgment, several of which have groups of subdivisions. Ten pages of appellants' long brief are required merely to state the points for reversal. It would serve no useful purpose to set them out in full or to take them up one at a time, provided we are able to cover them in groups and thus more expeditiously state the grounds of our decision. Many of the points are covered by the decision in Hiss v. Sutton, supra, and are decided adversely to appellants. Others involve questions of fact which are supported by substantial evidence and may not be disturbed on appeal. Another involves a conclusion of law which is supported by the findings of fact. All of such points have been considered and the grounds for our decision regarding them are stated above. The remaining points will receive more detailed consideration herein.

[2] It is the contention of appellants that the agency between the parties was an oral agency and was for no particular length of time. The agreement to pay the 5 per cent. commission was in writing and was made for a valuable consideration, and the contract was to pay a commission in the event of the exercise of the option, which right extended for a period of ten days. The defendants had no right to terminate or repudiate the option nor the agreement to pay the commission to become due in the event of the exercise of the option prior to the expiration of its term.

[3, 4] Appellants next contend that plaintiff was the agent of others for the purpose of acquiring the property at the very time defendants orally appointed plaintiff their agent to find a purchaser, and that plaintiff had been directed to obtain the property at the best price obtainable, to take an option in his own name, and to pay no more money than was necessary, such money being provided by the other parties, of which defendants had no knowledge, and to which they never consented, and that plaintiff cannot recover because the agencies were antagonistic. It will be observed that this involves a chain of facts each one of which it would be necessary for appellants to establish before the defense would be a sufficient one. Each and all of the facts, however, were found against appellants by the trial court. We mention this contention specifically because it runs all through appellants' brief. It is the one upon which they chiefly rely for reversal. The amount of the purchase price was fixed by appellants at the time the parties were

dealing at arms' length. There was never any suggestion from the plaintiff that the price be reduced. The option to purchase ran in the name of plaintiff, and here again the parties were dealing at arms' length. The plaintiff testified that upon his first approach to the defendants he told them that he had a client who wished to purchase property in the neighborhood, and on cross-examination the defendants admitted this. Furthermore, there was nothing inconsistent in the relationship as claimed and no confidence violated. It is doubtless true that, where an agent is employed to obtain for his principal the highest possible price for property, fiduciary relations arise out of such employment which preclude the agent from becoming the purchaser or acting for others and unduly profiting to the injury of the employer. But where an owner authorizes the sale by an agent at a fixed price net to him, with the understanding that the agent shall be entitled to any excess thereover, the agent may, without violating any trust relationship, purchase the property on his own account or act as the agent of others in acquiring the same. Allen v. Dailey (Cal. Sup.) 268 P. 404.

[5] Appellants also contend that plaintiff cannot recover for the reason that defendants had a right to expect and receive the personal efforts of plaintiff, and before he found a purchaser he transferred the instrument to Mr. O'Regan, who had no right to act for defendants, and that it was not until after such transfer that a purchaser was found. But no services were expected of plaintiff other than the finding of a purchaser on the terms provided in the option, and plaintiff found such purchaser. The assignment to Mr. O'Regan was only an assignment of the option to purchase. The plaintiff reserved the right to his commission and continued his personal efforts to produce a purchaser. The assignment of the option was a step in the procurement of a purchaser.

[6, 7] It is next contended by appellants that at a time when a confidential relation existed between the parties the plaintiff obtained the option from defendants, and that no evidence was offered or received on behalf of plaintiff that the purchase price was fair, just and equitable. But such a defense involves fraud, and there are no allegations of fraud respecting the amount of the purchase price; no claim of misrepresentation or concealment. There could be none, because the defendants fixed their own price for the property before any relation existed between the parties. There is no allegation even that a confidential relation existed at the time the option was obtained. On the contrary, the allegation is that the option was obtained and the relation was created on the same day, i. e., February 29, 1924; and, again, that "the agency (was) created by the option"; and these allegations are made only in and as a part of a paragraph in which the defense set up is that the contract was terminable at any time and that therefore the defendant had a legal right to terminate the relation of agent, which he did because he discovered the value of the property was greater than he thought when he made the plaintiff his agent. It is not even alleged that the plaintiff, at the time the contract was entered into, knew the value of the property was greater. There is no merit in such contention. For these reasons, also, the offer of defendants to prove the value of the property to be $30,000 was immaterial. The trial court made findings of fact covering all material allegations in the pleadings and the findings were supported by sufficient evidence.

[8, 9] As heretofore stated, the trial court made a finding against defendants as to all allegations in paragraph V of defendants' separate defense. Appellants contend that this finding as to several of the allegations contained in said paragraph is not supported by the evidence. However, the finding against defendants' allegation that at the time plaintiff became the agent of defendants neither of them had any knowledge that plaintiff was the agent of other persons for the purpose of purchasing the property and at no time consented that plaintiff might so act is amply supported by the evidence, and without a finding for defendants on this allegation this defense fails. Under such circumstances it is not ground for reversal if findings as to other portions of the defense are not supported by evidence. Code Civ. Proc. § 475. Any error in finding against an appellant on a particular issue is without prejudice to him if the judgment gives him all the relief to which he would have been entitled had the finding thereon been in his favor. 2 Cal. Jur. p. 1029; Pugh v. Moxley, 164 Cal. 374, 128 P. 1037.

There was no prejudicial error committed by the trial court in its rulings on the admission of evidence. As heretofore stated, the case is largely controlled by the case of Hiss v. Sutton, supra.

Judgment affirmed.

We concur: HOUSER, Acting P. J.; YORK, J.

96 Cal. App. 149

ROSENBAUM v. LUCE et al. (Civ. 6469.)

District Court of Appeal, First District, Division 2, California. Jan. 5, 1929.

Negligence ⚷121(3)—**Doctrine of res ipsa loquitur held inapplicable as to damage to merchandise from water seeping through ceiling from apartment above.**

Doctrine of res ipsa loquitur *held* inapplicable as to damage to stock of merchandise by reason of seepage of water through ceiling from apartment overhead when the drainpipe in basement became stopped up, there being no evidence tending to show that instrumentality causing injury was under the control of the lessees of the apartment building.

Appeal from Superior Court, City and County of San Francisco; Walter Perry Johnson, Judge.

Action by J. Rosenbaum against First Doe Luce and others. Judgment for plaintiff, and defendants appeal. Reversed.

T. F. Draper, of San Francisco, for appellants.

Milton A. Nathan, of San Francisco, for respondent.

NOURSE, J. Plaintiff sued to recover damages to his stock of goods, which was injured by seepage of water from the premises occupied by the defendants. The cause was tried by the court sitting without a jury and resulted in a judgment for the plaintiff in the sum of $1,147.50. The defendants have appealed on a typewritten record.

The plaintiff was the lessee of a storeroom on the first floor of a five-story building, situated on Polk street, in the city and county of San Francisco. The defendants were lessees of the four upper stories of the same building. The plaintiff conducted a suit and cloak business and the defendants an apartment house, subletting the separate apartments to separate subtenants. On the morning of July 7, 1927, when plaintiff opened his place of business, he found that water had seeped through the ceiling of his store and damaged his stock in trade. Upon investigation it was found that water had come from the floor of apartment No. 219 on the second floor of the building. A plumber was called by the defendants, who examined the plumbing in this apartment and found it free from defect. He then voluntarily went to the basement under plaintiff's store and found the drainpipe into the sewer stopped up. He removed the obstruction and the water flowed from the pipes without further leakage.

The complaint alleged that the carelessness and negligence of the defendants "consisted and consists in their failure to prevent the seepage of water through the floor dividing and separating the premises of plaintiff from the premises of said defendants." The trial court found that the defendants "supervised, maintained and used said premises, including said plumbing and plumbing appurtenances, or fixtures, so negligently and carelessly" that water seeped through the floor and damaged plaintiff's stock of goods.

The finding of negligence is not supported by any competent evidence, and the respondent seeks to support the judgment solely upon the application of the doctrine of "res ipsa loquitur." In support of this theory, respondent cites two pieces of evidence—one of which is supported by the record, while the other is not. He first cites the opinion of one of the appellants, given as a witness, that the water backed up and overflowed in the basin of the apartment because the drainpipe under the store of respondent was stopped up. He then states that the evidence shows that the washbasin and the drainpipe in the basement were both under the exclusive control of appellants, and follows this with the statement that "neither of the parties to this action rented, used, or controlled that basement." The evidence shows without conflict that the basin and the apartment were under the control of a subtenant of appellants and that the drainpipe was located under the store of respondent, and that appellants had neither supervision nor control over it.

That none of the elements necessary for the application of the "res ipsa loquitur" doctrine are present seems too plain for argument. The case is on a par with White v. Spreckels, 10 Cal. App. 287, 101 P. 920, where this doctrine is fully discussed and the cases are cited. Particularly applicable to the case here is the citation from Ryan v. Fall River Iron Wks., 200 Mass. 188, 86 N. E. 310, where it is said: "When the precise cause is left to conjecture and may be as reasonably attributed to a condition for which no liability attaches as to one for which it does, then a verdict should be directed against the plaintiff." Here the overflow occurred in an apartment over which appellants had no control; the plumbing in the apartment was inspected and found free from defect; the opinion was expressed that the overflow was caused by a stoppage in the drainpipe under respondent's store; if this was so, the respondent may have been equally responsible for the condition.

In the recent opinion in Olson v. Whitthorne & Swan Co. (Cal. Sup.) 263 P. 518, our Supreme Court said: "To render the doctrine applicable 'it must be shown that the instrumentality causing the injury was under the control of the defendant and that the injury was caused by some act incident to that control,' and the injury 'must be of such a nature that it ordinarily would not have occurred but for the defendant's negligence.' 19 Cal. Jur., 708, 710. It does not apply 'where an unexplained accident might have been caused by plaintiff's negligence, or been due to one of several causes, for some of which the defendant is not responsible.' 19 Cal. Jur., 710, 711."

There is no evidence in this record tending to show that the instrumentality causing the injury was under the control of the appellants, or that they were guilty of any act of commission or omission causing or contributing to the injury. On the other hand, the case is merely one of an unexplained accident which might have been caused by respondent's own negligence.

The judgment is reversed.

We concur: KOFORD, P. J.; STURTEVANT, J.

---

96 Cal. App. 58

In re MERRILL.

SCHUTZ et al. v. MERRILL.

(Civ. 3612.)

District Court of Appeal, Third District, California. Dec. 28, 1928.

1. Schools and school districts ⚷53(1)—Qualified county electors, listed on great register used in preceding general election, and still residing in precinct, could vote for school trustees at March election (Pol. Code, §§ 1041, 1043, 1044, 1083, 1094, 1120, 1121, 1593, 1598; Const. art. 2, § 1).

Under Pol. Code, §§ 1044, 1083, 1094, 1120, 1121, 1598, and Const. art. 2, § 1, qualified electors of county, whose names appeared on great register used in preceding general election, and who were still residing in precinct, had legal right to vote for school district trustees at election held in March, 1928, under section 1593, though such elections are neither general nor special elections within sections 1041, 1043.

2. Elections ⚷10½—Constitutional right to vote cannot be denied, in absence of plain prohibitory statute as to method of exercising right (Const. art. 2, § 1).

The right to vote, given by Const. art. 2, § 1, is not to be denied, in absence of plain prohibitory provision of Code as to method of exercising such right.

Appeal from Superior Court, Colusa County; Ernest Weyand, Judge.

Action by H. H. Schutz and another against A. P. Merrill, contesting the latter's election as trustee of Pierce Joint Union High School District. Judgment for defendant, and plaintiffs appeal. Affirmed.

Rutledge & Rutledge, of Colusa, for appellants.

Albert E. Sheets, of Sacramento, and Chas. K. Atran, of Portland, Or., for respondent.

PLUMMER, J. As stated by appellant, this action involved but one question, to wit: Whether a voter at a school election held on March 30 of the year 1928 was required to be on the great register for the year 1928 and to have registered during the year 1928, 30 days prior to such election, or whether it was sufficient that the voter had registered and his name was on the registration roll of what has been called in the pleadings the old register, or the register used at the previous general election.

At the election held for school trustees of Pierce joint union high school district on March 30, 1928, the respondent received 390 votes. The appellant J. M. Peart received 385 votes. It was stipulated at the trial that, of the 390 votes received by the respondent, 11 were cast by persons who had not registered during the year 1928, but were all properly registered on what is called the old register, or the register used at the previous general election. One vote was cast for the respondent, conceded to have been illegal by reason of the disqualification of the voter.

The trial court held that the 11 persons whose names properly appeared upon the old register, and who possessed the necessary qualifications provided by law, were qualified voters and entitled to cast their ballots for school trustee in said district on the 30th day of March, 1928.

By stipulation, all of the preliminary matters necessary to sustain a contest and present the question as to the legality of the votes contested, were presented to the trial court. We have, therefore, only to deal with the legal questions involved.

[1] By section 1593 of the Political Code it is provided that an election for school trustees must be held in each school district on the last Friday of March of each year, and by section 1598 of the Political Code the necessary qualifications of an elector to vote at a school election are set forth as follows: "Every elector, resident of the school district, who is a qualified elector of the county, and who is registered in the precinct where the election is held at least thirty days before the election, may vote thereat."

Section 1083 of the Political Code fixes the qualifications constituting a qualified elector of a county, to wit: "Every native citizen of the United States, every person who shall have acquired the rights of citizenship under or by virtue of the treaty of Queretaro, and every naturalized citizen thereof, who shall have become such ninety days prior to any election, of the age of twenty-one years, who shall have been a resident of the state one year next preceding the election, and of the county in which he or she claims his or her vote ninety days, and in the election precinct thirty days, and who has conformed to the law governing the registration of voters, shall be a qualified elector at any and all elections

---

⚷For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

held within the county, city and county, city, town, or district within which such elector resides." This section, in prescribing the qualifications of an elector of a county, specifically states that such an elector, conforming to the requirements of the section, shall be a qualified elector at any and *all* elections, not only those held within the county, city and county, state or town, but also of the district within which the elector resides. The particular election is not specified; it simply reads, "*all* elections." There are no limitations in the section as to general, special or primary elections, but vouchsafes the right to vote at *all* elections held in the district, city, town, or county where the elector resides. If a qualified elector, under the terms of section 1083 of the Political Code, then, according to the wording of section 1598 of the Political Code, the elector has a right to vote at any election for school trustee in the district in which he resides.

It is contended, however, that other sections of the Code limit the exercise of the right of suffrage in school elections, even though a voter may be entitled to vote at the county election or at a municipal election. In this behalf, our attention is directed to a proviso contained in section 1094 of the Political Code relating to registration of voters. This proviso reads as follows: "Provided, that where any general or special municipal election, or any other special election, including any primary election and all special elections to vote for officers, or upon or for or against any proposition or question authorized to be submitted to a vote, is held on or after the first day of January and before the first day of April of any even-numbered year, the original affidavits of registration and indexes used in the last general state election, in any county or city and county in this state, together with the original affidavits of registration since the last election, and supplemental indexes, showing all additional registrations, changes and corrections made since the registration for the last general election, completed to and including the thirty-first day prior to said election then being held, may be used at such election to determine the persons entitled to vote thereat." This proviso, however, does not purport in terms to limit, add to, or detract from the qualifications of electors specified in the sections of the Political Code which we have heretofore cited. The proviso has for its purpose the setting forth of a guide or method or means to be used by the election officers in determining whether any particular person is or is not entitled to vote at the election being held. The Code sections which we have cited, all being parts of the same Political Code, and not a single one of the sections quoted purporting, either in terms or by any intendment whatever, to amend, change, or alter the terms of any other section, they must all be read together and harmonized. With such reading it is evident that, if one is entitled to vote at an election in the county which includes the district in which he resides, he is likewise entitled to vote at all elections held in the district in which he resides, including election for school trustees. There is no escaping the conclusion that the challenged voters in this case all possessed the right to vote at any election held in the county and in the precinct in which they were residing, and it is likewise unescapable that the words "all elections" includes school elections, or elections for school trustees.

Again, it is urged that the Code provides only for general elections, special elections, and municipal elections, and does not mention the elections referred to in section 1593 of the Political Code, pertaining to the election of school trustees. In this particular our attention has been called to sections 1041, 1043, and 1044 of the Political Code. Section 1041, supra, reads: "There must be held throughout the state, on the first Tuesday after the first Monday of November, in the year 1880, and in every second year thereafter, an election, to be known as the general election." Section 1043, supra, is as follows: "Special elections are such as are held to supply vacancies in any office, and are held at such times as may be designated by the proper board or officer." And section 1044, supra, sets forth that: "Except in the particulars or cases otherwise provided for in the Constitution or laws of the state or by the provisions of a freeholder charter duly adopted or amended pursuant to the Constitution of this state, all municipal elections, where the same are held separate from state elections, and all elections held under the authority of section eight of article eleven of the Constitution, to elect boards of freeholders, or to vote upon proposed charters, or upon amendments to existing charters, and all other special elections, including all special elections to vote upon or for or against any proposition or question authorized to be submitted to a vote, shall be conducted under the provisions of sections 1044, 1120, 1121, 1133, and 1151 of this Code." Section 1121 contains a reference to the registration that shall be used when the election is held on an even-numbered year prior to the 1st day of April thereof. If the election is held prior to the 1st day of April, the old register with supplemental registrations may be used. If the election is held after the 1st day of April of any even-numbered year, then the section requires the use of the registration or affidavits of registration, etc., which have been had during the even-numbered year when the election is being held. Section 1120, supra, is only an additional provision relating to the qualifications of electors as mentioned in section 1044 of the Political Code, and explicitly states that: "Every person who was a qualified elector at the general state election immediately preceding the holding of any of the elections mentioned in section 1044 of this Code, and who was registered as required by law as a qualified elector of any one of the precincts which together composed the special election or consolidated election precincts, and who continues to reside within the exterior boundaries of such special election or consolidated election precinct, until the time of holding of the election provided for and held under said section 1044, shall be entitled to vote at said election, without other or additional registration except as provided in the second paragraph of this section." The second paragraph refers simply to the dividing line when the old and the new registrations must be used. It thus appears, again, from section 1120 of the Political Code that any one who is a qualified elector residing in the election precinct where the election is being held, and who is registered according to the law requiring registration for the previous general election, may vote. This second reading, in connection with section 1083, supra, giving such a person a right to vote at all elections, reinforces the right of the elector to vote at a school election.

It is further argued that, as the Legislature has defined two kinds of election, to wit, by section 1041 of the Political Code, a general election, as the election held on the first Tuesday after the first Monday of November, etc.; and, further, by section 1043, designated special elections as: "Special elections are such as are held to supply vacancies in any office, and are held at such times as may be designated by the proper board or officer"; and, as elections for school trustees are neither general state elections nor special elections, the Code provisions which we have cited do not apply. We may admit that the definition used by the Legislature in section 1043 of the Political Code, referring to special elections, does not in terms include an election held under the provisions for the election of school trustees. It may likewise be admitted that section 1041, supra, describing a particular election, which is held in November, as the general election, cannot apply to the election held for the choosing of school trustees. This does not necessitate the holding, however, that the Legislature intended, by the sections which we have quoted, to exclude, from participation in the election of school trustees, persons who are qualified under the terms of section 1083 of the Political Code to vote at *all* elections, as provided for in that section, including county, city, town, or district within which such elector resides.

That the words "general election," as used in the proviso contained in section 1094 of the Political Code, may have a broader meaning than the use made of the word in section 1041 of the Political Code, is sanctioned in the case of People v. Town of Berkeley, 102 Cal. 298, 36 P. 591, 23 L. R. A. 838. We quote from the opinion on page 306 thereof (36 P. 593): "The election held on May 8, 1893, was the annual election provided for by law for the election of municipal officers, and, in our opinion, it was a general election at which the question of reorganization might properly be submitted. It is true that the words 'general election' are ordinarily used to designate one at which state and county officers are elected, but we know of no provisions in the Constitution or statutes limiting them to such an election. Two classes of elections only are spoken of, general and special; and a regular annual municipal election cannot be included in the latter class, but must be treated as a general election."

The views which we have taken as to the application of section 1083 of the Political Code to the case at bar are supported in the case of Falltrick v. Sullivan, 119 Cal. 613, 51 P. 947. The court in that case, referring to section 1083 of the Political Code, and the right of a voter to vote at a school election being the same as that required for electors of a county, uses the following language: "Section 1083 of the Political Code, as it stood before the amendment of 1893, simply required that the name of the voter 'shall be enrolled on the great register of the county.' This provision was amended in 1893 by adding the words, 'fifteen days prior to an election.'" (This provision has also been added to, as we have stated, but does not change the application.) "Under the title, 'Election for School Trustees,' the Political Code, section 1598, provides: 'Every qualified elector of the county, who has resided in the district for thirty days next preceding an election, may vote thereat.' Under these provisions, it is clear that, if the five persons above named were not qualified electors of the county, they were not entitled to vote for school trustees, enrollment on the great register fifteen days before an election being essential." These sections have been amended since the decision in the case of Falltrick v. Sullivan, supra, but the essential requirement is still the same, to wit: To vote at a school election the elector must be a qualified voter in the county. Section 1098, Political Code, reads exactly the same. Section 1083 of the Political Code has been amended since the decision in the case of Falltrick v. Sullivan, supra, more clearly specifying what constitutes a voter within a county, but section 1598, providing that such a voter may vote at an election held by the choosing of school trustees, is unchanged. The opinion in the case of Falltrick v. Sullivan, supra, further holds: "School trustees are required to be elected annually on the first Friday in June, and it is obvious that the old register must remain for all purposes required by law before the completion of the new register, and the board of supervisors have no authority to declare it canceled before the registration is completed. It should be added that the five persons alleged to have voted illegally for respondent were not enrolled upon the great register alleged to have been canceled." In that case, although the election was then held in June, and now held in March, if the voter had complied with all the requirements of the law relative to placing his name upon the old registration list, he would have been entitled to vote.

[2] Again, the right to vote in this state is a constitutional right, and is not to be denied, unless there is a plain provision of the Code, relative to the method of exercising that right, which prohibits. Section 1 of article 2 relative to the right of suffrage, so far as applicable here, reads: "Every native citizen of the United States, every person who shall have acquired the rights of citizenship under or by virtue of the treaty of Queretaro, and every naturalized citizen thereof, who shall have become such ninety days prior to any election, of the age of twenty-one years, who shall have been resident of the state one year next preceding the election, and of the county in which he or she claims his or her vote ninety days, and in the election precinct thirty days, shall be entitled to vote at all elections which are now or may hereafter be authorized by law." Here, by express language, *all* elections are referred to, not simply municipal, not simply county, not simply city, not simply district, but *all* elections, and it cannot be logically argued that, if one is entitled to vote at all elections held in the city, town, county, or district in which he is a resident, and at which he would be entitled to vote under the registration laws to which we have referred, such a person is not entitled to vote for school trustees at an election held for such purpose.

We do not deem it of any particular importance whether the election for school trustees held on the last Friday in March of each year all over the state is a general election or a special election, or a general election for the special purpose of electing school trustees. The sections which we have quoted clearly vouchsafe the right to vote at such election to any one who is a qualified elector, for any other of the purposes mentioned in the Code provisions. While not necessary to so hold in order to sustain the judgment of the trial court in this case, we may mention the fact that, in the case of Pass School District v. Hollywood District, 156 Cal. 416, 105 P. 122, 26 L. R. A. (N. S.) 485, 20 Ann. Cas. 87, the opinion refers to "school district" in the following language: "School districts of this state are public quasi municipal corporations." Citing Hughes v. Ewing, 93 Cal. 414, 28 P. 1067; Kennedy v. Miller, 97 Cal. 429, 32 P. 558. "Subject to such constitutional limitations as may exist, the power of the Legislature over these public municipal corporations is plenary," etc. Thus, the inference may readily be drawn that the Legislature, in speaking of municipal elections, intended to include what the courts have held to be, or referred to as, "quasi municipal corporations," which would bring school elections within the literal wording of the provision contained in section 1094 of the Political Code.

The Code provisions which we have cited, when read together, we think lead clearly and unavoidably to the conclusion that the electors of the county, whose names appeared upon the great register used at the preceding general election, who were still residing in the precinct in which the election was being held, had a legal right to cast their ballots for school trustees at the election held on the last Friday in March, 1928, and that the trial court was correct in so holding.

The judgment is affirmed.

We concur: FINCH, P. J.; HART, J.

---

96 Cal. App. 169

GALWEY v. PACIFIC AUTO STAGES, Inc.★

(Civ. 6511.)

District Court of Appeal, First District, Division 1, California. Jan. 8, 1929.

Rehearing Denied Feb. 7, 1929.

1. Automobiles 🔑160(1)—Pedestrian and automobile have equal rights on highway.

Neither pedestrian nor automobile has superior right on highway, and conduct of both must be regulated by this rule.

2. Automobiles 🔑217(5)—Ordinary care of pedestrian, attempting to cross street after looking for approaching vehicles, must be determined in light of attending circumstances.

Where pedestrian looks for approaching vehicles before proceeding over crossing, question, whether he is negligent in attempting to cross street under rule of ordinary care, must be determined by consideration of attending circumstances.

3. Automobiles 🔑245(8)—Stage driver's compliance with Vehicle Act held question for jury, in action for injuries to child struck by auto stage while crossing street (Vehicle Act, § 113, as amended by St. 1927, p. 1436, § 30).

In action for injuries sustained by minor child struck by auto stage while attempting to cross street, question, whether driver of stage complied with requirements of the Vehicle Act (St. 1923, p. 553), § 113, as amended by St. 1927, p. 1436, § 30, as to care in driving and rate of speed, *held* for jury.

4. Automobiles 🔑245(40)—Whether automobile accident occurred in residence district held question for jury, in action for injuries, under evidence that signs prescribing residence district speed limit had been posted in locality (Vehicle Act, § 116 and § 114, as amended by St. 1927, p. 1437, § 31; Code Civ. Proc. § 1963, subd. 15).

In action for injuries to child struck by auto stage while attempting to cross street, question, whether point at which accident occurred lay within residence district, as defined in Vehicle Act (St. 1923, p. 554), § 114, as amended by St. 1927, p. 1437, § 31, limiting speed to 20 miles

---

★Rehearing denied.

an hour in residence district, *held* for jury, where signs were placed in district limiting speed limit under section 116; it being presumed that official duty was regularly performed under Code of Civ. Proc. § 1963, subd. 15.

5. Automobiles 🔑246(31)—Instruction, permitting recovery from defendant, for negligence in operation of auto stage causing injury to pedestrian, held not misleading, where recovery was made conditional on plaintiff's freedom from negligence.

In automobile accident case, instruction, with regard to defendant's duty in operating its auto stage, as related to safety of pedestrians, permitting recovery for negligence which proximately caused injuries, *held* not erroneous as misleading, where it was required that plaintiff should be free from negligence.

6. Trial 🔑296(4, 5)—Omission of definition in instruction on due care held not prejudicial, where matter was covered by other instructions.

Instruction, that plaintiff in crossing street was "chargeable only for the exercise of a due amount of care," *held* not prejudicial for failure to define terms, where defect, if any, was cured by other instructions covering the omitted matter.

7. Trial 🔑256(1)—One desiring fuller instruction should prepare instruction for trial court or express desire for fuller instructions.

Party who desires fuller and more elaborate instruction is under duty to prepare and present the same to the trial court, or to indicate his desire for further instructions.

8. Automobiles 🔑245(91)—Child's recovery, under last clear chance doctrine, for injuries from contact with auto stage, held question for jury.

Child's right of recovery, under last clear chance doctrine, for injuries sustained from collision with auto stage in crossing street, *held* properly submitted to jury under doctrine of last clear chance, in view of defendant's testimony as to good condition of lights and brakes.

9. Negligence 🔑72—Omission or unwise choice of person suddenly put in perilous position is not of itself contributory negligence.

If plaintiff is suddenly put in peril without having sufficient time to consider all the circumstances, his omission of some precaution, or his unwise choice, is not of itself contributory negligence.

10. Trial 🔑260(1)—Refusal of instruction fully covered by instructions given is not ground for reversal.

Refusal of instruction requested is not ground for reversal, where instruction so refused is fully given by the court.

11. Damages 🔑46—Minor suing for injuries held entitled to reasonable expense incurred for necessary hospital and physicians' services, where sole surviving parent was not able to pay such expense and made no promise to do so (Civ. Code, § 36).

Minor, suing by next friend for injuries sustained in automobile accident, *held* entitled to recover reasonable expense necessarily incurred for hospital and physicians' services, where it was clear that mother, who was only surviving parent, was unable to pay expenses and made no promise to do so, and services were necessary to save plaintiff's life, for which he would be liable to extent of their reasonable value under Civ. Code, § 36.

Appeal from Superior Court, Santa Clara County; P. F. Gosbey, Judge.

Action by Ernest Galwey, by guardian ad litem, against the Pacific Auto Stages, Inc. Judgment for plaintiff, and defendant appeals. Affirmed.

J. Hampton Hoge, of San Francisco, for appellant.

Louis Oneal, Maurice J. Rankin, and S. F. Holstein, all of San Jose, for respondent.

PER CURIAM. This action was brought by Ernest Galwey, a minor, through Hannah Galwey, his mother and guardian ad litem, to recover damages from appellant corporation for personal injuries. A jury returned a verdict for the plaintiff, and, from the judgment entered thereon, the corporation has appealed.

It is claimed that the verdict is unsupported, and that the court erred in its rulings upon the admissibility of certain testimony, in its instructions to the jury, and by refusing other instructions offered by appellant.

The accident which caused the injuries occurred at about 8:30 o'clock p. m. on August 2, 1925, at a point on Lincoln street, between Benton and Franklin streets, in the city of Santa Clara. At this point Lincoln street runs north and south, and the cross streets mentioned east and west. The plaintiff was aged about 11 years, and was skating or walking upon roller skates at the time of the accident. According to his testimony, he left his home which was situated to the east of Lincoln street, and skated west along the sidewalk on Franklin street to Lincoln; thence north along the east side of Lincoln to a point where the sidewalk ended, and from there walked to the corner of Benton street. The width of Lincoln street between the curbs is 49 feet, a strip in the center 20 feet in width being paved. After reaching the corner the plaintiff turned west to cross Lincoln street, and stepped from the curb into the unpaved strip east of the paved portion of the street. Before attempting to cross the pavement he looked to the north and south. A car approaching from the south passed him, and he saw the lights of another car coming from the north. While plaintiff did not so testify, the circumstances fairly support the inference that the latter car was the stage operated by appellant. This car was then distant from one-half to three-fourths of the length of the block, the block referred to being that between Benton and Fremont streets, to the north, which was shown to be 310 feet in length. Believing that he had time to cross in safety, he made the attempt, and when he had passed over the paved portion and reached the unpaved strip along the west side of Lincoln street he was struck and injured by the automobile stage. Plaintiff was unable to describe in detail the manner in which the accident happened other than as stated above, but denied that he stumbled and fell in front of the stage, as testified by certain of appellant's witnesses, or that he stepped from behind another car immediately into the path of the stage, as testified by others. The plaintiff's leg was crushed in such a manner as to make an amputation necessary. Although no bones were broken, a description of the injuries by a physician in attendance immediately after the accident, and who testified that earth and gravel were ground into the wounds made by the wheels of the stage, tends to support the conclusion that the collision occurred after the plaintiff had reached the unpaved strip adjoining the westerly curb of the street.

The driver of the stage testified that the accident happened about 110 feet south of Benton street; that the plaintiff suddenly appeared from behind a car traveling north, being, when first seen, from 8 to 10 feet distant; that the speed of the stage from Benton street south was from 12 to 15 miles an hour, and that the plaintiff, when in front of the stage, stumbled and fell under the wheels. His testimony in the above respects was corroborated by several witnesses called by appellant. He also testified that he applied the foot and emergency brakes when about 8 feet from the plaintiff, and that the stage, which was 23 feet in length, traveled from 25 to 30 feet before stopping. It further appears from his testimony, that it was dusk, but not dark, at the time; that his lights were such that he could see a distance of 150 feet; that the brakes of the stage were in good condition, and that the nearest car in front and traveling in the same direction was from 50 to 75 feet away. According to a witness for the plaintiff, the latter, after the collision, was lying near the west curb of the street about two stage lengths south of the property line on Benton street and about 2 feet north of the rear of the stage. The witness also testified that the wheels of the stage were then entirely off and to the west of the paved portion of the street. Whether the plaintiff was thrown or carried for any distance by the stage is not disclosed in the evidence, none of the witnesses having observed the effect of the collision in this respect. If, however, the testimony of the plaintiff as to the point where he attempted to cross the street was true, namely, at the corner of Benton street, then it is clear that he was carried for at least two stage lengths, as shown by the testimony of his witness as to where he was found.

[1-3] Appellant contends that the evidence shows that its driver was not negligent. While the greater number of witnesses testified for appellant, and their testimony, if believed by the jury would have been sufficient to establish this contention, nevertheless from the testimony of the plaintiff as to the place where he attempted to cross the street, and his precautions in looking for approaching vehicles before the attempt was made, together with that of the witness who testified as to where he was found after the collision, a jury might reasonably find that the accident occurred at the place claimed by the plaintiff; that the latter used due care for his own safety, and that the driver—who testified that the stage stopped over 100 feet south of the intersection, and also that at a speed of 15 miles per hour it could have been stopped within 40 feet—was either driving at a greater speed than he admitted, or that he failed to apply the brakes at the time and place claimed by him. Neither a pedestrian nor an automobile has a superior right on the highway, and the conduct of both must be regulated by this rule (Burgesser v. Bullock's, 190 Cal. 673, 214 P. 649); and where a pedestrian looks for approaching vehicles before proceeding, and sees none which appear to be dangerously close, the question, whether he was negligent in attempting to cross, under the rule that he is bound to use ordinary care for his own safety, must be determined by a consideration of all the attending circumstances (Reaugh v. Cudahy Packing Co., 189 Cal. 335, 208 P. 125; Mann v. Scott, 180 Cal. 550, 182 P. 281); and in the present case this question, with that as to whether the driver of the stage complied with the provisions of the Vehicle Act (St. 1923, p. 553, § 113, as amended by St. 1927, p. 1436, § 30), requiring the operators of motor vehicles to drive the same in a careful and prudent manner, and at a rate of speed not greater than is reasonable and proper, having due regard to the traffic, surface and width of the highway, were for the jury, and, under the evidence, were properly submitted for its determination (Burgesser v. Bullock's, supra; Reaugh v. Cudahy Packing Co., supra; Mardorf v. Penniman, 68 Cal. App. 696, 230 P 12).

[4] The court instructed the jury that, if it found from the evidence that the place where the accident occurred was in a residence district, then the defendant was required to drive its stage at a speed not exceeding 20 miles per hour in that district; and that, if it found that defendant drove its stage at a speed in excess of 20 miles per hour it was guilty of negligence, and, if such negligence was the proximate cause of the injuries received by the plaintiff, it was its duty to find for him. Appellant contends that there was no evidence that the place of the accident was within a residence district within the meaning of the Vehicle Act (St. 1923, p. 554. § 114, as amend-

ed St. 1927, p. 1437, § 31), and that the instruction was consequently erroneous.

A residence district was defined by the Vehicle Act as "the territory contiguous to a public highway which is on the line of said highway not mainly devoted to business where for not less than a quarter of a mile the dwelling houses and business structures on such highway average less than 100 feet apart"; further, that "no territory shall be deemed to be within a business or residence district unless sign-posted as provided in this act;" and section 116 of the same act provided that "the board of supervisors of any county and the city council, board of trustees or other legislative body of a city or town wherein any public highway lies within a residence district shall cause metal signs to be conspicuously placed on every such highway at the boundary lines of such residence district, etc., * * *," the size and color of the signs being described, and further providing that the same be inscribed with the words "20 miles speed limit." As stated by appellant, no direct evidence as to the character of the district where the accident happened was adduced. It was, however, stipulated by the parties that the board of trustees of the city of Santa Clara had, by an ordinance duly adopted, ordered that signs of the above description be erected on the street mentioned, and that pursuant thereto such signs were placed. In addition it was testified that a sign of the character described was in place to the north of the scene of the accident at the time the same occurred. It was the duty of the trustees of the city, if the highway lay within a residence district, to cause the sign mentioned to be erected; and, it being presumed that official duty has been regularly performed (Code Civ. Proc. § 1963, subd. 15), there was thus evidence sufficient to justify the submission of the question of the character of the district to the jury.

[5] By another instruction the jury was instructed with regard to the duty of appellant to operate its stage with due regard for the safety of pedestrians, and was told that if it found from a preponderance of the evidence that the defendant was guilty of negligence which proximately caused the injuries to the plaintiff, it must find for him, provided it also found that he was free from negligence. Later in the same instruction the first proposition was repeated, the qualification respecting plaintiff's freedom from negligence not being referred to again. Appellant claims that this was misleading, but with this contention we cannot agree, as the jury, there and elsewhere in the instructions, was fully advised that, unless the plaintiff's conduct was free from negligence contributing to the injury, he could not recover.

[6] Appellant also complains that by instruction 7 the court stated that the plaintiff in crossing the street was "chargeable only for the exercise of a due amount of care," without defining what was meant by a due amount of care. Any defect in this respect, however, was fully cured by instructions 11 and 27, by which the jury was instructed as to the degree of care required of children of the age of the plaintiff, and further, that, if it found that he failed to exercise the care of an ordinarily prudent person of his age, acting under like circumstances, and that his failure to do so proximately contributed to the accident and his resulting injuries, if any, then he could not recover.

[7, 8] Two instructions on the doctrine of the last clear chance were given. Appellant complains that there was no evidence in the case which would justify these instructions, and, further, that the same were faulty in that the jury was not told that, before the doctrine could apply, it must find that the plaintiff was oblivious to the impending peril, or in a position of danger from which, by the exercise of ordinary care, he could not extricate himself.

These instructions were brief but correct statements of the last clear chance rule, and followed similar instructions approved in the following cases: Esrey v. Southern Pacific Co., 103 Cal. 545, 37 P. 500; Ilardi v. Central Cal. Traction Co., 36 Cal. App. 489, 172 P. 763; London G. & A. Co. v. Southern Pacific Co., 53 Cal. App. 599, 200 P. 805. In Townsend v. Butterfield, 168 Cal. 564, 143 P. 760, refering to a like instruction, the court said: "If the defendant desired a fuller and more elaborate instruction on the doctrine of the last clear chance, it was his duty to prepare and present the same to the court, or in some way make known to the court the lack of a clearer instruction and his desire for a better definition of the rule." While the driver testified that he applied the brakes and swerved the stage to the right immediately upon perceiving the dangerous position of the plaintiff, nevertheless the evidence justified the giving of this instruction. The lights of the stage were such that the driver could see 150 feet in advance, and this, in connection with his testimony as to the speed of the stage, and the time required to stop after the application of the brakes, were facts from which the jury might infer that, contrary to his testimony, he did see the perilous position of the plaintiff at a time when he could, by the exercise of ordinary care, have avoided the accident. Wahlgren v. Market St. Ry. Co., 132 Cal. 657, 665, 62 P. 308, 64 P. 993; Hoy v. Tornich, 199 Cal. 545, 250 P. 565; Varcoe v. Lee, 180 Cal. 338, 181 P. 223; Chappell v. San Diego, etc., Ry. Co., 201 Cal. 560, 258 P. 73.

[9] Appellant further complains of an instruction in which was stated the rule as to the care required of one placed in sudden peril, and following which the court said: "I instruct you that in this case, if you find from the evidence that the plaintiff was suddenly

put in peril without having sufficient time to consider all the circumstances, he is excusable for omitting some precaution or making an unwise choice under this disturbing influence; and I instruct you that if he acted as a reasonably prudent boy of his age would have acted under the circumstances which were then presented to him he is not guilty of contributory negligence, and is not responsible for the accident." It is contended that the instruction ignored the question whether the plaintiff's position of peril was due to his own negligence. As an abstract proposition the statement of the rule contained in the first portion of the instruction was correct (Randolph v. Hunt, 41 Cal. App. 739, 183 P. 358); and an instruction substantially the same as the quoted portion was approved in Hammond v. Pacific Electric R. R. Co., 32 Cal. App. 756, 164 P. 50, wherein it was held that the instruction did not purport to say that a person in sudden peril by his own negligence is relieved from the imputation of contributory negligence, but stated the principle that an unwise choice under such peril is not of itself contributory negligence. Moreover, the jury was elsewhere repeatedly told that there could be no recovery against the defendant, unless the plaintiff himself was free from contributory negligence.

[10] Certain instructions offered by appellant, were refused, one directing a verdict for the defendant, and the other charging that at the place of the accident the maximum limit of speed authorized by law was 35 miles per hour, and a third, that the plaintiff could not recover if guilty of contributory negligence, however slight.

There was no error in the above, as there was sufficient evidence of negligence on the part of appellant to justify the submission of the case to the jury. Further, the question, whether the place of the accident was within a residence district, where the maximum limit of speed was but 20 miles per hour, was likewise one for its determination; and the third instruction so refused was fully covered by others given by the court.

[11] Appellant also objects to an instruction, in substance, that, if the jury found for the plaintiff in damages, then he was also entitled to recover such reasonable expense as he had necessarily incurred for hospital and physicians' services, not exceeding the amount alleged in the complaint. It is claimed that the mother of plaintiff was liable for his necessities, including medical attention; that the expense incurred was chargeable to her and could not be recovered in this action.

It is clear that the mother, who appears to have been the only surviving parent of the plaintiff, was not able to pay the expenses, and that she made no promise to do so. The services were necessary in order to save the life of the plaintiff, and for which, to the extent of their reasonable value, he would be liable (Civ. Code, § 36). Under the circumstances shown they were recoverable in the present action. Aubel v. Sosso, 72 Cal. App. 57, 236 P. 319; McManus v. Arnold Taxi Co., 82 Cal. App. 215, 255 P. 755.

We find no merit in the contention that the trial court erred in its rulings on the admissibility of certain evidence. The evidence was sufficient to sustain the findings of the jury, and the record discloses no error which would justify a reversal of the judgment.

The judgment is affirmed.

---

96 Cal. App. 138

WEARE v. SUPERIOR COURT IN AND FOR IMPERIAL COUNTY. (Civ. 6418.)

District Court of Appeal, Second District, Division 1, California. Jan. 4, 1929.

Justices of the peace ⟹160(3)—Notice of appeal from judgment for defendant in justice's court, timely served and filed, held to give superior court jurisdiction, though unsigned.

Notice of appeal from judgment entered in favor of defendant in justice's court, served and filed within due time, *held* sufficient to give superior court jurisdiction, though not signed by attorney for plaintiff or at all, statute providing for such appeals not in terms requiring that notice of appeal be signed, and since, so far as appearing from petition to prohibit review, notice of appeal may have been filed by plaintiffs themselves or their attorneys.

Application for writ of prohibition by C. F. Weare to be directed to the Superior Court in and for Imperial County to prohibit respondent from hearing an appeal from justice's court. Writ denied.

C. F. Weare, in pro. per.

PER CURIAM. In an action in the justice's court of Brawley township, wherein petitioner, Weare, was defendant, a judgment was entered in his favor. Thereafter, and within due time, a notice of appeal was served and filed. It is admitted that this notice was sufficient in all respects, except that it was not signed by the attorney for plaintiff, or at all. Petitioner moved the superior court to dismiss said purported appeal on the ground that the purported notice of appeal was insufficient to give the superior court jurisdiction of the cause. The court denied that motion, and set the case down for trial, and said court, unless prohibited from so doing, will proceed to a hearing and determination of the cause.

The statute which provides for such appeals does not in terms require that a notice of appeal be signed. So far as appears from the petition herein, the notice of appeal may have been filed and served by the plaintiffs themselves, or by their attorney. In our opinion, the stated facts are not sufficient to sustain the claim of petitioner that there is no pending appeal and that respondent court is without jurisdiction of said cause. In reaching this conclusion, we have not failed to consider the decision in Prescott v. Salthouse, 53 Cal. 221 (cited by petitioner), and the later cases, Harrigan v. Bolte, 67 Cal. xix, 8 P. 184; Anglo Cal. Trust Co. v. Oakland Railways, 191 Cal. 387, 216 P. 578, and Starkweather v. Eddy, 196 Cal. 73, 235 P. 734.

The petition is denied.

---

96 Cal. App. 93

STANDARD DREDGING CO. v. TITLE INS. & TRUST CO. et al. (Civ. 6536.)

District Court of Appeal, First District, Division 1, California. Dec. 31, 1928.

1. Process 🔑87—Complete jurisdiction in action to recover and quiet title was obtained by personal service on corporation, having in its possession within court's territorial limits the fund, amounting to seizure, and service by publication on nonresident claimants.

Personal service on the corporation, having within the territorial limits of the court the fund, to quiet title to and to recover which the action was brought, was equivalent to a seizure of the fund, giving jurisdiction of the res, so that, with service on the nonresident claimants by publication and mailing of copy, as directed by order of court, the court had complete jurisdiction.

2. Bills and notes 🔑166—Notes by their terms subject to trust agreement held not negotiable under law in force when they were issued (Civ. Code, § 3088).

Notes payable to bearer, but providing that they are subject to terms of certain trust agreement, whereby in case of any of enumerated defaults they may be declared payable forthwith, *held* not negotiable under Civ. Code, § 3088, as in force January 1, 1915, when they were issued.

3. Constitutional law 🔑190—Notes nonnegotiable when issued cannot be made negotiable by subsequent legislation.

Notes being nonnegotiable under the law in force when they were issued they cannot be made negotiable by subsequent law; otherwise the Legislature would itself make a contract for the parties.

4. Principal and agent 🔑137(1)—Owner of nonnegotiable notes held not estopped to claim ownership against purchaser from its agent.

The notes owned by plaintiff being nonnegotiable, it is not estopped to deny the authority to sell them of its agent, who did so, and to assert its ownership, unless it appears that it clothed him with some authority to do so, and so not where his authority in the first instance was limited to pledging them to a bank, and according to the record his authority to do anything with them, other than return them to plaintiff, ceased when he received them from the bank, on the loan from it being paid with money furnished by plaintiff, and plaintiff thereafter demanded them from him, but never received them.

5. Evidence 🔑235—Declarations against interest by possessor of nonnegotiable note held admissible against his successors.

Declarations of one made while in possession of notes *held* admissible as declarations against interest of one in possession of personal property against his successors in interest.

Appeal from Superior Court, City and County of San Francisco; Claude F. Purkitt, Judge.

Action by the Standard Dredging Company against the Title Insurance & Trust Company and another. From adverse judgments, plaintiff appeals. Reversed and remanded.

Elliott B. Davis and George F. Snyder, both of San Francisco, for appellant.

Ralph H. Spotts, Charles I. Baker, L. L. Otis, and H. C. Allen, Jr., all of Los Angeles, for respondent Title Ins. & Trust Co.

Leon A. Clark, of Oakland, for respondent Morgan.

CAMPBELL, Justice pro tem. This is an action brought by plaintiff, who is appellant herein, for money held by defendant Title Insurance & Trust Company, as a fund for the redemption of certain collateral trust notes, and to quiet title to the fund as against the other defendants. The collateral notes were issued by North American Dredging Company of Texas. The Title Insurance & Trust Company, a California corporation, of Los Angeles, was the trustee holding the collateral by which the notes were secured, which were by their terms payable at the office of the Title Insurance & Trust Company in Los Angeles.

The complaint alleges that ever since the 1st day of January, 1915, the plaintiff has been the owner of seven of these collateral trust notes, which are numbered respectively 104, 105, 210, 211, 394, 428, and 565; that notes numbered 104, 105, 210, and 211 are for the principal sum of $1,000 each, that notes numbered 394 and 428 are for $500 each, and that note numbered 565 is for $125; that the aggregate amount of the principal and accrued interest of the seven notes is $9,000; that all of the notes have matured, and that the defendant North American Dredging Company of Texas has deposited with defendant Title Insurance & Trust Company a fund in the sum of $9,000 for the purpose of redeeming these collateral trust notes, which sum is still held by the Trust Company. The complaint further alleges that the plaintiff is the owner of this fund. It is further alleged in the complaint that on February 18, 1915, the plaintiff delivered all of these notes to the defendant George C. Morgan, Jr., at Oakland, Cal., as its agent, with instructions to negotiate and secure a loan for the plaintiff and to use the notes as security therefor; that at the same time Morgan agreed in writing with the plaintiff that, in the event such loan should not be negotiated, he would thereupon return the notes to plaintiff; that Morgan never negotiated the loan, and never returned the notes; that at the time Morgan came into the possession of the notes he was a resident of Alameda county, Cal., but that for several years last past he has been absent from the state; that the notes 210 and 211 are in the possession of the defendant Mrs. Kendall Morgan.

By the complaint, plaintiff offers to give the defendant Title Insurance Company such indemnity as the court may deem proper and asks judgment against the Trust Company for the amount of the fund, upon giving such indemnity as the court may direct, and prays that plaintiff's title to the fund be quieted as to the other defendants. The summons and complaint were served on the defendant Title Insurance & Trust Company on February 17, 1925, and it filed its answer May 1, 1925. The defendants Mrs. Kendall Morgan and George C. Morgan, Jr., both resided out of the state of California; the former residing in Detroit, Mich., and the latter in Springfield, Mass.

After defendant Title Insurance & Trust Company had been served and filed its answer, the plaintiff filed an affidavit for publication of summons and secured an order directing that service be made on defendants Mrs. Kendall Morgan and George C. Morgan, Jr., by publication of the summons, which summons was thereafter published and mailed in accordance with the order of the court. The answer of defendant Title Insurance & Trust Company alleges that the security held under the trust agreement, at the request of the North American Dredging Company of Texas, was reconveyed to such company, and released under such trust agreement, upon deposit by it of a fund to redeem these notes; that the Trust Company held this fund pursuant to a trust agreement for the account of the legal owner and holder, or owners and holders, of the notes and respective interest coupons and for payment to such person or persons upon due surrender of such notes and coupons to defendant Title Insurance & Trust Company for cancellation. Mrs. Kendall Morgan appeared and filed an answer and cross-complaint, alleging her ownership of notes 210 and 211 for $1,000 each, and praying judgment against defendant Title Insurance & Trust Company for the amount of the principal and accrued interest. The plaintiff and the Trust Company filed answers to the cross-complaint of Mrs. Kendall Morgan.

The case came on for trial on January 18, 1926. On the day of the trial the defendant Title Insurance & Trust Company filed an amendment to its answer, setting up therein that George C. Morgan, Jr., is a necessary party to the action; that he is not within the state of California, and therefore the court has no jurisdiction of any property or any choses in action belonging to such defendant. At the conclusion of the evidence the defendant Title Insurance & Trust Company moved the court for a nonsuit, on the ground that the court had no jurisdiction of the subject-matter of the action. The court granted the motion for nonsuit, and entered judgment in favor of Mrs. Kendall Morgan on her cross-complaint against Title Insurance & Trust Company for the amount of the principal and accrued interest of the two notes held by her, and quieting her title to the two notes and the amount of principal and interest due as against the plaintiff. $3,547 of the fund deposited by the North American Dredging Company has been deposited with the trial court by stipulation of respective counsel, pending the outcome of this appeal; such being the amount of the judgment in favor of the defendant Mrs. Kendall Morgan. From both the judgment of nonsuit and the judgment in favor of Mrs. Kendall Morgan, plaintiff has appealed.

[1] Appellant urges that the court has jurisdiction of the subject-matter of the action; that the fund was within the state of California and in the possession of the defendant Title Insurance & Trust Company, which defendant had been served and had filed its answer; that this service and appearance conferred jurisdiction of the subject-matter; and that the service thereafter by publication gave jurisdiction of George C. Morgan, Jr., for the purpose of disposing of the fund.

The question presented by this objection is not a new one in this state. In State of California v. Security Savings Bank, 186 Cal. 419, 426, 199 P. 791, 794, the court quotes the following from Cooper v. Reynolds, 77 U. S. (10 Wall.) 317, 19 L. Ed. 931: "So also while the general rule in regard to jurisdiction in rem requires the actual seizure and possession of the res by the officer of the court, such jurisdiction may be acquired by acts which are of equivalent import, and which stand for and represent the dominion of the court over the thing, and in effect subject it to the control of the court. Among this latter class is the levy of a writ of attachment or seizure of real estate, which being incapable of removal, and lying within the territorial jurisdiction of the court, is for all practical purposes brought under the jurisdiction of the court by the officer's levy of the writ and return of that fact to the court. So the writ of garnishment or attachment, or other form of service, on a party holding a fund which becomes the subject of litigation, brings that fund under the jurisdiction of the court, though the money may remain in the actual custody of one not an officer of the court"—and follows with the announcement of the rule: "The service of the summons on the bank is, under the doctrine thus established, the equivalent of a seizure of the property of each depositor in his account with the bank and gives the court jurisdiction over it to the same extent as in cases in garnishment and other proceedings quasi in rem."

This case went to the United States Supreme Court (Security Savings Bank v. California, 263 U. S. 282, 44 S. Ct. 108, 68 L. Ed. 301, 31 A. L. R. 391), and in discussing the question here presented that court says: "Seizure of the deposit is effected by the personal service made upon the bank. Provident Institution for Savings v. Malone, 221 U. S. 660 [31 S. Ct. 661, 55 L. Ed. 899, 34 L. R. A. (N. S.) 1129]. Thereby the res is subjected to the jurisdiction of the court. Compare Miller v. United States, 11 Wall. 268, 297, 298 [20 L. Ed. 135]; Alexandria v. Fairfax, 95 U. S. 774, 779 [24 L. Ed. 583]. The service upon the bank has the same effect as had service of the injunction in Pennington v. Fourth National Bank, 243 U. S. 269 [37 S. Ct. 282, 61 L. Ed. 713, L. R. A. 1917F, 1159], or the service upon the garnishee in Harris v. Balk, 198 U. S. 215, 223 [25 S. Ct. 625, 49 L. Ed. 1023, 3 Ann. Cas. 1084], or the application for administration of the debt due an absentee in Cunnius v. Reading School District, 198 U. S. 458 [25 S. Ct. 721, 49 L. Ed. 1125, 3 Ann. Cas. 1121], or the levy of the writ and return of the fact to the court on attachment of the real estate in Cooper v. Reynolds, 10 Wall. 308."

In Jellenik v. Huron Copper Mining Co., 177 U. S. 1, 20 S. Ct. 559, 44 L. Ed. 647, the court says: "The stock held by the defendants residing outside of Michigan who refused to submit themselves to the jurisdiction of the circuit court being regarded as personal property, the act of 1875 must be held to embrace the present case, if the stock in question is 'within the district' in which the suit was brought. Whether the stock is in Michigan so as to authorize that state to subject it to taxation as against individual shareholders domiciled in another state, is a question not presented in this case, and we express no opinion upon it. But we are of opinion that it is within Michigan for the purposes of a suit brought there against the company—such shareholders being made parties to the suit—to determine whether the stock is rightly held by them. * * * The corporation being brought into court by personal service of process in Michigan, and a copy of the order of court being served upon the defendants charged with wrongfully holding certificates of the stock in question, every interest involved in the issue as to the real ownership of the stock will be represented before the court."

In First National Bank of Broken Baw v. Bank of Horatio, 161 Ark. 259, 255 S. W. 881, in an action to cancel certificates of deposit brought in the county in which the bank holding the funds represented thereby was situated against nonresident defendants, the court held that constructive service was sufficient to bring the nonresidents into court since the action was quasi in rem or in the nature of a suit in rem, and the situs of the action was, therefore, the place where the fund was located.

Respondent relies principally on the holding in Belcher v. Chambers, 53 Cal. 635, quoted in Mudge v. Steinhart, 78 Cal. 34, 20 P. 147, 12 Am. St. Rep. 17, as follows: "The state, having within her territory property of a nonresident, may hold and appropriate it to satisfy the claims of her citizens against him, and her courts may inquire into his obligations to the extent necessary to control the disposition of such property; and in such a case service of summons by publication, or other form authorized by the law of the state, is sufficient to inform the nonresident of the object of the proceedings, provided the court obtains jurisdictions of the property by seizure, or some equivalent act, in rem, or in the nature of a proceeding in rem, the object being to enforce proceedings against the property."

In the Belcher Case, however, personal service was not had upon the defendants composing the banking firm of Page, Bacon & Co., holders of the funds due upon the certificates of deposit, but service was made on all defendants by publication, and defendant Bacon, whose property was seized under execution, being a resident of the state of Missouri. Belcher v. Chambers and State v. Security Savings Bank are, therefore, not analogous. If, however, it be held that they are, the more modern rule that the service of summons upon the bank holding the property is equivalent to a seizure of such property, has succeeded the early rule announced in the earlier case, if such rule, under the circumstances in the present case, was so announced.

Respondent argues that as State v. Security Savings Bank was an action under a statute providing for the escheat of unclaimed bank deposits, it is not in point here. We are not in accord with this view and see no difference in principle in the two cases. Furthermore, from the language used in State v. Security Savings Bank, it is apparent that the court in announcing the rule did so for future guidance. Under the decisions from which we have quoted we are of the opinion that the court erred in granting the nonsuit.

[2] On the appeal from the judgment in favor of respondent Mrs. Kendall Morgan it

may be said that the collateral notes transferred to her by her husband, who received them from George C. Morgan, Jr., were not negotiable, being issued January 1, 1915, before the present Negotiable Instruments Law was enacted. The notes are payable to bearer and contain a provision that they are "subject to the terms and conditions contained in the trust agreement dated January 1, 1915, and executed between the company and the Title Insurance & Trust Company, as trustee, and all the rights of the holder thereof are subject to the provisions of said trust agreement." Article VIII of the trust agreement covers "Default and Remedies," and contains provisions not certain of fulfillment. Thus section 2 of the article provides: "If one of the events of default shall occur, the trustee may, and upon the written request of the holders of twenty-five per centum (25%) in amount of the notes issued hereunder then outstanding shall, by notice in writing delivered to the company, declare the principal of all notes issued hereunder, then outstanding, to be due and payable forthwith." Section 3088 of the Civil Code, as in force January 1, 1915, reads as follows: "A negotiable instrument must be made payable in money only and without any condition not certain of fulfillment, except that it may provide for the payment of attorney's fees and costs of suit, in case suit be brought thereon to compel the payment thereof."

Popp v. Exchange Bank, 189 Cal. 296, 208 P. 113, disposes of this question. There the court says: "The next contention of the plaintiff is that the bonds in question are not negotiable. We think this proposition must be sustained. The bonds were issued apparently in the state of New York on January 1, 1912. They are payable to the bearer, or to the registered holder in case the bonds be registered, and on their face they show that they are secured by a mortgage or trust deed upon real property, and they become due on January 1, 1962. The record does not show that they were ever registered. They are precisely similar in all respects to the bonds under consideration in Kohn v. Sacramento, etc., Co., 168 Cal. 1, 141 P. 626, and Crocker National Bank v. Byrne, 178 Cal. 329, 173 P. 752. In each of those cases bonds of that description were held to be nonnegotiable under the law of California in force in 1912, and the proposition must be considered as settled. The result is that the defendant cannot protect itself upon the rule, applying to negotiable instruments only, that where the holder thereof has by delivering the instrument to a third person clothed him with an apparent title thereto, and such third person disposes of it to an innocent purchaser, such purchaser obtains title as against the true owner, although the person to whom it was delivered had no authority to make a sale thereof. Chase v. Whitmore, 68 Cal. 547, 9 P. 942."

[3] While it is true that the Legislature, by an act which took effect on August 8, 1915, so amended our Code with relation to negotiable instruments as to make the notes here negotiable, the law in force at the time the contract is made must apply with respect to its interpretation, "otherwise the Legislature would itself make a contract for the parties." 1 Daniel on Negotiable Instruments, § 871; Popp v. Exchange Bank, supra.

[4] The notes in question being nonnegotiable, in order that plaintiff be estopped from denying the agent's authority to sell or dispose of them, it must appear that plaintiff had clothed its agent, George C. Morgan, Jr., with some authority to do so. According to the record the authority of George C. Morgan, Jr., to do anything with the collateral trust notes, other than to return them to plaintiff, ceased when he received the notes from the bank, upon the loan being paid with money furnished by plaintiff. His authority in the first instance was limited to pledging them to the Bank of Los Gatos. The plaintiff demanded them from him but never received them. Upon the record in its present state plaintiff is not, therefore, estopped to assert ownership. Chase v. Whitmore, 68 Cal. 545, 548, 9 P. 942. In the cases cited where the owner has been held estopped to claim property sold or pledged by an agent, the agent had either actual authority to pledge or to sell, or indicia of ownership, and in Wenban Estate, Inc., v. Hewlett, 193 Cal. 675, 227 P. 723, which respondent asserts "conclusively answers appellant's contention and its reliance on the Popp Case," Hewlett, as shown by the records of the corporation, was the actual owner of the stock transferred by him.

[5] We are of the opinion that the court should have admitted the declarations of defendant George C. Morgan, Jr., made while in possession of the notes, as the declarations against interest by one in possession of personal property are admissible against his successors in interest. Smith v. Goethe, 159 Cal. 628, 636–638, 115 P. 223, Ann. Cas. 1912C, 1205.

Under the view we have taken, it is unnecessary to discuss appellant's exception to the ruling of the court sustaining the objection to the introduction in evidence of the note and collateral agreement for which the notes in question were pledged as security, as the objection was sustained upon the theory that the coupon notes were negotiable, and that the court had no jurisdiction of George C. Morgan, Jr.

The judgments are reversed and the cause remanded.

We concur: KNIGHT, Acting P. J.; CASHIN, J.

96 Cal. App. 161

CARROLL v. CENTRAL COUNTIES GAS CO. (two cases). (Civ. 3666, 3667.) ★

District Court of Appeal, Third District, California. Jan. 7, 1929.

Rehearing Denied Feb. 6, 1929.

1. Death 🔑69—As respects recovery for daughter's death, proof of her attitude towards parent held permissible.

In action for damages for death of daughter, for purpose of showing loss to parent, it would be proper to permit introduction of testimony indicating attitude of deceased daughter towards parent and relations that existed between them.

2. Appeal and error 🔑1058(2)—Excluding proof of deceased daughter's attitude towards parent held harmless, as regards recovery for her death, in view of other proof.

In action for daughter's death, refusal to permit parent to show attitude of daughter toward him *held* harmless, where he was permitted to show that daughter was industrious and affectionate, and that she at times earned money and turned it over to him, and there being no question of excessive or insufficient damages.

3. Evidence 🔑552—Hypothetical question to engineers, coupling with inquiry regarding established engineering practice general custom prevailing throughout country, held objectionable.

Hypothetical question to engineers, whether method of constructing gas line across creek was in accordance with established engineering practice and general custom prevailing throughout the country in similar lines and crossing similar streams, *held* objectionable.

4. Negligence 🔑124(3)—Specific practice of others cannot be admitted as an excuse for alleged negligent act of defendant.

Where no contractual relations exist, and where there is no assumption of risk, the specific practice of others cannot be admitted as an excuse for the alleged negligent act of defendant.

5. Negligence 🔑62(3)—Proximate cause of injury may be laid in first negligent act, notwithstanding succeeding negligent act of another which should have been anticipated.

Even if negligent act is succeeded by a disconnected act of negligence of another person, and which results in injury to a third person, if original negligence was such that in ordinary and natural course of events second negligent act should have been anticipated as reasonably likely to happen, proximate cause of injury may be laid in first negligent act.

6. Appeal and error 🔑1170(9)—Trial 🔑194(16)—Instruction, that act of driver was independent act of third person, resulting in death of occupant when automobile was driven off bridge, held to invade province of jury, and required reversal under conflicting evidence (Const. art. 6, § 4½).

In action for damages for death of occupant of automobile, which, when driven off bridge, fell upon gas pipe, causing it to break and gas therein to be allegedly thrown upon occupants of automobile, instruction, wherein trial court determined as a matter of law that act of driver of automobile was the independent act of a third party, *held* erroneous as invading province of jury and to require reversal, under Const. art. 6, § 4½, where evidence was sharply conflicting upon material matters.

7. Trial 🔑250—Instruction regarding exemplary damages should not have been given where not called for by pleadings or evidence.

In action for death from automobile accident, instruction regarding exemplary damages should not have been given where not called for by pleadings or evidence.

Appeals from Superior Court, Tulare County; Frank Lamberson, Judge.

Actions by Geneva Carroll, by her guardian ad litem, T. L. Carroll, and by R. P. Carroll, against the Central Counties Gas Company. From judgments for plaintiffs, and orders denying new trials, plaintiffs appeal. Reversed, and new trial granted.

E. J. Emmons, of Bakersfield, and G. L. Aynesworth, of Fresno, for appellants.

O'Melveny, Millikin & Tuller, of Los Angeles, and Power & McFadzean, of Visalia (John A. Powell and Pierce Works, both of Los Angeles, of counsel), for respondent.

JAMISON, Justice pro tem. By stipulation the above two cases were tried together, the evidence offered and proceedings had in said trial applying to each of them, except the evidence as to the measure of damages.

These actions were brought by appellant, Geneva Carroll, for injuries sustained by her, and by R. P. Carroll, for the death of his daughter Belva Carroll, as they allege in their complaints, when the automobile in which the two women were riding as guests, ran off of a bridge and fell upon a gas pipe owned and operated by respondent, causing the pipe to crack or break and the gas flowing therein to escape therefrom, and become ignited and inflict serious burns upon the hands, face, and body of appellant, Geneva Carroll, and to so seriously burn the said Belva Carroll as to cause her death. The sole ground upon which appellants claim the respondent was guilty of negligence was that the pipe line, at the point where the accident occurred, was constructed, maintained, and operated in a negligent manner by respondent. Respondent denied the negligence, and set up contributory negligence on the part of appellants. The jury returned a verdict for respondent. Appellants filed motion for new trials; same were denied, and judgment in each case rendered in favor of defendants. Appellants appealed from the orders denying new trials and from the judgments.

The evidence on the part of appellants was to the effect that on the evening of December 10, 1926, four young boys and girls, among whom were appellant, Geneva Carroll, and

---

★For opinion on rehearing, see 274 P. 594.

deceased, Belva Carroll, were traveling in an automobile from Exeter to Visalia; one of the boys, John Ingram, was driving; that as the automobile approached the bridge, and while some 70 or 80 feet from its west end, they met a car, and Ingram swerved to the side of the road to let it pass; that the right-hand wheels of his automobile went off of the paved part of the road and ran that way for some distance before he could get them back on the paved part of the road; that, when some 20 or 30 feet from the west end of the bridge, he succeeded in getting the two right wheels upon the paved part of the road, but in doing so the automobile swerved to the left side of the road; that he turned the automobile to the right again, and it struck the north side of the bridge, broke through a wooden railing, and fell upon and broke the gas pipe and landed on top of the broken gas pipe in the bed of the creek; that the injuries to all of the occupants of the automobile, and the deaths of three of them, was caused by burns from the flame of the ignited gas that came from the broken gas pipe. Defendant produced evidence to the effect that none of the wheels of the automobile left the paved part of the highway in approaching the bridge, and that the gas did not ignite; that the gas pipe was not broken or cracked, so as permit gas to escape therefrom, except at the east end of the bridge, and that the fire that burned the occupants of the car was not caused by burning gas.

[1, 2] Appellant, R. P. Carroll, contends that the court erred in refusing to permit him to show the attitude of his deceased daughter Belva to him.

It is well settled that damages may be alleged for the pecuniary loss following the deprivation of society, comfort, and protection of a deceased child. Rocca v. Tuolumne County Electric Light & Power Co., 76 Cal. App. 569, 245 P. 468; Griffey v. Pacific Electric Ry. Co., 58 Cal. App. 509, 209 P. 45; Parsons v. Easton, 184 Cal. 764, 195 P. 419; Beeson v. Green Mountain G. M. Co., 57 Cal. 38. For the purpose of showing such loss, it would be material and proper to permit the introduction of testimony indicating the attitude of deceased toward her father and the relations, affectionate or otherwise, that existed between them.

However, the court did permit appellant R. P. Carroll to offer testimony to the effect that his daughter Belva was industrious and affectionate, and that she at times earned money and always turned it over to her father.

In view of the fact that there is no question of excessive or insufficient damages before the court, we do not believe that the action of the court in excluding further evidence of the attitude of Belva toward her father resulted in any prejudice to appellant R. P. Carroll.

[3, 4] The next contention of appellants is that certain evidence was improperly admitted by the court. Three witnesses were produced by respondent who, after qualifying as mechanical and constructive engineers, and stating that they were familiar with the crossing at Deep creek where the accident occurred, were each asked the following question by respondent attorney: "Q. I'll ask you to state whether or not the method in which this line was constructed and in which it crossed Deep creek at the point where this accident occurred, was in accordance with recognized and established engineering practice and general custom prevailing throughout the United States in similar lines and crossing similar streams?" To which question appellants' attorney objected upon the ground that the question was incompetent, irrelevant, and immaterial. The court overruled the objection, and each of the witnesses answered that it was. The uncontradicted evidence was: That the pipe line extended across the creek from buttress to buttress a distance of 54 feet; that it was 5 feet from the north side of the bridge, and 1 foot lower than the floor of the bridge, and about 6 feet above the bed of the creek; that the gas pipe was a 3-inch steel pipe and carried a pressure of from 60 to 80 pounds; that the gas pipe was enclosed within a 7-inch casing, the casing being disconnected at the ends, and was placed around the gas pipe only for the purpose of protecting it from the weather and to prevent the heat of the sun from expanding it; that there were no supports to said gas pipe other than the buttresses at each side of the creek, and that along the sides of the bridge was a wooden railing about 30 inches high, composed of 2 by 4 timbers. It was upon these facts that appellants founded their claims that respondent was guilty of negligence. The question as framed was objectionable in that it coupled with the inquiry regarding the recognized and established engineering practice, the general custom prevailing throughout the United States in similar lines and crossings of similar streams. Where no contractual relations exist, and where there is no assumption of the risk, as in the case where the relation of master and servant is concerned, the specific practice of others cannot be admitted in testimony as an excuse for the alleged negligent act of the defendant. Phoenix Assurance Co. Ltd. of London et al. v. Texas Holding Co., 81 Cal. App. 61, 252 P. 1082. The standard of care required of persons under given circumstances is not to be established by proof that others have been in the habit of acting in a certain manner. Rudd v. Byrnes, 156 Cal. 636, 105 P. 957, 26 L. R. A. (N. S.) 134, 20 Ann. Cas. 124.

[5] The more serious matters calling for the consideration of the court upon this appeal are the two instructions given by the trial court at the request of respondent, and referred to by appellants in their brief as instructions A and B. Respondent's instructions

were not numbered. The instructions referred to as A and B are as follows:

"(A) Even though you find defendant was negligent, still if you find that the injury complained of would not have resulted except for the independent negligent act of the owner of the automobile, then I instruct you that such independent act breaks the chain of causation and that your verdict must be in favor of the defendant."

"(B) The law considers only the direct cause and not the remote cause of an event. Ordinarily, even where one is negligent, but where no injury results except through the independent act of a third person, the first party is not liable for such injuries. The first party is only liable if he ought reasonably to have foreseen the occurrence of such independent act, and to have guarded against it. In the case at bar, if you find the defendant was not negligent in maintaining its gas pipe, then your verdict must be for the defendant. If, however, you should find that defendant was negligent, still the act of the owner of the car was an independent act of a third person, and you cannot find defendant liable for resulting injuries, unless you also find that defendant. in the exercise of ordinary care, ought reasonably to have anticipated the occurrence of such independent act and have provided against it."

In effect, these two instructions virtually directed a verdict for the respondent.

We think the court erred in instructing the jury as it did by said instructions A and B, that the act of the driver of the automobile was an independent act of a third person. In the case of Carroll v. Central Counties Gas Co., 74 Cal. App. 303, 240 P. 53, Finch, P. J., delivered the opinion of the court, and collated therein many of the decisions of this state bearing upon this question. Relative to the independent act of a third person operating to relieve a defendant from the consequences of his own negligent act, the court said: "Respondent contends that, if it be conceded that it was guilty of negligence in the maintenance of its pipe-line, such negligence was not the proximate cause of the alleged injury, but that 'the act of the automobilist who forced the car in which plaintiff was riding off the road was the proximate cause of the injury.' The defendant's negligence, however, was continuous in its nature, existent at all times up to the moment of the injury. Under a state of facts not distinguishable in legal effect from those here involved, it is said: 'The independent wrongful act, to constitute the proximate cause by displacing the original primary cause, must be so disconnected in time and nature as to make it plain that the damage occasioned was in no way a natural or probable consequence of the original wrongful act or omission. * * * The original act of negligence, the primary causation, may be in its nature so continuous that the concurrent wrongful act precipitating the disaster will in law be regarded not as independent, but as conjoining with the original act to create the disastrous result.'" Merrill v. Los Angeles Gas Co., 158 Cal. 499, 111 P. 534, 31 L. R. A. (N. S.) 559, 139 Am. St. Rep. 134; Marton v. Jones, 44 Cal. App. 299, 186 P. 410; Parkin v. Grayson-Owen Co., 25 Cal. App. 269, 143 P. 257.

Even if the negligent act is succeeded by a disconnected act of negligence of another person, and which results in injury to a third person, if the original negligence was such that, in the ordinary and natural course of events, the second negligent act should have been anticipated as reasonably likely to happen, the proximate cause of the injury may be laid in the first negligent act. Sawyer v. Hooper, 79 Cal. App. 395, 249 P. 530; Feeney v. Standard Oil Co., 58 Cal. App. 587, 209 P. 85; 12 R. C. L. 913.

[6] If respondent did in fact maintain its gas pipe line in such close proximity to the bridge as to endanger the lives or safety of the public traveling thereon, then such maintenance was a continuing negligence, and, under these circumstances, respondent would be charged with the duty of anticipating the natural and ordinary consequences of its negligence. Hale v. Pacific Tel. & Tel. Co., 42 Cal. App. 55, 183 P. 280. The question, of whether or not the act of the driver of the automobile was the independent act of a third person, was a question of fact for the jury. There is no evidence in this case that warranted the trial court in determining as a matter of law that the act of the driver of the automobile was the independent act of a third party. By so declaring in these two instructions the court invaded the province of the jury.

This court is of the opinion that the aforesaid errors seriously prejudiced the substantial rights of the appellants. There is a sharp conflict in the evidence upon material matters, and this court cannot say that the jury was not influenced in rendering its verdict for respondent by reason of said errors. Therefore, the provisions of section 4½ of article 6 of the Constitution cannot be invoked for the purpose of upholding the said judgments.

[7] As it will be necessary to have a retrial of these cases, the court suggests that, inasmuch as no facts are set forth in the complaint calling for punitive or exemplary damages, and no evidence offered under any such claim by appellants, the instruction regarding exemplary damages should not have been given. The motion for a new trial should have been granted.

The orders denying motions for new trials and the judgments are reversed.

We concur: HART, Acting P. J.; PLUMMER, J.

96 Cal. App. 782

J. A. COBBS and Fannie Cobbs, Plaintiffs and Appellants, v. CENTRAL COUNTIES GAS COMPANY (a Corporation), Defendant and Respondent. *

S. C. INGRAM, Plaintiff and Appellant, v. CENTRAL COUNTIES GAS COMPANY (a Corporation), Defendant and Respondent.

(Civ. 3668, 3669.)

District Court of Appeal, Third District, California. Jan. 7, 1929.

Rehearing Denied Feb. 6, 1929.

Appeals by plaintiffs from judgments of the Superior Court of Tulare County, Frank Lamberson, Judge, in actions for damages for personal injuries. Reversed.

E. J. Emmons, of Bakersfield, and G. L. Aynesworth, of Fresno, for appellants.

O'Melveny, Millikin & Tuller, of Los Angeles, and Power & McFadzean, of Visalia (John A. Powell and Pierce Works, both of Los Angeles, of counsel), for respondent.

JAMISON, Justice pro tem. By stipulation of the parties the above two cases, upon the evidence produced and instructions given in the cases of Geneva Carroll, etc., v. Central Counties Gas Co. and R. P. Carroll v. Central Counties Gas Co. (Cal. App.) 273 P. 875, this day decided, were submitted to the same jury that tried said last-named cases. The jury returned verdicts in favor of respondents. Appellants filed motions for new trials, which were denied, and judgments were rendered in favor of respondent. From the orders denying their motions for new trials, and from said judgments, defendants have appealed.

For the reasons set forth in the opinion of this court in the aforesaid cases, orders denying motions for new trials and the judgments in these two cases are reversed.

We concur: HART. Acting P. J.; PLUMMER, J.

★For opinion on rehearing, see 274 P. 594.

206 Cal. 242

CHRISTOPHEL, County Treasurer, v. RILEY, State Controller, et al. (S. F. 13044.)

Supreme Court of California. Jan. 22, 1929.

1. Drains 🔑85—Provision permitting landowners in drainage district to tender district warrants in payment of assessment is valid and mandatory on county treasurer (St. 1927, pp. 1505, 1509, §§ 3, 13; St. 1919, p. 1111, § 54).

St. 1927, p. 1509, § 13, permitting landowners within boundaries of drainage district to present district warrants in payment of assessments levied under section 3, and St. 1919, p. 1111, § 54, is valid, and makes county treasurer's receipt of warrant in payment of assessment mandatory.

2. Constitutional law 🔑70(1)—Court will not, by construction, confer on ministerial state officers authority not given by statute.

Court, in interpreting powers vested by Legislature in ministerial officers of state, will not by construction confer upon such officers authority which Legislature has seen fit to withhold.

3. Mandamus 🔑118—County treasurer held not entitled to mandamus to require state officers to give credit for warrant which county treasurer was required to accept in payment of drainage district assessment (St. 1919, p. 1111, § 54; St. 1927, pp. 1505, 1509, §§ 3, 13; Pol. Code, § 3865; Code Civ. Proc. § 1085).

County treasurer, required to accept warrants of drainage district in payment of assessments levied by district under St. 1919, p. 1111, § 54, and St. 1927, pp. 1505, 1509, §§ 3, 13, *held* not entitled to mandamus to require state controller and treasurer to credit him with amount of warrant under Pol. Code, § 3865, requiring county treasurers to settle with state controller and pay over to state treasurer all moneys in their possession belonging to the state, since mandamus lies only to compel performance of duty resulting from office under Code Civ. Proc. § 1085, and duty of state officers in this respect is not provided for by statute.

In Bank.

Application by Frank P. Christophel, as County Treasurer of the County of Sacramento, for writ of mandate prayed to be directed by Ray L. Riley, as State Controller, and Charles G. Johnson, as State Treasurer. Writ denied.

Stephen W. Downey, Downey, Brand & Seymour, and Frederick H. Pierce, Jr., all of Sacramento, for petitioner.

Devlin & Devlin, of Sacramento, amici curiæ.

U. S. Webb, Atty. Gen., and Robert W. Harrison, Chief Deputy Atty. Gen., for respondents.

WASTE, C. J. Petition for writ of mandate, to compel the respondents, as controller and treasurer, respectively, of the state of California, to credit petitioner, as treasurer of Sacramento county, with the amount of a certain warrant tendered by a landowner to, and accepted by, petitioner in part payment of Sutter-Butte by-pass assessment No. 6, levied upon landowners in the Sacramento and San Joaquin drainage district.

The Sacramento and San Joaquin drainage district is a state agency, legally created, and the management and control thereof is vested in the reclamation board of the state of California. On November 6, 1917, the board adopted and determined upon a project known and designated as "Sutter-Butte By-

Pass Project Number Six." By resolution, said board authorized and approved the imposition of an assessment, totaling $8,144,327.33, upon such lands of the drainage district as would be benefited by the contemplated project, and separate assessment lists were duly forwarded to the county treasurer of each county where any of the lands so assessed were situate. This assessment was validated in a proceeding instituted in the superior court of Sutter county, three judges sitting, and the judgment was affirmed by this court. In re Sutter-Butte By-Pass Assessment No. 6, etc., 191 Cal. 650, 218 P. 27.

A bond issue, with the proceeds of which the reclamation board proposed to defray the expenses of the project for which the assessment had been levied, proving unsuccessful, the Legislature authorized the board, in its discretion, to order the cancellation of the issue, and to call for the payment of the assessment whenever it appeared that the bonds had not been sold within a year from their issuance. Stats. 1919, c. 520, § 54, p. 1111. In 1927, the Legislature passed an emergency measure known as the "Sacramento and San Joaquin Drainage District Refunding Act," in which, among other provisions, it was made the duty of the reclamation board to cancel all proceedings taken in connection with the bond issue relating to project No. 6, and to take certain steps looking to the levying of a supplementary assessment No. 6 upon all the lands within the drainage district. Stats. 1927, c. 774, § 3, p. 1505. It was further provided in the act (section 13, p. 1509) that any owner or holder of lands within the boundaries of the district whose lands were subject to assessment No. 6 or the supplemental assessment should have the right to present to any officer authorized by law to collect such assessment warrants of the district issued in connection with project No. 6 prior to the effective date of the act, May 26, 1927, and it was made the duty of such officers to accept such warrants in payment, at their face value, plus accrued interest, on account of such assessment.

In accordance with the provisions of these legislative enactments, the reclamation board, on January 25, 1928, made its order canceling all unsold bonds of the Sacramento and San Joaquin drainage district based upon and secured by the Sutter-Butte by-pass assessment No. 6, and directed the payment of the assessment in semiannual installments of a specified amount. Thereafter, an owner of certain lands in Sacramento county subject to such assessment tendered to the petitioner, in part payment of his obligation, a warrant of the Sacramento and San Joaquin drainage district issued in connection with said project No. 6. Petitioner accepted the warrant, together with certain cash, and credited the particular assessment as having been paid. Subsequently, the respondents, in selling accounts with the county treasurer, declined to accept the warrant from petitioner, and this mandamus proceeding was thereupon instituted.

[1-3] The statute makes it mandatory upon the petitioner, as county treasurer, to receive at full face value, and accept in lieu of so much cash, any warrant of the drainage district tendered by a landholder in payment of the assessment on his land. It is the settled law of this state that such a provision is valid. Hershey v. Reclamation Dist. No. 730, 162 Cal. 401, 405, 122 P. 1074. The important question for our consideration is whether or not the respondents state controller and state treasurer, have any duty to perform in the matter. If they have not, no writ should issue, for mandamus lies only to compel the performance of an act which the law specially enjoins as a duty resulting from an office, trust, or station. Code Civ. Proc., § 1085. While this court will go to all reasonable lengths in interpreting the powers vested by the Legislature in the ministerial officers of the state, in order to give effect to the laws and subserve the ends of justice, it will not by construction confer upon such officers authority which the Legislature has seen fit to withhold. San Francisco, etc., L. Co. v. Banbury, 106 Cal. 129, 135, 39 P. 439. County treasurers are required to "settle with the [state] controller, and pay over to the [state] treasurer all *moneys* in their possession belonging to the state." Pol. Code, § 3865. Warrants are not money. While, in certain transactions, they may be made to represent money, they are not money. There is not to be found any provision of law in the general statutes relating to the state treasurer which makes it the duty of that officer to accept warrants as cash in settling with county treasurers. The Refunding Act, supra, which makes it the duty of the county treasurer to accept the warrants as cash at their face value, plus accrued interest, when tendered in payment of the assessments levied in connection with project No. 6, contains no other provision even remotely relating to the matter. There seems to have been a clear omission on the part of the Legislature to provide for the further disposition of the warrants after their receipt by the county treasurer. The precise situation is well presented by the plea of the Attorney General, representing the respondents here, that, if this court grants the writ prayed for, and compels the state officers to accept this particular warrant in settling with the petitioner, it should go further and tell respondents what to do with the warrant when they have it. We are not inclined to assume that burden. In view of the clear omission of any provision in the Refunding Act declaring what the action of the state officers should be in such a case, we feel the question is one which should be referred to the Legislature which is now in biennial

session. The matter is one for its consideration rather than for this court.

The petition for the writ is denied.

We concur: SHENK, J.; LANGDON, J.; PRESTON, J.; CURTIS, J.; RICHARDS, J.; SEAWELL, J.

206 Cal. 240

FIRST TRUST & SAVINGS BANK OF PASADENA v. LOS ANGELES COUNTY.
(L. A. 8171.)

Supreme Court of California. Jan. 18, 1929.

As Modified Feb. 15, 1929.

1. Taxation ⚿866 — Beneficiary's estate had equitable interest, until corpus of trust was paid to beneficiary's executor in accordance with trust, as regards taxation.

Under trust providing for payment by trustee of income to beneficiary and on her death for payment of corpus of trust to beneficiary's executor, estate, as the successor in interest of beneficiary, had equitable interest in trust property until corpus was paid over to executor, as regards taxation of estate's interest in the trust.

2. Taxation ⚿866—Estate of beneficiary of trust, corpus of which was payable to beneficiary's executor, held taxable as equitable owner of property before executor was appointed and received property.

Under trust providing income should be paid to beneficiary for life and on her death entire corpus of trust was to be paid to her executor, beneficiary had equitable interest therein, and her estate was taxable as equitable owner of property before executor was appointed and received corpus of property.

3. Taxation ⚿904—Irregularity in taxing solvent credits of estate instead of beneficial interest held no ground for recovering taxes.

That taxes were collected from estate on solvent credits of estate, rather than on beneficial interests of estate, *held* no ground for recovery of taxes as not assessable on solvent credits, since action is in equity and taxes cannot be recovered for mere irregularity.

In Bank.

Appeal from Superior Court, Los Angeles County; Charles S. Burnell, Judge.

Action by the First Trust & Savings Bank of Pasadena against the County of Los Angeles. Judgment for plaintiff, and defendant appeals. Reversed.

Superseding opinion of District Court of Appeal in 262 P. 355.

Everett W. Mattoon, W. Sumner Holbrook, Jr., Edward T. Bishop, Co. Counsel, J. A. Tucker, Deputy Co. Counsel, and Woodward M. Taylor, Deputy Co. Counsel, all of Los Angeles, for appellant.

J. W. Morin, of Pasadena, and James S. Bennett, of Los Angeles, for respondent.

LANGDON, J. This is an appeal by the defendant from a judgment allowing recovery of taxes paid by the plaintiff as executor of the last will of Caroline Dillingham. Her estate consisted of a substantial interest as beneficiary under a trust in which a Wisconsin company was trustee. The terms of the trust were that the trustee should hold the corpus of the trust, and invest and reinvest the same, paying over the income to the beneficiary, and upon her death the entire corpus of the trust was to be paid to her executor.

The will of decedent was admitted to probate and the respondent was appointed executor thereof on March 7, 1922. The trustee subsequently sold the capital stock constituting the trust fund and remitted the proceeds to the executor. The first Monday in March of the year 1922 fell on the 6th, the day before the executor was appointed. Some time thereafter the assessment was levied.

[1, 2] The question presented by the appeal is whether the interest which the estate had in said trust on March 6, 1922, was taxable. The estate, as the successor in interest of Caroline Dillingham, also had an equitable interest in the trust property until the corpus was paid over to the executor. In the case of Estate of Dillingham, 196 Cal. 525, 238 P. 367, involving this same trust, it was held that this equitable interest constituted taxable property in this state for the purpose of inheritance taxation. It has been held that the rules of construction with reference to the use of the word "property," in our Inheritance Tax Law (St. 1921, p. 1500) are applicable to the same term in the laws governing the levy and collection of an ordinary property tax. Chambers v. Mumford, 187 Cal. 228, 201 P. 588, 42 A. L. R. 342. It follows, therefore, that the estate was taxable as the equitable owner of the property involved here even before the executor was appointed and received the corpus of the property. Upon that question, the case of City of St. Albans v. Avery, 95 Vt. 249, 114 A. 31, would also be persuasive here, but the reasoning of that case need not be relied upon as a precedent, since this court has passed upon the very trust in question here for the purposes of inheritance taxation in the Estate of Dillingham, supra, and it has been held that the same rule and reasoning is applicable upon the question involved here.

[3] But it is insisted by respondent that the assessment here did not purport to be one upon the beneficial interest of the estate, but upon solvent credits of said estate. Technically, the position of respondent is sound, but this is an action in equity, and, as stated in Steele v. San Luis Obispo, 152 Cal. at page 787, 93 P. 1021: "The rules based upon the maxim that he who seeks equity must do equity are applicable in suits to recover taxes

paid. The idea upon which such a suit is predicated is that the county or municipality has received that which in justice it ought not to retain, and, therefore, when the proceedings have been simply irregular, the action will not lie." In the case of Pierce v. Santa Barbara Co., 40 Cal. App. 302, 180 P. 641, it was said: "In actions, such as the present one, to recover taxes, as well as in actions to enjoin or set aside tax deeds, the law is that when there is a moral obligation to pay the tax, it cannot be revoked on account of some technical defect rendering the assessment void."

The judgment is reversed.

We concur: WASTE, C. J.; PRESTON, J.; CURTIS, J.; SHENK, J.; SEAWELL, J.; RICHARDS, J.

---

96 Cal. App. 69

DORRIAN v. CITY AND COUNTY OF SAN FRANCISCO. (Civ. 6393.)★

District Court of Appeal, First District, Division 1, California. Dec. 29, 1928.

Rehearing Denied Jan. 28, 1929. Hearing Denied by Supreme Court Feb. 25, 1929.

1. Quieting title ⚷44(1)—Plaintiff, in action against city to quiet title, had burden to show that father as source had actual possession when statutes relinquished lands to occupants (St. 1858, p. 52).

Plaintiff, in action against city to quiet title to land formerly used as street, and recover damages for withholding possession from plaintiff, had burden to show that father, under whom she claimed title, was in actual possession of the property when the Van Ness Ordinance, St. 1858, p. 52, providing for the relinquishment of lands within city to persons in actual possession, with certain exceptions and reservations, was passed, including streets and other public places.

2. Quieting title ⚷44(4)—Evidence held to sustain finding, in action to quiet title, that plaintiff had no title (St. 1858, p. 52).

Evidence, in action to quiet title and to recover damages for withholding possession, *held* to sustain finding that plaintiff had no title, since father, under whom she claimed title, never had title to the property in question through possession when the Van Ness Ordinance, St. 1858, p. 52, relinquishing certain lands to persons in possession, was passed.

3. Quieting title ⚷44(2)—Evidence, showing ownership of lands bordering tract to which title was sought to be quieted, held inadmissible to prove possession or title to tract.

Evidence, in action against city to quiet title to land and to recover damages for withholding possession from plaintiff showing ownership by common reputation of lands adjacent to tract to which title was sought to be quieted, *held* inadmissible to prove possession or title to such tract.

Appeal from Superior Court, City and County of San Francisco; George H. Cabaniss, Judge.

Action by Mary Keenan Dorrian against the City and County of San Francisco. Judgment for defendant, and plaintiff appeals. Affirmed.

Bordwell, Mathews & Wadsworth and O. S. McConnell, all of Los Angeles, for appellant.

John J. O'Toole, City Atty., and Walter A. Dold, Asst. City Atty., both of San Francisco, for respondent.

SPENCE, Justice pro tem. This is an appeal from a judgment in favor of defendant and respondent, the city and county of San Francisco, in an action brought by plaintiff and appellant, Mary Keenan Dorrian, to quiet title to, and recover damages for withholding possession of, certain lands in San Francisco, which land was formerly a public street known as Ash street.

Ash street was near the center of the block of land in San Francisco, now occupied by the city hall, having run parallel to McAllister and Fulton streets between Polk street and Van Ness avenue. The street was 35 feet wide and 384 feet in length. The record does not disclose when this property was first used as a public street. It was conceded that Ash street came into existence as a public street by use and not by dedication or action on the part of the municipal authorities. It was recognized as a public street at least as early as 1858 in conveyances covering property adjacent thereto, and was apparently used and recognized as a public street until 1913.

Although the action was not brought to trial until 1924, the complaint was filed in 1918. The statute of limitations was not pleaded, as the action was commenced within five years after the formal abandonment of Ash street as a public street in 1913.

Appellant is the sole surviving heir of her father, John Keenan, who died in 1858, and appellant's claim is based upon her contention that said John Keenan was the owner of the property described in the complaint at the time of his death. Appellant's case was apparently tried on the theory that John Keenan obtained title through the so-called "Van Ness Ordinance" hereinafter referred to. On this appeal it is contended that testimony shows without contradiction that appellant is the owner of the property, and that the adverse findings on the issue of ownership are not supported by the evidence.

The issue of ownership was tried solely upon various stipulations of counsel and the testimony of Henry E. Monroe. In view of these stipulations it will be unnecessary to go exhaustively into the interesting history of the source of title.

It was stipulated that in 1853 the city was the owner in fee of this property and the

---

★Rehearing denied. Hearing denied by Supreme Court.

lands adjacent thereto. In that year one Francis Quail executed a deed purporting to convey to John Keenan a large tract of land, including the land in question. It was not contended that this deed vested in Keenan anything more than such squatter's rights, if any, as Quail may have had. No conveyance of any of this land was ever made by the city to either Quail or Keenan. For convenience, we will hereafter refer to the large tract of land covered by the Quail deed to Keenan as the "Keenan tract."

In 1855, the so-called "Van Ness Ordinance" was passed in San Francisco. There were in fact two ordinances, which were subsequently ratified by the Legislature on March 11, 1858. Stats. 1858, p. 52. The first of these ordinances, known as ordinance No. 822, provided for the relinquishment of certain lands within the city of San Francisco, which came to the United States through the Mexican conquest, to persons in actual possession, with certain exceptions and reservations including streets and other public places. The actual possession referred to was "actual possession thereof by themselves or tenants on or before the first day of January," 1855; "provided such possession has been continued up to the time of the introduction of this ordinance in the common council, or, if interrupted by an intruder, or trespasser, has been, or may be, recovered by legal process." The second of these ordinances, known as ordinance No. 845, provided for the furnishing, through a commission, of a recommendation for a plan of streets. This map was subsequently prepared, and became known as the Van Ness map. Ash street was not delineated upon the Van Ness map.

Shortly after Keenan's death in 1858 his heirs conveyed to others certain property adjacent to Ash street. In each instance the property conveyed was described as running to and along the line of Ash street, but did not include any part of Ash street, nor was any part of Ash street ever conveyed by the Keenans. Ash street was used as a public street until the formal abandonment shortly before the erection of the new city hall.

Mr. Monroe, the vice president and chief counsel of the California Pacific Title Insurance Company, was called as a witness by appellant for the purpose of establishing ownership by common reputation. After considerable discussion between court and counsel, the testimony of Mr. Monroe was admitted over the objection of counsel for respondent, who subsequently made a motion to strike all of this testimony. This motion was not ruled upon, the court no doubt deeming a ruling immaterial, in view of the decision in favor of respondent. As appellant's position on this appeal is based mainly on this evidence, we will briefly set forth the substance of Mr. Monroe's testimony.

Mr. Monroe testified: That the abstract of title showed that the successors of John Keenan had conveyed the property on either side of Ash street, and that there was nothing of record to show that any one else had deeded this property. That the Keenan title had always been recognized as a good source of title to all of the Keenan tract, and that the records did not disclose any controversy. That title men, searchers of records, and abstract men, as far as his knowledge of any titles in San Francisco went, back to 1890, recognized the Keenan tract as a valid source of title. That the Keenans never received any deed from the city. That, of course, his knowledge came from an examination of records in the last 25 or 30 years and from information he got from older title men, since deceased. That he remembered going over the origin of different claims with these men, but wouldn't specifically say the Keenan tract. That he could not say, in his conferences with these title men, the question of the validity of the title of the Keenan tract was ever brought up or doubted. All the old searchers and attorneys recognized and laid down a principle that these old claims, where there was no dispute at all, were to be accepted as a source of title. That, as far as the record went, there was no dispute over the Keenan tract. These old possessory claims were accepted by the abstract companies and searchers and were passed along without any question. That city deeds were required by them after the Supreme Court decided that it was necessary in order to establish title of record. These were obtained up to the time of the fire, and since then the board of supervisors refused to grant any more city deeds. That searchers had recognized the title to the Keenan tract without any city deed. That there are no suits of record involving the possession of the Keenan tract, and nothing in his records to show any possession or confirmation of possession in Keenan. That the only evidence recognizing possession officially would be a city deed, and there was no city deed.

There is some difficulty in determining from the transcript and the appellant's briefs whether appellant claims title under the provisions of the Van Ness Ordinance or whether appellant claims title without relying upon that ordinance. On this appeal counsel lays stress upon the presumptions set forth in subdivisions 11 and 12 of section 1963 of the Code of Civil Procedure. Subdivision 11 provides a presumption "that things which a person possesses are owned by him." Subdivision 12 provides a presumption "that a person is the owner of property from exercising acts of ownership over it, or from common reputation of his ownership." Counsel's opening brief is largely devoted to setting forth the evidence on which counsel claims to have proved possession, exercise of acts of ownership, and common reputation of ownership. Assuming that there was competent evidence proving or tending to prove these facts, the result would be that the proof of these facts would give rise to a disputable presumption of ownership. Ordinarily such proof and the resultant presumption would not compel the conclusion of ownership in the party making such proof as against the admitted ownership of the other party prior thereto. Here the parties stipulated that the city was the owner in 1853, and that no conveyance of the property was made by the city at any time, and we are satisfied that in this case appellant's claim, if any, is dependent upon the Van Ness Ordinance.

[1] In order to divest the city of title and prove title in John Keenan under the provisions of the Van Ness Ordinance, the burden was upon the plaintiff to show that John Keenan was in actual possession of the property herein referred to on or before January 1, 1855, and continued in possession until the introduction of the ordinance. "There is no presumption that any portion of the land covered by the ordinance was or was not in the actual possession of any one during this period; but, in any legal proceeding in which the fact whether a particular parcel of land was or was not then held in actual possession becomes material, it must be established by that party who relies upon the fact as an affirmative issue in support of his claim or defense. (Code Civ. Proc. sec. 1981.)" Goodwin v. Scheerer, 106 Cal. 690, 696, 40 P. 18, 19.

[2] Appellant concedes that there was no direct evidence of actual possession by Keenan of the property involved in this action and referred to as Ash street. In fact there was no direct evidence to show that Quail or Keenan was ever in actual possession of any portion of the so-called Keenan tract. But it is contended that the property described in Quail's deed was always known as the Keenan tract, and that "the historical fact that the property embracing Ash Street was publicly and notoriously known as Keenan Tract is 'justly entitled to the highest consideration' and furnished 'a just inference' that John Keenan was in possession of the land covered in the Quail deed and was owner thereof." Assuming, but not deciding, that a just inference would be furnished by such testimony, there is no evidence showing that any property was publicly or notoriously known as the Keenan tract in 1855 or at any other time. All that is shown is that Mr. Monroe and counsel on the trial referred to the property described in the Quail deed as the Keenan tract. Mr. Monroe did not testify that this tract was known, publicly or otherwise, as the Keenan tract in 1855 or at any other time, or that he ever discussed this particular tract with any one. Furthermore, we are here concerned with the property formerly embraced in Ash street, which property, so far as is affirmatively shown by the record, was at least as early as 1858 publicly and notoriously known as Ash street, and was used as a public street until 1913. Stress is laid upon the fact that Ash street was not delineated on the Van Ness map. At most, this could only tend to show that Ash street was not a street at the time the map was made, but would not relieve appellant from affirmatively proving that Keenan was in actual possession of the land at the time referred to in the Van Ness Ordinance. Proof of possession by Keenan in 1855 of the property described in the complaint, and known as Ash street was essential to plaintiff's claim of ownership by virtue of the Van Ness Ordinance, and the evidence is insufficient to prove such possession, and leaves this question of possession to conjecture and speculation. We conclude that the appellant failed to sustain the burden of proving her ownership of the property, and that the evidence was sufficient to sustain the findings adverse to appellant on this issue.

We do not wish to be understood as deciding that possession or ownership may be proved by common reputation of ownership in a case of this kind, or that the evidence offered was competent evidence to prove common reputation. The authorities are not entirely in accord. For the reasons above set forth, we do not deem it necessary to discuss the authorities cited by counsel dealing with these questions.

[3] It should be further noted that any common reputation of ownership or exercise of acts of ownership, which it may be claimed that the testimony tended to show, related to adjacent land in the so-called Keenan tract and not to Ash street, the property here involved. Such testimony cannot be relied upon to prove possession in 1855 of the property herein involved and referred to as Ash street, nor to establish the title thereto.

The judgment is affirmed.

We concur: TYLER, P. J.; KNIGHT, J.

MUSTO v. GROSJEAN et al. (Civ. 6544.)★

District Court of Appeal, First District, Division 1, California. Jan. 10, 1929.

Rehearing Denied Feb. 9, 1929. Hearing Granted by Supreme Court March 11, 1929.

1. Contracts 🔑173—Mutual covenants going to entire consideration are mutual conditions and dependent.

Mutual covenants going to the entire consideration are mutual conditions, and dependent.

2. Mortgages 🔑25(5)—Default of vendor in improving premises as covenanted, where not sole consideration for mortgage by purchaser, was partial failure of consideration.

Where covenant by vendor to improve premises was not sole consideration for mortgage by purchaser to vendor, default of vendor in carrying out covenant constituted partial failure of consideration, for which mortgagor could be adequately compensated in damages.

3. Contracts 🔑173—Covenant going only to part of consideration, breach of which is compensable in damages, is independent covenant.

When covenant goes only to part of consideration and breach may be compensated in damages, it is to be regarded as independent covenant.

4. Mortgages 🔑25(5)—Vendor's default in not performing covenant, constituting part of consideration for purchaser's mortgage to vendor, did not bar foreclosure.

Where covenant by vendor to improve premises was only part of consideration of mortgage by purchaser to vendor, default of vendor did not bar action to foreclose mortgage.

5. Mortgages 🔑489—Mortgagee obligated to make improvements, agreeing not to collect interest pending improvements, held not precluded from recovering interest on foreclosure, where mortgagor in effect recovered cost of improvements.

Where mortgagee agreed that interest on mortgage was not to be payable pending improvements to be placed on property by mortgagee, but action to foreclose purchase-money mortgage was brought after principal sum of debt had matured, and mortgagor counterclaimed for cost of improvements which was allowed by court as against judgment for mortgage debt, mortgagor could not claim mortgagee was not entitled to interest on mortgage after in effect obtaining judgment for cost of improvements.

6. Executors and administrators 🔑224—Counsel fees in foreclosing mortgage held not allowable against estate of mortgagor, unless claim was first presented to administratrix (Code Civ. Proc. § 1500).

Under Code Civ. Proc. § 1500, counsel fees could not be allowed on foreclosure of mortgage against estate of mortgagor unless claim based on mortgage had first been presented to administratrix.

7. Mortgages 🔑460—Burden of proving cost of improvement to have been made by mortgagee, held on mortgagor claiming damages therefor on foreclosure.

Where making of improvements to be placed on premises by mortgagee was not condition precedent to right to foreclose purchase-money mortgage, burden of proving cost of making improvements as part of damages claimed by mortgagors rested on mortgagors.

8. Witnesses 🔑144(9)—Mortgagee held competent to testify in foreclosure by assignee against mortgagor's administratrix (Code Civ. Proc. § 1880, subd. 3).

In suit by assignee of mortgagee to foreclose mortgage, brought against administratrix of mortgagor's estate, mortgagee was competent to testify as witness, under Code Civ. Proc. § 1880, subd. 3.

9. Mortgages 🔑489—Mortgagee, waiving interest to compensate mortgagor for delay in not making improvements, held not liable for rent which mortgagor might have received in addition to cost of improvements on foreclosure.

Where mortgagee, required to make improvement on premises, agreed that interest was not to be payable pending making of improvements, and intended that any loss due to delay in making improvements was to be compensated by deferring interest payments on mortgage, mortgagor, on foreclosure of mortgage, could not claim amount for loss of rent which he might have received had property been improved in addition to cost of making improvements.

10. Damages 🔑68—Mortgagors' damages for mortgagee's failure to improve premises held uncertain, precluding recovery of interest thereon prior to judgment (Civ. Code, § 3287).

In suit to foreclose mortgage, in which mortgagors counterclaimed for damages resulting by mortgagee's failure to make improvements as agreed, damages suffered by mortgagor were unliquidated and uncertain and not capable of being made certain within Civ. Code, § 3287, and hence interest thereon could not be recovered prior to judgment.

11. Vendor and purchaser 🔑201—Under contract entitling purchaser to improve premises and apply cost on mortgage debt if vendor failed, action by purchaser was wholly optional.

Under contract by vendor to improve premises, providing that, if vendor failed to fulfill contract, purchaser should have right to do so or cause premises to be improved and apply cost on mortgage debt, action by purchaser was wholly optional.

12. Limitation of actions 🔑149(2)—Supplemental agreement by vendor deferring interest payments on mortgage pending completion of improvements held unequivocal acknowledgment of obligation to complete improvements, taking case out of statute of limitations (Code Civ. Proc. § 337, subd. 1).

Where vendor agreed to complete improvements on premises by December 15, 1919, supplemental agreement postponing payment of

---

★Superseded by opinion of Supreme Court 281 P. 1022.

interest on mortgage to vendor pending completion of work was unequivocal acknowledgment by vendor of obligation to pay for improvements, sufficient to show continuing contract and take case out of statute of limitations (Code Civ. Proc. § 337, subd. 1).

13. Mortgages ⚷256—Assignment of nonnegotiable note secured by mortgage, and mortgage referring to contract obligating mortgagee to make improvements, held part of one agreement, and did not prejudice mortgagor's defense existing before notice of assignment (Civ. Code, § 1459).

Where note secured by mortgage was not negotiable instrument, and together with mortgage expressly referred to contract requiring mortgagee to make improvements on premises, instruments were part of one agreement, and assignment of note and mortgage to plaintiff was without prejudice to any set-off or other defense existing to mortgagor at time and before notice of assignment, under Civ. Code, § 1459.

Appeals from Superior Court, City and County of San Francisco; Louis H. Ward, Judge.

Action by Marie A. Musto against Ellen S. M. Grosjean, as administratrix with the will annexed of the estate of C. E. Grosjean, deceased, and others, in which defendant named and another filed a counterclaim. From the judgment, plaintiff and defendants appeal. Affirmed in part, and in part modified and affirmed.

Alexander McCulloch and C. J. Goodell, both of San Francisco, for plaintiff.

Robert H. Borland, of San Francisco, for defendants Newell.

George Clark Sargent, of San Francisco, (Aaron M. Sargent, of San Francisco, of counsel), for appellants C. E. Grosjean and others.

PER CURIAM. An action to foreclose a purchase-money mortgage for $65,000 upon certain land situated in the Islais creek district, in San Francisco.

The mortgage was executed on May 7, 1919, by C. E. Grosjean, now deceased, and Ellen S. M. Grosjean, his wife, to E. W. Newell, the plaintiff's assignor, and was junior to another mortgage for a like sum executed on the same date. The mortgage was duly recorded, and secured the payment of a promissory note executed by the deceased alone; the note being payable five years after its date, with interest at the rate of 6 per cent. per annum, interest payable monthly.

On March 8, 1919, a contract for the sale of the property by Newell, as first party, to C. E. Grosjean, as second party, was entered into, the purchase price being $135,000, of which $15,000 was paid and the balance evidenced by the notes and mortgages mentioned above. The contract provided, among other things, that certain conditions precedent to the purchase of the property should be fulfilled or caused to be fulfilled by the first party not later than May 10, 1919. These referred to the extension of Tulare street, which the property adjoined, and the conveyance to the state of California of certain land in order to enable the state to enlarge the shipping facilities at the westerly end of Islais channel, and were performed according to the agreement.

The contract further provided that, in the event the second party purchased the property, the first party should make certain improvements thereon; these being specified therein as follows: (1) Grade or cause to be graded the streets on three sides of the property to the official grade; (2) pave these streets and construct sidewalks according to the ordinances of the city; (3) grade and fill the block (the property mortgaged) with earth and rock to a plane one foot above the city base; and (4) obtain a permit for and construct a railway spur track from the easterly line of the block to the westerly terminus of an existing spur track on the state wharf situated on the southerly side of Islais creek. All of the improvements specified in the four paragraphs above were to be made at the expense of the first party, who agreed that work thereon should commence not later than June 15, 1919, and the improvements be fully completed not later than December 15, 1919.

It was further provided that, if the first party failed to fulfill the contract in these respects, the second party should have the right to do or cause the same to be done, and to apply the cost thereof as payment on account of the indebtedness secured by the second mortgage, this being the indebtedness and mortgage involved in the present action; or otherwise to recover the cost of the work from the first party.

On December 15, 1919, none of the work specified had been commenced, and none of the work was subsequently done except that in January, 1920, the land was partially filled with rock and earth. The contract provided that reference should be made in the second mortgage to the above promises of the first party and the rights of the second party, so that, in the event the same should not be fulfilled, any owner of the mortgage and note secured thereby might be charged with knowledge thereof. This reference appears both in the mortgage, which was executed pursuant to the contract, and in the note thereby secured.

Newell, the mortgagee, assigned the note and mortgage to S. W. Newell, by whom, on the same day, the instruments were assigned to Marie A. Musto, the plaintiff, and both instruments were recorded.

As defenses to the action, the mortgagors

⚷For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

alleged that, due to the failure of the vendor to perform the contract as above, the consideration for the mortgage failed, further alleging as a counterclaim that, by reason of the vendor's default, they have suffered damage. As one of her defenses to this counterclaim, the plaintiff alleged that the same was barred by the provisions of subdivision 1 of section 337 of the Code of Civil Procedure.

The trial court entered judgment foreclosing the mortgage, with interest on the principal sum and attorneys' fees as provided in the mortgage, but deducted therefrom the sum of $21,753.63 as the damage suffered by the mortgagors by reason of the failure of the vendor to make the promised improvements.

Pending the trial, the defendant and mortgagor, C. E. Grosjean, died, and Ellen S. M. Grosjean, as administratrix with the will annexed of his estate, and on her own behalf as a defendant, has appealed from an order denying a motion to vacate the judgment entered and to enter a different judgment, and also from the judgment. Plaintiff Musto, with defendants E. W. Newell and Allene B. Newell, his wife, have appealed from that portion of the judgment allowing the counterclaim or set-off from the amount of the mortgage.

Appellant Grosjean claims that the vendor, having made default under the contract, the same was a bar to a foreclosure; that the plaintiff was not entitled to interest or attorneys' fees; that the mortgagors should have been allowed as a part of their damage the rental value of the land from the date of the vendor's default, as well as the cost of making the improvements thereon; and, further, that the court erred in its rulings that the burden of proving the damage was on the mortgagors, and that the vendor was not incompetent to testify as a witness at the trial.

As grounds for the appeal by the other appellants named, it is contended that the set-off or counterclaim pleaded by the mortgagors was barred by the statute; and that under the terms of the contract the counterclaim could not be maintained against the vendor or the assignee of the mortgagee.

As stated, the purchase price of the land was $135,000, and the title thereto was conveyed to Grosjean, the mortgagor, who paid thereon in cash the sum of $15,000. The title to the property is still retained by the estate; no offer to rescind was made, and it is not claimed that the consideration for the mortgage, other than to the extent of the damage caused by the failure of the vendor to construct the improvements, has failed. It is contended, however, that, the default of the vendor being shown, no action to foreclose the mortgage could be maintained. In support of this, reliance is placed upon the case of Meyer v. Weber, 133 Cal. 681, 65 P. 1110, and other cases in which that decision was followed; but an examination thereof shows either that there was a total failure of consideration for the mortgage sought to be foreclosed, a partial failure followed by rescission, or an allowance for such partial failure of consideration by way of set-off. It is also claimed that the contract of sale, with the notes and mortgages executed pursuant thereto, being, as found by the court, parts of one transaction, the promise to pay the note involved in this action was dependent upon the promise of the vendor to make the improvements, and that, before the vendor or the holder of the note with notice could enforce the same, it was necessary to allege and prove compliance with the contract in that respect.

[1-4] Where mutual covenants go to the entire consideration on both sides, they are mutual conditions and dependent (13 Corp. Jur. "Contracts," p. 571, § 540, and cases cited); but in the present case it appears without dispute that the covenant in question was not the sole consideration for the mortgage, and the default of the vendor in this respect constituted but a partial failure of consideration, for which the mortgagors could be adequately compensated in damages. When a covenant goes only to a part of the consideration, and a breach may be compensated in damages, it is to be regarded as an independent covenant. Ernst v. Cummings, 55 Cal. 184; 13 Corp. Jur. "Contracts," p. 571, § 540, and cases cited. As the court said in Union Pacific R. Co. v. Travelers' Ins. Co. (C. C. A.) 83 F. 676, 678, "The approved test for the determination of this question is found in the rule which Lord Mansfield stated in Boone v. Eyre, 1 H. Bl. 273; [126 Eng. Rep. (reprint), 160] in these words: 'Where mutual covenants go to the whole of the consideration on both sides, they are mutual conditions, the one precedent to the other. But where they only go to a part, where a breach may be paid for in damages, there the defendant has a remedy on his covenant, and shall not plead it as a condition precedent.'"

It is claimed further that the plaintiff was not entitled to a judgment for interest on the mortgage or for attorneys' fees. On March 31, 1921, the vendor, then being in default with respect to the improvements promised, made a supplemental agreement with Grosjean, this being in the form of a letter, which was as follows:

"C. E. Grosjean, Esq., San Francisco, Cal. Dear Sir: Referring to the provision in my agreement with you dated March 8, 1919, respecting the grading and filling of the land described in that agreement, I hereby agree that the payment of the interest now unpaid and the interest accruing on your promissory note to me dated May 7, 1919, for the sum of $60,000, pending the completion of the work, shall be postponed and not be payable by you until this work is completed by me; that the nonpayment of said interest by you pending the completion of the work shall not constitute a default on your part in respect to the interest provided in said note to be paid. * * *

"Nothing herein shall be construed to deprive you of your right under the agreement dated March 8, 1919, to do or cause said work to be done at any time, and to exercise all other rights in regard thereto given to you in said agreement.

"Yours truly, E. W. Newell."

[5] According to this agreement, interest was not to be payable pending the making of the improvements, and its nonpayment was not to constitute a default under the mortgage. It may be conceded that, other things being equal, no action to collect the interest would lie before the improvements were completed; but the action to foreclose was brought after the principal sum of the debt had matured, and the mortgagors sought to recover, as against the claim for principal and interest, the cost of making the improvements, and this amount as found by the court was allowed them in the judgment. Having sought and obtained what was in effect a judgment for the cost of making the improvements, they are in no position to assert that, because the vendor was in default in this respect, the obligation to pay interest had not matured. As stated by counsel, the plaintiff should not be charged with the cost of doing the work, the equivalent of doing it, and at the same time be deprived of interest because the work was not done.

Following the death of C. E. Grosjean and the appointment of defendant Ellen S. M. Grosjean as administratrix with the will annexed of his estate, a supplemental complaint was filed by plaintiff, alleging these facts, and expressly waiving all recourse against any property of the estate except that described in the mortgage. No claim was filed by the plaintiff against the estate, but the trial court nevertheless allowed as a part of its judgment an attorneys' fee of $600, which sum, by the terms of the mortgage, was declared to be a lien upon the property therein described.

[6] No counsel fees could be allowed in the decree unless a claim based upon the mortgage had first been presented to the administratrix of the estate. Code Civ. Proc. § 1500; Hibernia Sav. & Loan Society v. Wackenreuder, 99 Cal. 503, 34 P. 219.

[7] The trial court ruled that the burden of proving the cost of making the improvements as a part of the damage claimed by the mortgagors rested upon them. In their briefs many cases are cited holding that, where the plaintiff as a condition precedent to his right to recover must prove substantial performance, the burden of showing the cost of remedying defects is upon him. The present, however, is not such a case; the making of the improvements for the reasons stated not being a condition precedent to the right of maintaining an action to foreclose the mortgage.

[8] We find no merit in the claim that Newell, the vendor, who was the assignor of plaintiff, was not competent to testify as a witness, as a claim within the meaning of subdivision 3 of section 1880, Code of Civil Procedure, has been held not to include a mortgage or other lien where no deficiency judgment is sought against the estate of a decedent. Fallon v. Butler, 21 Cal. 24, 81 Am. Dec. 140; Booth v. Pendola, 88 Cal. 36, 23 P. 200, 25 P. 1101.

[9] In addition to the cost of making the improvements, the mortgagors claimed an amount for the loss of rent which they might have received had the property been improved. This the court disallowed, and we think properly, as it is clear from the supplemental agreement that an extension of time for making the improvements was thereby granted, and that the parties intended that any loss due to the delay in this respect was to be compensated by deferring the interest payments on the mortgage.

[10] It is suggested that interest on the amount of the damage suffered by the mortgagors as found by the court should have been allowed. These damages, however, were unliquidated and uncertain and not capable of being made certain by calculation within the meaning of section 3287 of the Civil Code, and interest thereon could not be recovered prior to judgment. Ferrea v. Chabot, 121 Cal. 233, 53 P. 689, 1092; Burnett v. Glas, 154 Cal. 249, 97 P. 423; McNutt v. City of Los Angeles, 187 Cal. 245, 201 P. 592.

[11] The plaintiff and her coappellants, as grounds for their appeal, contend that, under the original contract between Newell and Grosjean, the latter, in the event of Newell's default, was bound to make the improvements, and either apply the cost as payment to that extent on the mortgage debt, or recover the same by suit. We find no merit in this; such action by the vendee under the provisions of the contract being wholly optional.

[12] It is further claimed that Newell, having obligated himself to complete the improvements by December 15, 1919, a cause of action based upon his default then arose, which was barred by statute; the present action having been brought some time before October 8, 1924, but more than four years after the default. As to this it will be sufficient to say that the supplemental agreement, dated March 31, 1921, contains a distinct and unequivocal acknowledgment by the vendor of his obligation to complete and pay for the improvements. This acknowledgment was sufficient evidence of a continuing con-

tract to take the case out of the operation of the statute. Southern Pacific Co. v. Prosser, 122 Cal. 413, 52 P. 836, 55 P. 145.

[13] The note secured by the mortgage was not a negotiable instrument, and both it and the mortgage by express terms referred to the contract and its provisions respecting the improvements. As the trial court properly found, these instruments were parts of one agreement, and the assignment of the note and mortgage to the plaintiff was without prejudice to any set-off or other defense existing at the time and before notice of the assignment. Civ. Code, § 1459; St. Louis Nat. Bank v. Gay, 101 Cal. 286, 35 P. 876; Briggs v. Crawford, 162 Cal. 124, 121 P. 381; McKenney v. Ellsworth, 165 Cal. 326, 132 P. 75.

The findings of the court are fully supported by the evidence, and the record, with the one exception noted, contains no error which would justify this court in disturbing the judgment. The portion of the judgment appealed from by plaintiff Marie A. Musto and defendants E. W. Newell and Allene B. Newell is accordingly affirmed. The order appealed from by defendant Ellen S. M. Grosjean, individually and as administratrix with the will annexed of the estate of C. E. Grosjean, deceased, is also affirmed. The judgment entered in favor of plaintiff Marie A. Musto is modified by deducting therefrom the sum of $600 allowed by the trial court as attorneys' fees, and, as so modified, is affirmed. It is further ordered that appellant Ellen S. M. Grosjean, individually and as administratrix, recover her costs on appeal.

---

96 Cal. App. 192

VON SCHRADER et al. v. MILTON et al.★
(Civ. 3644.)

District Court of Appeal, Third District, California. Jan. 8, 1929.

Rehearing Denied Feb. 7, 1929.

1. Pleading 🔑72—If plaintiff prays wrong form of relief, courts will nevertheless allow him to proceed, where facts stated show some right of recovery (Code Civ. Proc. §§ 307, 580).

Prayer of complaint is simply statement of relief plaintiff believes should be granted to him, so that, if plaintiff misconceives relief, courts will nevertheless, under Code Civ. Proc. §§ 307 and 580, allow him to proceed, where the facts stated show some right of recovery.

2. Fraud 🔑41—Complaint purporting to be based upon right of rescission held nevertheless to state cause of action for fraud and deceit, though plaintiff was mistaken in relief asked (Const. art. 6, § 4½; Code Civ. Proc. § 580).

Complaint seeking recovery of money it alleged that defendants had fraudulently induced plaintiffs to pay defendant bank, though purporting to be based upon equitable right to rescission of contract, which action could not be maintained against defendant bank, the bank not being a party to the contract, *held* nevertheless to state cause of action against bank for damages based upon fraud and deceit so that judgment for plaintiff was not miscarriage of justice prohibited by Const. art. 6, § 4½, and, in view of Code Civ. Proc. § 580, providing that court may grant plaintiff relief consistent with case made by complaint and embraced within issue.

3. Appeal and error 🔑1026—Error without prejudice does not afford appellant relief.

Error without prejudice does not afford appellant any relief in the Court of Appeal.

4. Fraud 🔑12—Misrepresenting terms of trust defendant bank had assumed with reference to moneys deposited with it and as to what under trust would be done with moneys, inducing plaintiffs to pay over certain sum held fraudulent.

Where statements inducing plaintiffs to pay over to defendant bank certain sum of money were made as to nature and terms of trust which defendant bank had assumed with reference to moneys deposited with it and as to what under terms of its trust would be done with moneys in future, the terms of trust being misrepresented and also duties of bank in respect thereto, the statements amounted to a fraud.

5. Fraud 🔑58(2)—Findings on misrepresentations, disclosed by record to follow almost verbatim testimony of plaintiffs, had supporting evidence.

Where the record disclosed that findings on questions of misrepresentations inducing plaintiffs to pay over money to defendant bank followed almost verbatim testimony of plaintiffs, there was evidence to support them.

6. Fraud 🔑20—Representations fraudulently inducing plaintiffs to pay money to defendant held actionable, though defendant received no benefit; liability being predicated upon fact that plaintiffs were prejudicially misled.

Where plaintiffs suing to recover money which they claimed they were fraudulently induced to pay over to defendant bank, fact that bank did not profit from transaction did not render representations inactionable, it not being essential to actionable fraud that guilty party should derive any benefit from his misrepresentation or concealment; liability being predicated upon fact that plaintiff has been misled to his prejudice and not that defendant has profited by wrong.

7. Appeal and error 🔑173(7)—Objection not raised during trial, that bank officers' representations inducing plaintiffs to pay defendants money exceeded authority, cannot be considered.

Where it was not objected to, in action to recover back moneys plaintiffs were fraudulently induced by defendants to pay over to defendant bank, that officers of bank in making representations complained of exceeded their

---

★Rehearing denied.

authority, and that bank had no interest in project except to act as trustee, so that evidence upon question went in without any suggestion or intimation that bank would make objection upon appeal, such could not be raised upon appeal.

8. Corporations 🔑423—Corporation is liable for fraud and deceit of officers and agents acting in apparent employment, though acts were unauthorized or committed for personal benefit.

Corporation is liable for the fraud and deceit of its officers and agents acting in the apparent course of their employment, although it did not authorize or know of the fraud or deceit, and although it may have been committed by the officer or agent for his own benefit.

9. Pleading 🔑248(3)—Amended complaint elaborating allegations in preceding one, though adding additional misrepresentation, did not state new cause of action.

Where amended complaint was simply an elaboration of allegations in second amended complaint, though an additional misrepresentation was included as basis for plaintiffs' action to recover money which they alleged they were fraudulently induced to pay over to defendant bank, it did not state a new cause of action; the new inclusion being in connection with same cause of action for fraud and deceit, as disclosed by second amended complaint.

Appeal from Superior Court, Los Angeles County; P. E. Keeler, Judge.

Action by Alleyne Von Schrader and another against Jack Milton, the Long Beach National Bank, and others. Judgment for plaintiffs, and second named defendant appeals. Affirmed.

Chandler, Wright & Ward, of Los Angeles, for appellant.

Clay Carpenter, of Long Beach, and Norman T. Mason, of Los Angeles, for respondents.

TUTTLE, Justice pro tem. This is an action to recover $4,800 which respondents allege was obtained from them through fraud. Judgment went for plaintiffs in the sum of $2,635. Only one defendant, Long Beach National Bank, appeals from said judgment.

On February 21, 1923, Alice Welstead, assignor of plaintiffs, entered into a contract in writing to purchase from defendant Bolivar Holding Company, for a consideration of $9,300, 93 shares of its capital stock and, also, a 99-year lease upon an apartment in a building to be erected by said corporation. Said contract was thereafter assigned to plaintiffs, who assumed all the obligations thereunder. At the time of said assignment only $100 had been paid on the said stock and lease, which at all times were deposited with defendant bank, as trustee. On April 4, 1923, plaintiffs paid to defendant bank, on account of said contract, the sum of $4,800. Of this amount $1,700 was in the nature of a bonus, and this bonus was paid over at once by the bank to defendant Milton Realty Company, leaving the sum of $3,100 in the hands of defendant bank. There was also deductible from said last-named amount 15 per cent. broker's fee, making the net amount of $2,635 to be accounted for by appellant.

The promoters of the scheme proposed to build an apartment house with the proceeds from stock sales and the subscriber of each block of stock was to have a 99-year lease upon an apartment in said building.

Under a permit issued by the state corporation commissioner, defendant Bolivar Holding Company "proposed to impound the moneys received from the sale of stock to the public with the Long Beach National Bank (one of defendants herein) under an agreement whereby the first $40,000.00 raised will be used to meet the first payment on the real estate described, the next $85,000.00 to pay off the existing mortgage, and the following $150,000.00 in order to start construction of its building. In the event that building is not constructed, all moneys paid in on stock shall be returned to original subscribers."

After the said permit was issued, defendant Bolivar Holding Company (referred to herein as the holding company) and defendant bank entered into an "agreement and declaration of trust." Among the terms of this agreement were the following: The bank was to receive deposits under the terms of the permit, and to act as depositary, trustee, stock transfer agent, and stock registrar in connection with the financing and consummation of the undertaking, and no issue of stock was to be valid until registered by the bank; the bank could loan money to the trustee, and it had a prior lien upon the real property as security for such loans. Particularly pertinent are the following portions of said agreement:

"That whenever additional sums aggregating not less than one hundred and fifty thousand dollars ($150,000.00) shall have been so deposited with the depositary, the same shall be by the depositary paid to the trustee and such sums shall be by the trustee used for the uses and purposes and pursuant to the terms and conditions hereinafter set forth.

* * *

"(c) That in the event that there shall not be deposited with the depositary on or before two (2) years from date hereof additional sums aggregating not less than one hundred and fifty thousand ($150,000.00) dollars for use pursuant to the purposes mentioned in said permit, such additional deposits which may have been received by the depositary shall be by the depositary returned to the respective depositors thereof, less such portion thereof as may have been paid by the depositary to the holding company as and for a sales commission fund. * * *

"That if the title to the said real property shall be vested in the trustee, free and clear of said mortgage indebtedness, and if the said fund of one hundred fifty thousand dollars ($150,000.00) or such lesser amount as may be deemed sufficient by the trustee, shall be created and under the control of the depositary, on or before two years from date hereof, or if the trustee, in the exercise of its absolute discretion shall consider its act to be for the best interest of depositors, the trustee shall convey the title to the said real property, in the condition which it may then be, together with such net sums as may be in its hands available for the purpose, to the holding company, and that by such conveyance the depositary and trustee shall be wholly relieved and discharged from all duties, responsibilities and liabilities arising hereunder."

The sad part of the story follows: Sufficient funds to finance the proposition were not collected. The building hardly progressed to completed foundations. The bank turned over to the holding company the money collected before a sufficient amount to complete the building had been paid in. Plaintiffs notified the bank to withhold any payments to the promoters and demanded their money back. The bank did not repay the money. The promoting corporation drifted into bankruptcy. There was no salvage, and the investors lost their all. The saying that "it is an ill wind that blows no good" was never better nor more appropriately applied than to this episode of high finance. Thousands of dollars were paid out, as the evidence shows, to the promoters, under the cloak and guise of "commissions" and "bonuses." The spirit, if not the letter, of the permit issued by the corporation commissioner was openly flaunted and violated. The bank received $5,000 for acting as "trustee," $10,000 as a bonus for a loan of $100,000, besides a percentage on collections and other perquisites. After all was over and the smoke of battle cleared away, the only losers were the investors.

The pleadings of respondent and the manner in which the issues of the case were finally determined are assailed by appellant with great vigor and from many points of attack. Three amended complaints were filed. The case went to trial upon the second amended complaint, and the third amended complaint was filed after submission, and with permission of court, to conform to the proofs. It is quite apparent that, originally, respondent started out with an action to rescind the assignment agreement upon the ground of misrepresentations made by defendant holding company. The second amended complaint, however, charges all defendants with these misrepresentations. The third amended complaint contains additional matter which is merely an elaboration of the allegations of the prior complaint. In substance, the final complaint sets up that plaintiffs were induced to enter into said assignment contract through misrepresentations made upon the part of defendants; that defendants made the following representations, which were not true: The money paid in by plaintiff would be held by the bank as trustee, and that no money would be released until sufficient funds accrued from sale of leases or apartments in the proposed building to construct the same—"that plaintiffs were induced to and did purchase the interest of Alice Welstead in said stock and lease, take to themselves the assignment of said application and paid said $4,800.00 to defendant, Long Beach National Bank, by reason of the following statements and representations made to them at and immediately prior to said assignment by the defendant Long Beach National Bank, in which statements the defendant Bolivar Holding Company joined and concurred, upon which the plaintiffs relied and but for which they would not have made said purchase or paid said money, to-wit: That the defendant bank held the title as trustee to the land on which the El Bolivar Building was to be erected and that the plaintiffs need have no fear whatsoever in making their proposed investment; the defendant bank was the trustee and plaintiffs' money would be held by it in trust until the completion of the proposed building and not a cent of it would be released until sufficient funds were on hand to start construction and to finish the building; that the money paid for shares in the Bolivar Holding Company was being impounded with the defendant bank as trustee and that no money would be released until sufficient funds accrued from sale of leases or apartments in the proposed building to construct the same; that if sufficient money was not collected to insure the completion of the proposed building, the money paid in by plaintiffs on the proposed investment would be returned to them; that it would be held by the defendant bank without interest, but would be returned to the plaintiffs in case enough apartments in the proposed building were not sold to assure its completion; that the money would be kept by the defendant bank, as it were, in escrow, and that in case enough apartments were not sold to assure the completion of the proposed building the defendant bank would give their money back to plaintiffs, without interest; that more than enough apartments were sold the first week to assure the erection of the proposed building and that there were but two double apartments left unsold."

Plaintiffs also alleged that notice of rescission of the assignment contract had been duly served, and they prayed that said contract be rescinded and that the sum of $4,800, which they had paid thereon, be returned to them. There was also a prayer for general relief.

The answer denied these allegations in respect to the alleged false statements, and also set up defenses of laches and estoppel. The trial court found the said allegations of the complaint to be true, and also against the affirmative defenses. Judgment was entered that plaintiffs recover the sum of $2,635 from defendants bank and holding company.

[1-3] It is contended that the complaint does not state facts sufficient to constitute a cause of action. This argument is based entirely upon the theory that the cause of action upon which the judgment is founded is one for rescission of a contract. It will be observed, however, that appellant was not a party to the contract referred to in the complaint. It must be conceded that an action for rescission, under such circumstances, cannot be maintained against appellant. We have the unusual situation of a complaint stating or purporting to state a cause of action based upon rescission against certain defendants, and a cause of action arising out of fraud and deceit against another defendant. Appellant concedes that an action for fraud and deceit might have been maintained by plaintiffs, but contends that the prayer of the complaint shows conclusively that the action is not of that character, as no damages are sought, and that there is no allegation of damages in the complaint. The prayer asks for rescission of the contract, and that plaintiffs recover the consideration of $4,800 and "for such other and further relief as to the Court shall seem just and equitable in the premises."

In determining the cause of action, the prayer of a complaint has very little controlling force. It is simply a statement of the relief plaintiff believes should be granted to him, and, if he misconceives the form of relief, the courts will nevertheless allow him to proceed where the facts stated show *some right of recovery*. Zellner v. Wassman, 184 Cal. 80, 193 P. 84. It is not necessary or essential that a complaint should state a cause of action for the relief which plaintiff seeks in his prayer. In defining the relief which may be granted to plaintiff, section 580 of the Code of Civil Procedure provides that "the court may grant him any relief consistent with the case made by the complaint and embraced within the issue." Many years ago our Supreme Court took a decided stand in upholding a liberal construction of pleadings, as plainly appears in the following excerpt from the opinion in the case of Walsh v. McKeen, 75 Cal. 519, 17 P. 673:

"As to the alleged change in the nature of the action, an answer is found in the fact that we have in this state but one form of civil actions for the enforcement or protection of private rights (Code Civ. Proc. § 307); and where an answer has been filed, any relief may be granted to the plaintiff which is consistent with the facts stated in the complaint. (Code Civ. Proc. § 580.) An action does not now as formerly, fail because the plaintiff has made a mistake as to the form of his remedy If the case which he states entitles him to any remedy, either legal or equitable, his complaint is not to be dismissed because he has prayed for a judgment to which he is not entitled. 'Legal and equitable relief are administered in the same forum, and according to the same general plan. A party cannot be sent out of court merely because his facts do not entitle him to relief at law, or merely because he is not entitled to relief in equity, as the case may be. He can be sent out of court only when, upon his facts, he is entitled to no relief, either at law or in equity.' (Grain v. Aldrich, 38 Cal. 520, 99 Am. Dec. 423; Emery v. Pease, 20 N. Y. 64; Pomeroy's Remedies, sec. 71.)"

In the instant case, it is alleged that plaintiff was induced, through fraudulent representations made by appellant, to pay over to it the sum of $4,800, and judgment is asked for that amount. While the word "damages" or other word of similar import was not employed in the complaint, the facts pleaded show such damage and the measure of damages would be the amount which was unlawfully taken from plaintiffs. Finally, we do not see how any prejudice resulted from the failure to specify that the money which plaintiff sought to recover was in the nature of "damages," or from the failure to allege that plaintiff had been "damaged," nor has appellant indicated in its very able presentation of the matter that any injury had resulted to it, assuming that the contention in respect to the pleadings is true. Its argument is somewhat academic in character, and failing, by practical application to the case, to show prejudice or injury. Error without prejudice does not afford appellant any relief in this court. It denied in its answer that it made any false statements to plaintiffs; denied that plaintiffs, relying upon any statements or misrepresentations it had made, paid to it the sum of $4,800, or any other sum, or otherwise, or at all. It introduced the same evidence and availed itself of the same objections which it might have urged whether the cause of action were technically one at law for damages or in equity for rescission. It is certain that no miscarriage of justice resulted from the irregularities complained of. Const. Cal. art. 6, § 4½. We are of the opinion that the complaint states a cause of action against appellant, based upon fraud and deceit.

[4] It is contended that the alleged representations were made concerning future acts only, and could not, in contemplation of law, amount to a "fraud," as they could neither be false nor true when made. We do not read the record in that light. The statements were made as to the nature and terms of the

trust which the bank had assumed with reference to moneys deposited with it, as and to what, under the *terms of its trust*, would be done with the moneys in the future. The terms of the trust were misrepresented, and also the duties of the bank in respect thereto. "A mere promise to perform an act in the future is not, in a legal sense, a representation, nor does a failure to perform such promise convert it into a false representation; but if the promise is accompanied with statements of existing facts which show the ability of the promisor to perform his promise, and without which the promise would not be accepted or acted upon, such statements are denominated representations, and if falsely made are grounds of avoiding the contract, though the thing promised to be done lies wholly in the future." Russ Lumber & Mill Co. v. Muscupiabe Land & Water Co., 120 Cal. 521, 529, 52 P. 995, 998, 65 Am. St. Rep. 186.

As to the affirmative defenses of estoppel and ratification, the court found that the facts alleged in the answer in connection therewith were not true, and those findings are not attacked. Furthermore these defenses are urged solely against a cause of action based upon rescission. As we have indicated, the judgment is not predicated upon a rescission, but upon fraud and deceit upon the part of the bank, whereby plaintiffs were induced to invest $4,800 and lost the entire amount.

[5] It is next contended that the evidence is insufficient to support the findings on the question of misrepresentations. The record discloses that they follow almost verbatim the testimony of the plaintiffs. It can scarcely be urged, with any degree of seriousness, that these findings lack support. Respondent argues that the testimony of said witnesses is very improbable. He also points out that the bank officials denied the conversations mentioned. It is a waste of time to attack findings under such circumstances. If there is any substantial evidence to support the findings, further inquiry on our part is foreclosed. The argument made by appellant might well be advanced before the trial court, as it is based upon the weight and effect of the testimony, and the credibility of the witnesses—matters with which we have no concern.

[6] It is contended that the bank did not profit from the transaction in question, and hence the representations were not actionable. The question of a profit is immaterial. It is not essential to actionable fraud that the guilty party should derive any benefit from his misrepresentation or concealment. 26 C. J. 1180. Liability is predicated upon the fact that the plaintiff has been misled to his prejudice, and not that defendant has profited by his wrong.

[7, 8] Appellant takes the position that "if anyone is to be held liable for the misrepresentations by Mr. Meeker and Mr. Dutton (President and Vice President, respectively, of the bank), it must be them individually and not the bank." It is urged that the said officers, in making the representations complained of, exceeded their authority, and that the bank had no interest in the project except to act as trustee. This objection was not raised when plaintiffs testified to said representations, and evidence upon the question went in without any suggestion or intimation that appellant would take the position which it now assumes. It is an elemental rule of appellate practice that, where evidence is introduced at the trial of a cause without objection, an objection to the same cannot be raised upon appeal. We are of the opinion, however, that appellant did not play the passive role portrayed by its counsel. "As a corporation can only speak or act through its agent, there is stronger reason for holding it answerable for the acts and representations of the agent done within the ostensible scope of his authority and while transacting the business of the principal, than applies when the principal is a natural person. A corporation is liable for the fraud and deceit of its officers and agents, acting in the apparent course of their employment, although it did not authorize or know of the fraud or deceit, and although it may have been committed by the officer or agent for his own benefit. Fletcher, Cyc. Corp. vol. 5, § 3346. "In such cases the doctrine of ultra vires has no application, for it would be a travesty on justice and common honesty to permit a corporation, whether private or quasi-public, to participate in a fraud and to benefit therefrom and then escape liability on the ground that the act was not that of the corporation itself, but its officers who were in control thereof." Thompson on Corporations (2d Ed.) vol. 5, § 5474.

[9] It is urged that the third amended complaint introduced a new cause of action. We take the view that the amended complaint was simply an elaboration of allegations in the second amended complaint. An additional misrepresentation was included, but this was in connection with the same cause of action, to wit, fraud and deceit.

Other objections are raised by appellant, but we have carefully examined them, and are satisfied that they are without merit.

The judgment of the trial court is fully justified by the record before us, and accordingly it is affirmed.

We concur: FINCH, P. J.; HART, J.

96 Cal. App. 267

YATES v. YATES. (Civ. 6531.)★

District Court of Appeal, First District, Division 1, California. Jan. 12, 1929.

Rehearing Denied Feb. 11, 1929. Hearing Denied by Supreme Court March 11, 1929.

1. **Divorce ⟹245(3)—Evidence, on application for modifications, sustained order requiring divorced husband to pay $50 per month.**

Evidence, on application for modification of decree awarding alimony, *held* to sustain order requiring divorced husband to pay alimony to the wife in the amount of $50 per month.

2. **Divorce ⟹245(3)—Divorced husband, applying for modification of decree awarding alimony, had burden of showing inability to pay any sum.**

Divorced husband, applying for modification of decree awarding alimony, had burden of establishing allegation that he had no ability to pay any sum.

Appeal from Superior Court, Monterey County; Fred A. Treat, Judge.

Divorce action by Mary Beatrice Yates against Henry Newton Yates. From an order modifying the decree awarding alimony, defendant appeals. Affirmed.

R. M. Estcourt, of San Francisco, for appellant.

Hudson, Martin & Jorgensen, of Monterey (Geo. Allan Smith, of Monterey, of counsel), for respondent.

TYLER, P. J. [1, 2] Application for modification of a decree awarding alimony. The parties hereto were formerly husband and wife. On November 23, 1923, in anticipation of the wife filing an action for divorce, they entered into a property settlement and maintenance agreement. This agreement provided, among other things, that the husband should pay his wife the sum of $150 per month for her support and maintenance until the death of either party or until the wife should remarry, in which event the payments were to cease. Certain real property was conveyed to the wife, which was heavily incumbered. On December 20, 1923, the wife filed a suit for divorce. The husband defaulted, and an interlocutory decree was entered declaring the wife entitled to a divorce and awarding her the sum of $150 per month for her maintenance and support. On January 5, 1925, a final decree was entered and the allowance for her support was carried into this judgment. Thereafter the husband remarried. On the 16th day of August, 1926, he filed an affidavit in the divorce action, which alleged that he had been unable to earn sufficient money to comply with the terms of the decree, and he prayed for an order releasing him entirely from its operation in this respect. On the hearing it was admitted that no payment had ever been paid by him on account of the orders. After hearing, the court rendered its decision modifying the decree awarding alimony to the wife by reducing the amount to the sum of $50 per month, which sum it was found the applicant had the ability to pay. The husband appeals from this order and claims the trial court abused its discretion in ordering such payment, as there is no evidence in the record to show that he has the ability to pay this or any other sum whatsoever. There is no merit in the contention. The evidence shows that respondent is a woman of some 57 years of age, and that she lived with her former husband for over 30 years. It further appears therefrom that she is in poor health, having suffered two operations from which she has not fully recovered, and that she is unable to earn a livelihood. Other evidence shows that appellant is a physician and has earned at his profession sums aggregating from $90 to $300 and over a month. Appellant was not present at the hearing, but his present mother-in-law testified as to his earnings and expenditures. A further review of the evidence would answer no useful purpose. The burden was upon appellant to show, as he claimed, that he had no ability to pay any sum.

The determination of questions of this character are addressed to the sound and liberal discretion of the court. There is ample evidence to sustain its conclusion.

The order is affirmed.

We concur: KNIGHT, J.; CASHIN, J.

---

96 Cal. App. 289

DE GEER v. MORELAND MOTOR TRUCK CO. (Civ. 5428.)

District Court of Appeal, Second District, Division 1, California. Jan. 14, 1929.

Judgment ⟹223—Addition to judgment held not erroneous as including interest on additional sum, which judgment expressly provided was not allowed.

Court's computation of additional amount due up to entry of judgment *held* not erroneous as including interest on such sum, where no objection was made to the calculation and judgment expressly provided that no interest was to be recovered on the additional amount provided for.

Appeal from Superior Court, San Diego County; W. P. Cary, Judge.

Action by J. W. De Geer against the Moreland Motor Truck Company. Judgment for plaintiff, and defendant appeals. Affirmed.

Loyd Wright, Charles E. Millikan, and Fred Reed, all of Los Angeles, for appellant.

Crouch & Sanders, of San Diego, for respondent.

★Rehearing denied. Hearing denied by Supreme Court.

YORK, J. Appellant's first contention is that the evidence is insufficient to support the findings of the court, that on or about the 8th day of May, 1923, the plaintiff subscribed and purchased from the defendant corporation 150 shares of common stock of the defendant corporation, or that the defendant and one Charles Klein agreed to receive in full payment for said 150 shares of common stock bonds of the United States, described in plaintiff's complaint; and that the evidence is insufficient to support any finding that the defendant corporation entered into any agreement whatever with the plaintiff in connection with the 150 shares of common stock alleged to have been purchased from the defendant.

The appellant also objects that the evidence is insufficient to support the finding of the court that the plaintiff delivered to the said Charles Klein for the defendant all of the bonds of the United States, as described in plaintiff's complaint, or that the purchase price of the 150 shares of common stock, alleged to have been purchased, was paid. Appellant also objects that the evidence is insufficient to support the finding of the court that the defendant has neglected, refused, and failed to deliver any of the said 150 shares of common stock, so purchased by plaintiff from the defendant and paid for as set out in the complaint, or that the plaintiff has failed and refused to deliver or return to the plaintiff any of the bonds of the United States received in payment of the said stock.

Appellant also objects that the evidence is insufficient to support the finding of the court that there is now due, owing, and unpaid from defendant to plaintiff the sum of $1,575, together with interest thereon at the rate of 7 per cent. from December 24, 1923, or to support any finding that any sum whatever is owing from defendant to plaintiff.

An examination of the evidence shows that there was sufficient evidence in the record to sustain, not only the findings objected to, but each and all of the findings made by the trial court.

There was objection made by appellant that the court erred in awarding interest on the amount found by the court to be due from the time it was made until entry of the judgment, which amounted to the sum of $220.50. As to this objection, it shows upon the face of the judgment that it is merely a calculation made by the trial court, and the trial court particularly provided that no interest was to be recovered upon the said sum of $220.50, and in the absence of any objection by the respondent, we do not see how this court can interfere with this computation made by the trial court.

The objection that the complaint did not state facts sufficient to state a cause of action is not well taken.

The objection that the conclusions of law are not supported by the findings of fact is not well taken, as the findings of fact fully support the conclusions of law, and the evidence, as we have heretofore stated, amply supports the findings of fact.

The eighth point made by appellant that material findings have been made without any support from the evidence has been answered by the statements heretofore made in this opinion.

The judgment appealed from is therefore affirmed.

I concur: CRAIL, Justice pro tem.

I concur in the judgment: HOUSER, Acting P. J.

---

96 Cal. App. 236

STATE COMPENSATION INSURANCE FUND et al. v. LAMB et al.

(Civ. 6596.)

District Court of Appeal, First District, Division 2, California. Jan. 10, 1929.

1. Appeal and error ⇨1067—Refusal to instruct on presumption of care held not prejudicial, where drivers of colliding trucks testified regarding their conduct.

Where drivers fully testified regarding their conduct in action for damages by collision of trucks, instruction on presumption of care could not have helped jury, and refusal to give same was not prejudicial.

2. Trial ⇨253(9)—Requested instruction in action for injuries, confined to only part of defendant's acts, held properly refused.

In action for injuries resulting from automobile collision, requested instruction, confined to only part of acts of defendant, and not enumerating all acts, *held* properly refused.

3. Trial ⇨240—Requested instruction which was argumentative held properly refused.

Refusal to give requested instruction which was argumentative *held* proper.

4. Trial ⇨260(1)—Requested instruction, covered by instruction given, held properly refused.

Requested instruction, fully covered by instructions given, *held* properly refused.

5. Automobiles ⇨242(7)—Defendant, asserting inevitable accident as affirmative defense to action for injuries by automobile collision, had burden of proving inevitable accident.

Where defendants, in action for injury growing out of automobile collision, introduced question of inevitable accident in opening statement, and introduced proof thereof, asserting same as affirmative defense, burden was on defendants to prove inevitable accident.

6. Trial ⇨228(1)—Instruction on general subject of driver's duty to drive on right side of street held not objectionable for failure to state rights of driver thrown to left side of street by breaking of wheel.

Instructions, in action for injuries by automobile collision, on general subject of duty of driver to drive on right-hand side and not left-hand side of street, *held* not objectionable for failure to state rights of driver breaking wheel and thrown to left-hand side of street, since instructions were not addressed to that subject.

7. Trial ⇨296(9)—Instructions using words "the carelessness," "the negligence," and "the damages" held not objectionable as assuming facts for failure to use words "if any," where court further instructed it was not expressing opinion on evidence.

In action for injuries growing out of automobile collision, instructions using words "the carelessness," "the negligence," and "the damages" *held* not objectionable as assuming facts by failing to insert words "if any," where court further instructed jury that court was not expressing, or desiring to express, any opinion on weight of evidence, or that any alleged fact is or is not true.

8. Trial ⇨295(1)—Court's instructions are to be read as whole.

Instructions of court are to be read as a whole.

9. Trial ⇨251(8)—Instruction on subject of preponderance, using phrase "of some act of negligence," held not erroneous as not confined to negligence pleaded.

Instruction, in action for injuries by automobile collision addressed to subject of preponderance using phrase "of some act of negligence," *held* not erroneous as not confined to acts of negligence pleaded in complaint.

10. Evidence ⇨558(1)—Plaintiff's cross-examination of defendant's expert on same subject as examination by defendants held not objectionable as not cross-examination nor within issues.

Where defendants called witness as expert, and examined him regarding subject of crystallization of metals, defendant's cross-examination of expert on same subject was not objectionable as not cross-examination, not within issues of case, and therefore immaterial.

11. Appeal and error ⇨1047(3)—Error, if any, in refusing to strike hearsay statement, held not prejudicial, where fact was confirmed by other witnesses, and motion to strike was too uncertain.

Where witness, testifying to damage to truck, subsequently stated he was told fact and did not make examination, error, if any, in denying motion to strike, was not prejudicial, where motion was too broad and uncertain, and there was no question regarding fact, and two other witnesses testified directly to same fact confirming hearsay statement.

12. Appeal and error ⇨1047(3)—Error in refusing to strike injured party's answer containing conclusion held not prejudicial, where answer was not harmful to defendant, and conclusion was correct.

Where injured party was asked as to recollection of putting on brakes before striking parked truck, and answered in negative, and that, if he had, he would have been hit head-on, error in refusing to strike out answer was not prejudicial, where injured party's conclusion was correct, and not harmful to defendant.

Appeal from Superior Court, City and County of San Francisco; Louis H. Ward, Judge.

Action by the State Compensation Insurance Fund and another against George W. Lamb and others. Judgment for plaintiffs, and defendants appeal. Affirmed.

Louis V. Crowley and Cooley, Crowley & Gallagher, all of San Francisco, for appellants.

Bronson, Bronson & Slaven, of San Francisco, for respondent Robbins.

Frank J. Creede, of San Francisco, for respondent State Compensation Insurance Fund.

STURTEVANT, J. On the 4th day of May, 1925, A. Robbins was injured in an automobile accident. He duly applied to the Industrial Accident Commission for relief. In due time he was awarded certain relief, and the State Compensation Insurance Fund complied with the award, and then it commenced this action against the defendants. The defendants appeared and answered, and a trial was had in the trial court before the court sitting with a jury. The jury returned a verdict in favor of the plaintiffs, and from a judgment entered thereon the defendants have appealed under section 953a of the Code of Civil Procedure.

The defendants contend that the trial court erred (1) in refusing to give certain instructions; (2) in giving certain instructions; and (3) in making certain rulings on the admission of evidence.

Before proceeding further, it will clarify the case to state that the accident happened in Townsend street between First street and Second street, about 9 o'clock in the morning. Shortly prior to the accident the Great Western Power Company had caused one of its trucks to be parked on the north side of Townsend street, near the curb. That truck was facing to the west, and the rear end of it had the tailgate down. While that truck stood there in that position, one of the trucks of the defendants approached from the west, traveling east on Townsend. There was some evidence that it was traveling 35 miles an hour, with its right-hand wheels on the left-hand side of the middle of Townsend street. A. Robbins at the same time was driving a Ford truck in a westerly direction on the north side of Townsend street—that is, on the right-hand side. About the time that the trucks were approaching the truck of the Great Western Power Company it was the theory of the plaintiffs that the left front wheel of defendants' truck came off and that truck swerved further to the left and, to avoid a collision, Robbins turned further to his right, but, as the two trucks passed each other, the defendants' truck side-swiped the Ford truck, hitting the left rear wheel thereof, and that before the Ford truck came to a stop it ran against and underneath the tailgate of the truck of the Great Western Power Company, thus injuring the driver Robbins. On the other hand, it was the contention of the defendants that their truck was not traveling faster than 16 to 18 miles per hour; that the left front wheel came off by reason of a break at the shoulder of the spindle; and that the break was caused by a latent defect that could not be ascertained by the exercise of ordinary care. It was further contended by the defendants that their truck did not touch the Ford truck, and that, whether the driver Robbins was injured, such injuries were not referable to any act of the defendants.

The trial court gave 57 instructions. They are not numbered, and therefore we have numbered them. The defendants proposed and asked the trial court to give 42 instructions. They are not numbered, and therefore we have numbered them. The trial court gave 17 of the instructions so requested. The defendants earnestly contend throughout their brief that the trial court, in its instructions, instructed on the theory of the plaintiffs, but did not instruct on the theory of the defendants. They quote their requested instruction 39, and vigorously contend that the trial court erred in not giving it. The contention is entirely without merit. Of the instructions given, Nos. 24 and 34 should be read together, and the two constitute an instruction on the theory of the defendants, and the same may be said of instructions 51 and 52. These four instructions very fully and completely instruct on the theory of the defendants.

[1] The defendants requested an instruction to the effect that one lawfully in the street is presumed to act lawfully and in the proper manner. The trial court refused the instruction, but gave another on the same subject. It is contended that the trial court erred in refusing the defendants' instruction, and also erred in giving the instruction which it did give. In so far as the subject-matter of both instructions is concerned, it was covered by the sworn testimony of the driver of the Ford truck and the driver of the defendant's truck. Conceding, for the purpose of this decision, and solely for that purpose, that either ruling was erroneous, it is quite impossible to see how the ruling could have been prejudicial. When each of the witnesses had fully testified regarding what he did or did not do, it is impossible to see how the jury could have been helped by an instruction on the presumption of care.

[2] The defendants complain because the trial court refused their instruction No. 28. We think it was properly refused. It was confined to only a part of the acts of the defendants, and did not enumerate all of them. In so far as it was sound law, it was covered by one of the instructions given, No. 47.

[3, 4] They also complain because the trial court did not give their instruction No. 17. The instruction was argumentative, and should not have been given. Furthermore, the subject-matter was fully covered by instructions 49 and 51, which were given.

[5] The defendants complain of an instruction given by the trial court, No. 46. That instruction was addressed to the question as to who should prove an inevitable accident. It is difficult, under the issues made by the pleadings, to see just what was the pertinency of the subject-matter. Be that as it may, the defendants introduced it in the opening statement made by their attorney, and thereafter followed up the subject and introduced proof thereon. There is nothing in the case showing that there was any duty on the part of the plaintiffs to introduce evidence in support of the existence of the theory of inevitable accident, and, if the subject-matter be asserted as an affirmative defense, then the burden was on the defendants to make the showing.

The trial court gave instruction No. 42, which was addressed to the subject-matter of the reciprocal rights of those lawfully in the streets. Taking up the subject-matter of duty in the presence of imminent danger, the defendants argue that the instruction was erroneous. It did not treat, nor purport to treat, on that subject. Elsewhere the trial court instructed on that subject, and did so properly.

[6] In instructions 38 and 39 the trial court instructed on the general subject of the duty of a driver to drive on the right-hand side, and not on the left-hand side of the street. It is not claimed they are incorrect. It is claimed that they do not state what would be the rights of the defendants if the breaking of a wheel should throw the driver on the left-hand side when otherwise he was on the right-hand side. The instructions were not addressed to that subject. Other instructions covered the dilemmas, rights and liabilities arising from a wheel breaking by reason of a latent defect.

As to instruction No. 48, given by the trial court, the defendants contend that it was misleading, in view of the plaintiffs' contention regarding defendants' alleged negligence which preceded and caused the breaking of the spindle. It was not misleading on that subject. It was pertinent to that subject.

Instruction 51, given by the trial court, was an attempt to state that, if all of plaintiffs' allegations had been proved, and, if A. Robbins was not guilty of contributory negligence, then the plaintiffs could recover. It is claimed that by its wording it is an assertion that, if A. Robbins did not participate in or cause the negligence charged against the defendants, then the plaintiffs could recover. This claim is not well founded. The instruction is so worded that it is not reasonably susceptible of any other interpretation than that it was addressed to the negligence of the defendants and the contributory negligence, if any, of A. Robbins.

[7, 8] Each of the last two instructions used the words "the carelessness," "the negligence," without inserting immediately thereafter "if any." It is claimed that both instructions were erroneous in assuming facts. It has been held that, when the trial court expressly assumes a certain fact and at the same time purports to submit the question to the jury, then there is a conflict, and the case must be reversed. Cahoon v. Marshall, 25 Cal. 197, 200; 24 Cal. Jur. 841, 842. However, in the instant case there was no express assumption, but merely an ambiguous expression, which is susceptible of the charge of assuming facts. Furthermore, in the first instruction given by the court, it was stated: "Our provinces are entirely distinct and separate, and you will understand that in this charge the court in no manner or form is expressing or desiring to express any opinion on the weight of the evidence or any part of it, * * * or that any alleged fact in the case is or is not true." Instruction No. 22, as given, used the words "the damages" without following it with the expression "if any." The same attack is made. However, the damages suffered by A. Robbins were not a disputed fact in the case. Whatever they might be, it was the theory of the defense that these defendants were not liable. As the instructions of the court are to be read as a whole, we find no fault with the instructions given.

[9] Instruction No. 24, given by the trial court, was addressed to the subject of preponderance. It used the phrase "of some act of negligence." The defendants say it was not confined to acts of negligence pleaded in the complaint. The evidence introduced did not even purport to drag in any act of negligence not pleaded. Most assuredly the instruction as given did not purport to do so; therefore it was not erroneous.

Instruction No. 5, as given by the trial court, treated of the subject of the number of witnesses requisite to prove a fact. The defendants attack it as to the weight of the evidence. It was not addressed to that subject. As to the proper rule concerning the weight of the evidence, the instructions, when read as a whole, contain no error.

[10] During the trial the defendants called a witness as an expert, and examined him regarding the subject of the crystallization of metals. On cross-examination the plaintiffs addressed certain questions to the witness on the same subject. The defendants objected that the questions were not cross-examination, not within the issues of the case, and were therefore immaterial. The objections were overruled. We think that the ruling was quite proper.

[11] While one of the witnesses was being examined, he stated that the left-hand hub cap of the Ford truck was damaged. Later he stated that he did not make the examination, but was told that fact. A motion to strike out was made. The motion was denied. It is not clear from the record that there was any error in the ruling. The motion was made in language that was too broad and too uncertain. Moreover, there was no question regarding the fact. Two different witnesses testified directly to the fact and confirmed the alleged hearsay statement of the witness under examination. It is therefore patent that, even though the ruling may be said to be erroneous, it was not prejudicial error.

[12] When the witness Robbins was testifying, he was asked on recross-examination: "Have you any recollection of putting on your brake at all just before you crashed into that parked truck? A. No; if I had I would have been hit, head-on." Defendants moved to strike out; the motion was denied. Apparently the ruling was erroneous. However, it is equally apparent that the latter part of the answer, even though it did state a conclusion, was, under the facts, a true and correct conclusion, and, furthermore, that the ruling did not prejudice the defendants.

We find no error in the record. The judgment is affirmed.

We concur: KOFORD, P. J.; NOURSE, J.

RAY v. SUPERIOR COURT WITHIN AND FOR SAN DIEGO COUNTY. (Civ. 5986.)★

District Court of Appeal, Second District, Division 2, California. Jan. 8, 1929.

As Modified Feb. 7, 1929. Hearing Granted by Supreme Court March 7, 1929.

Criminal law 🔑576(1)—Prosecution must be dismissed where trial was not commenced for thirty days after plea of not guilty without application for continuance (Pen. Code, § 1382, and § 1050, as added by St. 1927, p. 1036).

Where trial was commenced over objection more than thirty days after accused pleaded not guilty, and not within 30 days as required by Pen. Code, § 1050, as added by St. 1927, p. 1036, and accused made no application for continuance under section 1383, upon accused's motion for dismissal no cause being shown by state to contrary, under direct provision of section 1382, court had no alternative other than to grant motion.

Application by Estella M. Ray for a writ of mandate to compel the Superior Court of the State of California, within and for the County of San Diego, to dismiss a criminal proceeding. Writ granted.

M. W. Conkling, of El Centro, and Arthur Dorn and Edgar B. Hervey, both of San Diego, for petitioner.

Stephen Connell, Dist. Atty., and E. N. Clark, Deputy Dist. Atty., both of San Diego, for respondent.

CRAIG, J. The petitioner in this proceeding was indicted by a grand jury in the county of San Diego, on November 10, 1927, was arraigned and pleaded not guilty on the 16th day of said month, and her trial was set for December 12, 1927. No continuances were applied for or granted at the request of either party, and the record is silent as to what may have occurred on the date last mentioned. On December 27, 1927, however, the case was reset by the court for January 16, 1928, without objection, and, while it was not then called, it was on the following day announced ready by the people, at which time the defendant, petitioner herein, moved that the prosecution be dismissed. The motion was denied, and the defendant was forced to trial. She now prays by petition for a writ of mandamus from this court that the charges upon which she was indicted be ordered dismissed upon the grounds that she was not afforded a trial within 30 days after the entry of her plea, nor within 60 days after the return and filing of the indictment, and that no continuance was requested or ordered upon sufficient or any reason being first shown therefor.

A referee was appointed by this court to take evidence and report his findings of fact upon the issues presented by the petition and the answer thereto, and, the referee having complied with the requirements of his delegation, reported findings of the facts herein recited, and, further, that affidavits were filed by the petitioner upon the motion for dismissal, which embodied the entire proceedings therein, and that the averments thereof were not denied by the people.

Section 1050 of the Penal Code (as added by St. 1927, p. 1036) provides as follows: "The court shall set all criminal cases for trial for a date not later than thirty days after the date of entry of the plea of the defendant. No continuance of the trial shall be granted except upon affirmative proof in open court, upon reasonable notice, that the ends of justice require a continuance. No continuance shall be granted for any longer time than it is affirmatively proved the ends of justice require. Whenever any continuance is granted, the court shall enter in its minutes the facts proved which require the continuance. Criminal cases shall be given precedence over civil matters and proceedings. If any court is unable to hear all criminal cases pending before it within thirty days after the respective defendants have entered their pleas, it must immediately notify the chairman of the judicial council."

Section 1383 of the Penal Code directs that if the defendant be not charged or tried as provided in section 1382, the court may order the action to be continued from time to time, and in the meantime may discharge the defendant from custody on his own undertaking of bail for his appearance to answer the charge at the time to which the action is continued.

Section 1382 of the Penal Code requires that: "The court, unless good cause to the contrary is shown, must order the prosecution to be dismissed in the following cases: * * * 2. If the defendant whose trial has not been postponed upon his application, is not brought to trial within sixty days after the finding of the indictment, or filing of the information."

The trial of the instant case was commenced more than 30 days after the plea of the defendant was entered. This was done over the objection of the defendant, after repeated continuances without any showing as to the necessity, or length of time required, for a continuance; it was prosecuted more than 60 days after the indictment was found against her, although at least one civil case was tried in the same court in the meantime. As we have observed, upon her motion for dismissal no good cause was attempted to be shown by the people to the contrary. Section 1382 of the Penal Code is mandatory (People v. Perea, 273 P. 836), and under the conditions presented by the record herein it is obvious that a trial court has no alternative than to grant a motion for dismissal of the prosecution. Other

---

★Superseded by opinion of Supreme Court 281 P. 391.

propositions argued by the parties need not be discussed since the foregoing is determinative and conclusive of the right contended for by petitioner.

The writ of mandate is granted, and the court below is directed to dismiss the prosecution as prayed.

We concur: WORKS, P. J.; THOMPSON, J.

---

96 Cal. App. 107

In re FIRST NAT. BANK IN OAKLAND et al.

FIRST NAT. BANK IN OAKLAND v. FOSS, County Treasurer et al.

(Civ. 6603.)

District Court of Appeal, First District, Division 2, California. Dec. 31, 1928.

Depositaries ⚷7—Acquisition and improvement district bond held good security for county deposit, though statute amending one so providing designated other bonds as security (St. 1925, p. 849; St. 1927, p. 1389).

Acquisition and improvement district bond *held* good as security, as provided by St. 1925, p. 849, for deposit by county treasurer of county's funds, though St. 1927, p. 1389, amended St. 1925, by designating another class of bonds as security for such deposits, the two statutes not being inconsistent, and hence there was no repeal by implication.

Mandamus by the First National Bank in Oakland against F. W. Foss, as County Treasurer of the County of Alameda, and Earle Warren, as District Attorney thereof to compel respondents to accept a certain bond as security for the deposit of public money. Writ granted.

Orrick, Palmer & Dahlquist, of San Francisco, for petitioner.

Earle Warren, Dist. Atty., and Agnes R. Polsdorfer, Deputy Dist. Atty., both of Oakland, for respondents.

NOURSE, J. This is a controversy without action in the form of a petition for a writ of mandate, submitted upon an agreed statement of facts under the provisions of sections 1138 and 1140 of the Code of Civil Procedure. In accordance with the terms of the Public Moneys Deposit Act of 1927 (Stats. 1927, p. 1389) the respondent Foss, as county Treasurer of the county of Alameda, duly deposited with the petitioner herein as an inactive deposit the sum of $200,000, belonging to or in the custody of the county of Alameda, taking as security therefor certain treasury notes or bonds of the United States and of the state of California. Thereafter said respondent notified petitioner that the security so deposited was inadequate, and requested petitioner to deposit additional security of the value of $1,000. Petitioner tendered to said respondent, as such additional security, a valid and outstanding bond of acquisition and improvement district No. 28 of the county of Los Angeles which had been duly issued under the provisions of the Act of May 23, 1925 (Stats. 1925, p. 849). Said respondent accepted said bond as sufficient security for the purposes, subject, however, to the approval of the district attorney of said county of Alameda, as required by the Public Moneys Deposit Act. Said district attorney, the respondent Warren, refused to approve said bond, upon the ground that it was not a bond authorized by law to be received by public officers as security for the deposit of public moneys.

This is the single question at issue in this proceeding, which prays for a writ of mandamus to require the respondent Foss to accept, and the respondent Warren to approve, the bond referred to. The Public Moneys Deposit Act of 1923 (Stats. 1923, p. 25) authorized the deposit in banks of the funds of counties and municipalities only. As security for such deposits the treasurer was authorized to accept "treasury notes or bonds of the United States, or of this state or of any county, municipality, school district or irrigation district within this state" (section 4). This act was repealed by a new enactment of 1927 (Stats. 1927, p. 1389), which was made applicable to the deposit of the funds of counties, municipalities and other political subdivisions. Section 4 of the act of 1927 enumerated the kinds of bonds acceptable as security for such deposits. This section reads: "For the security of inactive deposits there shall be deposited with such treasurer treasury notes or bonds of the United States, or of this state or of any county, city and county, city, town, municipal utility district, flood control district, school district or irrigation district within this state, which bonds shall be approved by the treasurer and attorney of the county, city and county, city, town, municipality or other political subdivision."

Acquisition and improvement districts are organized and maintained under the act of 1925 (Stats. 1925, p. 849). This act provides a complete scheme for the creation and management of such districts, including the raising of funds for the purposes of the districts, the issuance of bonds evidencing the indebtedness, and the payment of the expenses of operation including the principal and interest on the bonds so issued. Section 45 of this act, having particular reference to such bonds, reads: "Any bonds which shall be issued under the provisions of this act shall be legal investments for all trust funds, and for the funds of insurance companies, banks, both commercial and savings, and trust companies, and for state school funds, and whenever any money or funds may by any law now or hereafter enacted be invested in bonds of cities, cities and counties, counties, school districts or irrigation districts within the state of California, such money or funds may be invested in the said bonds issued under this act and in accordance with its provisions, and whenever bonds of cities, cities and counties, counties, school districts or irrigation districts within this state may by any law now or hereafter enacted be used as security for the performance of any act or the deposit of any public moneys, the said bonds issued under this act and in pursuance of its provisions may be so used."

While this act was in full force and effect, and while districts were organized and bonds were issued in accordance with its terms, the Legislature, in 1927, amended the Public Moneys Deposit Act as above noted, and added to section 13 thereof an express repeal of the act of 1923, "and all acts amending said act and all acts and parts of acts in conflict with this act." Does this section repeal, expressly or by implication, the provisions of section 45 of the Acquisition and Improvement Act of 1925, relating to the use of bonds of such districts as security for public deposits? Manifestly there is no express repeal as the Improvement Act is not mentioned, either in the title or in the body of the Deposit Act, and the latter only purports to repeal such acts or parts of acts as are in conflict with it. Now there is nothing in either act which is in conflict with the other. The Deposit Act prescribes the procedure for the deposit of public moneys of certain public agencies and enumerates the kinds of bonds which may be accepted as security. It does not purport to make this enumeration exclusive of all others—that is to say, it does not provide that such bonds, and no others, may be received as such security. When, therefore, the Legislature, by other enactment, expressly makes other bonds acceptable for these purposes, it merely adds to the enumeration herein; but there is not the conflict between the two enactments which makes the one repugnant to the other, but both may be read together as one enactment.

To hold that the provisions of the Improvement Act were repealed by implication it would be necessary to find that the two acts are so inconsistent that effect cannot be given to both. The rule to be followed in such cases is found in Hilton v. Curry, 124 Cal. 84, 87, 56 P. 784, 785, where it is said: "Repeals by implication are not favored in the law, and whenever there are two statutes upon the same subject courts will endeavor to harmonize them so that, if possible, effect may be given to the provisions of each. It is only when there is a repugnancy or inconsistency between the two that the later act will be held to repeal the prior one." The same rule is differently expressed in Railroad Comm. v. Riley, 192 Cal. 54, 57, 218 P. 415, 417: "Repeals by implication are not favored and are recognized only when there is an irreconcilable conflict between two or more existing legislative enactments," and in Chicago, M. & St. P. Ry. Co. v. United States, 127 U. S. 406, 409, 8 S. Ct. 1194, 1196 (32 L. Ed. 180): "When there are two acts or provisions of law relating to the same subject, effect is to be given to both, if that be practicable. If the two are repugnant, the latter will operate as a repeal of the former to the extent of the repugnancy. But the second act will not operate as such repeal merely because it may repeat some of the provisions of the first one, and omit others, or add new provisions. In such cases the later act will operate as a repeal only where it plainly appears that it was intended as a substitute for the first act. As Mr. Justice Story says [Wood v. United States, 16 Pet. 342, 10 L. Ed. 987], it 'may be merely affirmative, or cumulative, or auxiliary.'"

Here we have a statute of 1923 which provides that county, municipal, school, and irrigation district bonds may be used as security for certain public deposits. In 1925 the Legislature, without expressly amending this act, but in an entirely separate enactment, provided that improvement bonds could be used as such security whenever county, municipal, school or irrigation district bonds are authorized to be so used "by any law now or hereafter enacted." There is certainly no "irreconcilable conflict" between the act of 1923 and that of 1925. The later act merely adds to the list of securities which are available for the purposes of the earlier act. By the amendment of 1927 additional bonds were added to this list, but without reference to the Improvement Act of 1925 or to the bonds issued under it. Though new bonds were added, the bonds of counties, cities, school and irrigation districts were retained. Thus the provisions of the improvement act that the bonds issued under it should be available whenever the bonds of counties, cities, school or irrigation districts should be made available are wholly consistent with the provisions of the act of 1927, particularly as the Legislature did not use any language in the act of 1927 which indicated an intention to limit the security to the bonds enumerated therein.

We find no conflict between the two enactments but we are satisfied that the one is merely cumulative of or auxiliary to the other. We therefore follow the rule, so well expressed in Cohn v. Isensee, 45 Cal. App. 531, 537, 188 P. 279, 282, "that all consistent statutes which can stand together, if related to the same subject, shall be construed together, and with reference to the whole system of which they form a part, and shall be harmonized, and effect given to all, if this can consistently be done, so as to make the law consistent in all its parts and uniform in its application and results."

Let a peremptory writ issue as prayed.

We concur: KOFORD, P. J.; STURTEVANT, J.

---

96 Cal. App. 215

PEOPLE v. WILLIAMS et al. (Cr. 1723.)

District Court of Appeal, Second District, Division 2, California. Jan. 9, 1929.

1. Criminal law 🔑1159(4)—Appellate court cannot consider credibility of witnesses.

On appeal from conviction based on conflicting evidence, appellate court cannot consider whether jury should have believed witnesses for defense and not those for the prosecution.

2. Criminal law 🔑491(1)—Questions to handwriting expert whether characteristics of personality shown by examples of defendant's handwriting showed defendant was not person making forged check held properly excluded.

In prosecution for forgery, questions to handwriting expert whether writings of defendant showed certain characteristics of understanding, frankness, and belief in ultimate good of things not indicated in forged check, and whether person who wrote check was wholly unlike defendant as shown by his handwriting, *held* properly excluded.

3. Criminal law 🔑448(2)—Question to minor implicated with defendant in forging check, proceeds of which were used to buy grapefruit, whether he bought grapefruit himself, held properly excluded as calling for conclusion.

Where minor alleged to have committed forgery with defendant for purpose of procuring funds to purchase grapefruit detailed transaction and purchase, question to minor whether he bought all the grapefruit himself *held* properly excluded as calling for conclusion of witness.

4. Criminal law 🔑824(4)—Requested instructions on proof of guilt beyond every reasonable doubt held properly excluded as unintelligible.

Requested instruction in prosecution for forgery that circumstances or suspicion no matter how strong are not proof of guilt, and, unless fact of defendant's guilt is proved beyond reasonable doubt, "actual exclusion of every reasonable hypothesis of their innocence consistent with facts proven," *held* properly refused as unintelligible.

5. Criminal law 🔑823(9, 15)—Requested instruction on presumption of innocence and question of reasonable doubt held properly refused, in view of instruction given (Pen. Code, § 1096, as amended, and § 1096a, as added by St. 1927, p. 1039).

Where court instructed jury in accordance with Pen. Code, § 1096, as amended, and section 1096a, as added by St. 1927, p. 1039, on presumption of innocence and question of reasonable doubt, refusal of requested instruction thereon was not error.

6. Criminal law 🔑1178—Points not argued nor supported by authority need not be considered.

Points not argued and not supported by citation of authority need not be considered on appeal.

Appeal from Superior Court, Tulare County; Frank Lamberson, Judge.

Elmer Williams and another were convicted of forgery, and they appeal. Affirmed.

J. C. Thomas, of Visalia, for appellants.

U. S. Webb, Atty. Gen., and Leroy McCormick, Dist. Atty., and Leslie A. Cleary, Deputy Dist. Atty., both of Visalia, for the People.

WORKS, P. J. The defendants were convicted of the crime of forgery. They appeal from the judgment.

[1] One of the points made by appellants is that the evidence was insufficient to support the verdict, but an examination of their brief shows that nothing more can be asserted than that there was a conflict in the evidence. Indeed, the argument proceeds principally upon the theory that the jury should have believed the witnesses for the defense and not those for the prosecution. With such a consideration, of course, courts of appeal have nothing to do. The evidence was sufficient.

[2] Appellants assign as error certain rulings of the trial judge in sustaining objections to questions put to a handwriting expert on cross-examination. These questions were: "Do you not know that in Elmer Williams' writing, in these examplars furnished you, there is a versatile mental agility and a humorous blending of understanding, personality and imagination not indicated in the written check upon which this action is based? * * * Is it not a fact that the examples which the defendants, the Williams brothers, have given you, show in their writing frankness and candor, the opposite to concealment, dissimulation, falsehood, cunning and finesse? * * * Is it not a fact that in the writing of the Williams brothers, the defendants, there is shown therein a buoyance of mind in the ultimate good of things and in the justice of Providence as shown by their writings, not indicated in the alleged forged check? * * * Is it not a fact that the person who wrote this check is a person wholly unlike Elmer Williams, and is a person who is a garrulous person? * * * Is it not a fact that the writing furnished you by Elmer Williams does not exhibit any crudities and is free from ostentation? * * * Do you not know that men like Eldon Williams and Elmer Williams

have more sense than to furnish you with exemplars of their handwriting if they were guilty of forging that check?" The objections were properly sustained.

[3] It was the theory of the prosecution that appellants and a third person, who was a minor, and was made a ward of the juvenile court because of his complicity in the acts out of which the charge against appellants grew, committed the forgery for the purpose of procuring funds for the purchase of certain grapefruit. It was upon the testimony of the juvenile, together with ample corroborating evidence and circumstances, that appellants were convicted. The testimony of the juvenile contained a complete story of the consummation of the forgery, and showed that he and appellants, after realizing the proceeds of the forged check, went to the owner of the grapefruit, and, apparently, after some negotiations with him, themselves picked the fruit. The minor then, in the presence of appellants, made payment to the seller for it, and appellants and he carried it away. On the cross-examination of the witness appellants' counsel asked him the question: "Well, you bought all the grapefruit yourself, did you not?" The witness answered: "Well, that is according to the way you would consider the transaction." A direct answer to the question was then insisted upon, and the objection was interposed that it called for a conclusion of the witness. The objection was sustained, and it is contended that the ruling was error. We think not. The entire circumstances surrounding the purchase having been detailed, it was for the jury, and not for the witness, to say whether appellants and the juvenile, or he alone, had "bought" the grapefruit. The witness, by his answer to the question as first propounded, showed that he correctly appraised the situation, even if appellants' counsel did not.

[4, 5] Appellants claim that the trial judge erred in refusing to instruct the jury "that circumstances of suspicion, no matter how grave or strong, are not proof of guilt, and, unless the fact of the defendants' guilt is proved beyond every reasonable doubt, the actual exclusion of every reasonable hypothesis of their innocence consistent with the facts proven." This proposed instruction is unintelligible, and it was properly refused for that reason. Moreover, the judge gave to the jury, in accordance with the provisions of sections 1096 and 1096a of the Penal Code (St. 1927, p. 1039), an instruction concerning the presumption of innocence and on the question of reasonable doubt. Section 1096a is to the effect that "the court may read to the jury section 1096 of this Code, and no further instruction on the subject of the presumption of innocence or defining reasonable doubt need be given."

[6] Appellants state two other points, but, as they are not argued, and as no authority is cited in support of them, we deem it unnecessary, under a familiar rule, to consider them.

Judgment affirmed.

We concur: CRAIG, J.; THOMPSON, J.

96 Cal. App. 283

In re BLEIL'S ESTATE.★

FLEISHELL et al. v. BELL et al.

(Civ. 6340.)

District Court of Appeal, Second District, Division 1, California. Jan. 14, 1929.

Rehearing Denied Feb. 4, 1929. Hearing Denied by Supreme Court March 14, 1929.

1. Trial 🔑165—On motion for nonsuit, evidence must be viewed in most favorable light as it affects theory of complaint.

On motion for nonsuit, all contradictions, conflicts, and inconsistencies which may appear in evidence adduced by plaintiff must be disregarded, to end that evidence as a whole may be viewed in its most favorable light as it affects theory of complaint.

2. Wills 🔑163(4)—Presumption of undue influence, where beneficiary was testatrix's attorney, as against evidence of attorney's nonparticipation, was not sufficient in itself to establish undue influence.

Presumption of undue influence arising from relationship, where beneficiary was testatrix's attorney, as against evidence of nonactivity or nonparticipation by attorney either in suggesting, counseling, or advising with reference to preparation or execution of will, was not sufficient in itself to sustain charge of undue influence.

3. Wills 🔑326—Where evidence is such that verdict for will contestant on issue of undue influence would have to be set aside, order of nonsuit is justified.

Where, on an issue of undue influence, evidence introduced by contestant is such that, assuming thereon verdict should be rendered in favor of contestant, trial court would be bound to set it aside, an order of nonsuit is justified.

4. Wills 🔑324(3)—In will contest, issue of undue influence, where testatrix's attorney was one of beneficiaries, held not for jury under evidence.

In contest of will, in which testatrix's attorney was one of beneficiaries, issue of undue influence *held* not for jury under evidence.

Appeal from Superior Court, San Diego County; Charles C. Haines, Judge.

In the matter of the estate of Caroline E. Bleil, deceased. Will contest between Mary E. Fleishell and others, contestants, and George E. Bell and another, proponents. From a judgment of nonsuit, contestants appeal. Affirmed.

★Rehearing denied. Hearing denied by Supreme Court.

F. L. Richardson, of San Diego, for appellants.

E. Swift Torrance and E. A. Luce, both of San Diego, for respondent Bell.

Sloane & Sloane, of San Diego, for respondent Davis.

HOUSER, J. This appeal is from a judgment rendered in pursuance of an order of nonsuit in a will contest.

At the time the will was drawn, the testatrix was 82 years of age. She left no surviving husband, children, father, mother, brother, or sister. Her property was devised and bequeathed unto her "good friend George E. Bell * * * for the term of his natural life, and at his death in fee simple to my (her) friend W. Jefferson Davis. * * *" The contestants of the will are either surviving nieces or nephews of the testatrix. Although other grounds were alleged in the contest, the ground upon which reliance was finally placed by the contestants was that of undue influence.

The only point made by appellants herein is that "the court erred in sustaining the proponents' motion for nonsuit and taking the case from the jury."

[1] On a motion for nonsuit, it is a well-established rule that all contradictions, conflicts, and inconsistencies which may appear in the evidence adduced by the plaintiff shall be disregarded, to the end that the evidence as a whole may be viewed in its most favorable light as it affects the theory of the complaint. For the sole purpose of ruling on the motion, without any question being permissible as to the falsity of such facts, for the moment they are assumed to be true and necessarily must be so accepted by the trial court. With so much in mind, in brief it may be stated that from the evidence presented by the contestants herein, it was made to appear that Davis, to whom the remainder of the estate was bequeathed and devised, was, and for a considerable length of time preceding the date of the execution of the will had been, the attorney for the testatrix; that at that time she was indebted to Davis for legal services rendered by him in her behalf in the sum of $250; that the testatrix was a frequent caller at the law office of Davis, and that he also was more than an occasional visitor at the home of the testatrix; that both at the home of the testatrix and in public places as well, Davis bestowed unusual attentions upon the testatrix; that on several occasions he presented her with flowers and potted plants; that together they went to dinner or automobile riding, from which they sometimes returned to the home of the testatrix at a late hour, when the testatrix appeared to be under the influence of intoxicating liquor.

From the testimony of one of the witnesses introduced by contestants, it appeared that on the day before the will was executed the testatrix went to Davis' law office, and there in the presence of such witness stated to Davis that she wished to change a will theretofore executed by her, so that in case of the death of Mr. Bell (who was the beneficiary both in the will which she desired to have changed and in the will in question) neither his relatives nor her relatives would receive any portion of her estate; but that "she desired to substitute Mr. Davis as a beneficiary under her will in place of any of Mr. Bell's relatives. That Mr. Davis laughed, * * * threw up his hands and said, 'You aren't talking to me, Mrs. Bleil; of course, you can make your will any way you want, but under the circumstances I could not draw it for you, or have anything to do with it; you will have to find another attorney to do it for you.'" Accordingly, the testatrix procured the services of a Mr. Butler, an attorney who theretofore had "handled a case" for her. The next day, in the absence of Mr. Davis therefrom, the testatrix went to his office, at which time she made the statement to his secretary "that she stopped at Mr. Butler's office, but that he was out; that he was drawing up a new will for her, and later she asked her (the secretary) to telephone Mr. Butler to see if her will was ready for her to sign; that she had him draw it up the day before, and it was ready for her that day. * * * She (the secretary) telephoned Mr. Butler at Mrs. Bleil's request; he stated the will was ready, and asked if Mrs. Bleil would come down and execute it, to which Mrs. Bleil replied that she was in a hurry, and said he could bring it to her quicker, and asked that he bring it to her at Davis' office. Mr. Butler brought the will up to Davis' office at Mrs. Bleil's request, and she signed it and declared it to be her will, in the presence of Mr. Butler and herself in Davis' office; there being no other person present, and requested that Mr. Butler and herself sign as witnesses which they did."

Mr. Davis, called as a witness by contestants, corroborated the fact that when the testatrix asked him to draw the will by which he would be made a beneficiary, he declined to do so, but told her that "she would have to get another attorney. That he never advised with Mrs. Bleil about the making of her will in 1926, and made no attempt of any kind to suggest any of the terms of her will; that he was not present when the same was executed and had only casual knowledge of its contents until long after the same was executed; that Charles E. Butler, who drew the will, was an attorney with offices in the same building, but with no professional relationship then existing between them."

The question of law presented to this court is whether from the foregoing facts it was error on the part of the trial judge to refuse to submit the issue of undue influence to the jury for its determination.

[2] A consideration of the evidence hereinbefore outlined discloses the situation that, aside from the presumption arising from the confidential relation sustained by the attorney to his client generally, no positive fact was presented from which the conclusion could be reached that undue influence was exerted to procure the execution of the will in question. Nor was the evidence such that an inference rightfully could be deduced that the normal mind of the testatrix had been subjugated to that of the attorney. At most, nothing more than a conjecture that such was the case could properly be indulged. The presumption of undue influence which attached to the attorney solely because he was the attorney for the testatrix was not positive in character. In order that the presumption become absolute, evidence of activity, persuasion, or instigation on the part of the attorney, directed toward the execution of the will in his favor, is an indispensable prerequisite. Unless some such act of inducement be discernible from the evidence, the foundational presumption becomes negligible in importance as a factor in determining the issue of undue influence. In other words, the relationship of attorney and client when appearing respectively as between the beneficiary and the testatrix, although carrying a presumption of confidence and trust from which would naturally flow a simple influence on the part of the attorney toward the client to follow a specified suggested action, nevertheless (in the absence of either direct or circumstantial evidence of some act by the attorney from which an inference, at least, might be legally deduced that pressure was brought to bear directly upon the testamentary act, to the end that the free agency of the testatrix was thereby destroyed), such presumption, as against evidence of nonactivity or nonparticipation by the attorney either in suggesting, counseling or advising with reference to the preparation or the execution of the will, is not sufficient in itself to sustain a charge of undue influence. Estate of Higgins, 156 Cal. 257, 104 P. 6; Estate of Lavinburg, 161 Cal. 536, 119 P. 915; Estate of Ricks, 160 Cal. 450, 117 P. 532; Estate of McDevitt, 95 Cal. 17, 30 P. 101; Estate of Morey, 147 Cal. 495, 82 P. 57.

In Estate of Baird, 176 Cal. 381, 384, 168 P. 561, 563, it is said that: "A 'presumption of undue influence' arises from proof of the existence of a confidential relation between the testator and such a beneficiary, 'coupled with activity on the part of the latter in the preparation of the will.' The confidential relation alone is not sufficient. There must be activity on the part of the beneficiary in the matter of the preparation of the will"—citing authorities.

The evidence in the instant case introduced by the contestants, far from showing any act on the part of the attorney from which it might be inferred that the mind of the testatrix had been subjugated and that her free agency in the matter of the preparation and the execution of her will had been destroyed, to the contrary, disclosed a state of facts, positive in character, which indicated with conclusiveness that in the preparation and the execution of the will the testatrix acted freely, voluntarily, and without pressure of any sort so far as the attorney was concerned.

In Estate of Higgins, 156 Cal. 257, 262, 104 P. 6, 8, where a situation somewhat similar to that here involved was under consideration, among other things, the court said: "* * * Giving to contestants the full force of the presumption of undue influence arising from the confidential relations between the testator and the proponent, coupled with activity on the part of the latter in the preparation of the will (In re McDevitt, 95 Cal. 17, 33 [30 P. 101]; Coghill v. Kennedy, 119 Ala. 641 [24 So. 459]), this presumption was fully met and overthrown by the uncontradicted evidence showing the actual circumstances surrounding the preparation and execution of the will. (Estate of Morey, 147 Cal. 495 [82 P. 57].) *It was shown that the testator, before executing his will, had consulted with an attorney, who visited him for that purpose.* At this interview no member of his family, except his wife, was present. * * *"

[3, 4] Although it is true that ordinarily in a case where by the will of a client his attorney has been made a beneficiary therein, on a contest of such will the burden is cast on the attorney to overcome the presumption of fraud and unfair dealing which the law attaches to an attorney in such a situation (Estate of Witt, 198 Cal. 407, 245 P. 197), nevertheless, where, on an issue of undue influence, the evidence introduced by the contestant is such that, assuming that thereon a verdict should be rendered in favor of the contestant, the trial court would be bound to set it aside, no error is committed by the trial court in refusing to submit such issue to the jury; but in such circumstances an order of nonsuit is justified. Estate of Higgins, 156 Cal. 257, 104 P. 6; Estate of Morey, 147 Cal. 495, 82 P. 57.

The judgment is affirmed.

We concur: CONREY, P. J.; YORK, J.

96 Cal. App. 304

FUQUA v. THOMAS. (Civ. 5443.)

District Court of Appeal, Second District, Division 1, California. Jan. 15, 1929.

1. Customs and usages 🔑14—Custom, as to duration of plaintiff's employment, held immaterial in action for salary, where court found period of contract was covered by express agreement.

In action to recover salary under contract of employment, in which controversy arose as to length of time covered by employment, refusal of trial court to admit evidence relating to custom limiting time of such employment *held* not error, where court found as a fact that particular time for duration of plaintiff's services was fixed by express agreement; custom being immaterial.

2. Master and servant 🔑80(7)—Time-book kept by employer's manager held competent in action for salary to show dates on which employee performed services.

In action for salary, time book furnished by employer's manager at his own instance, constituting part of bookkeeping system employed by manager in conduct of employer's business, *held* competent to prove dates on which plaintiff performed services.

Appeal from Superior Court, Los Angeles County; Victor R. McLucas, Judge.

Action by J. W. Fuqua against Richard Thomas. Judgment for plaintiff, and defendant appeals. Affirmed.

C. A. Stice, of Los Angeles, for appellant.

Leland J. Allen, of Los Angeles, for respondent.

HOUSER, J. [1] Plaintiff was employed by defendant as a camera man at a salary of $150 per week. The controversy arose from a difference of opinion between plaintiff and defendant as to the length of time covered by the employment. Plaintiff and his witnesses testified to a definite period. Defendant denied such certainty of time with reference to the employment, and, although no custom was specially pleaded by defendant, on the trial he endeavored to establish a custom to the effect that employment of the nature of that rendered by plaintiff was limited to time actually consumed in photographing the picture being produced. Appellant complains that the trial court restricted defendant in the evidence relating to custom; but, as the findings of fact made by the trial court (which were supported by the evidence) were to the effect that by agreement of the parties the employment commenced and ended, respectively, at a date certain, the question of whether custom prevailed in the premises became immaterial. It follows that no error was committed by the trial court in refusing to admit certain evidence offered by defendant with relation to such claimed custom. Moreover, as against appellant's contention, it appeared that, although each of the parties was permitted to introduce some evidence relating to the custom in question, the trial court was positive in its declaration that the contract of employment of plaintiff covered a fixed period, and that "I am not going to decide this case on the custom, because the court knows that it is very uncertain. Sometimes they do and sometimes they don't."

[2] We find no merit in appellant's contention that the time book kept by the manager of the defendant, showing dates on which plaintiff performed service for defendant, was improperly received in evidence. Although the time book was furnished by the manager at his own instance, and not in pursuance of any special direction therefor by his employer, it clearly appeared that the time book was a part of the bookkeeping system employed by the manager in the conduct of the business of defendant.

The judgment is affirmed.

We concur: CONREY, P. J.; YORK, J.

In re JOHNSON et al. (Civ. 6298.)★

District Court of Appeal, Second District, Division 2, California. Jan. 10, 1929.

Hearing Granted by Supreme Court March 11, 1929.

Schools and school districts 🔑101—District tax levies by board of supervisors for high school purposes exceeding 75 cents on $100 assessed valuation held valid; "proviso" (Pol. Code, §§ 1612a, 1755).

District tax levies by board of supervisors for high school purposes, exceeding 75 cents on each $100 of assessed valuation, *held* valid under Pol. Code, § 1612a, since proviso in section 1755 limiting "total tax for high school purposes" to 75 cents on $100 assessed valuation was not intended to have general effect, and section 1755 pertains only to supplying new buildings and equipment for newly formed district; usual office of "proviso" being to qualify enacting clause.

[Ed. Note.—For other definitions, see Words and Phrases, First, Second, and Third Series; Proviso.]

Application of James Hervey Johnson and another for a writ of review to review a resolution providing for tax levy for high school purposes made by the Board of Supervisors of the County of San Diego. Resolution affirmed.

Earl H. Miller, of Los Angeles, and Jesse George, of San Diego, for petitioners.

Stephen Connell, Dist. Atty., of San Diego, for respondents.

THOMPSON, J. This is an original proceeding wherein the petitioners seek by the

---

★Superseded by opinion of Supreme Court 281 P. 57.

writ of review to annul district tax levies by the board of supervisors of San Diego county for high school purposes. It appears from the pleadings that the petitioners reside, the one in the San Diego high school district and the other in the Sweetwater union high school district, and that they each pay taxes in their respective districts. On the 4th day of June, 1928, the boards of education of these two districts submitted to and filed with the county superintendent of schools school budgets showing the purposes for which and the amount of money needed by each of the districts, together with the total estimated receipts, and the remainder necessary to be raised by a tax levy. On June 20, the county superintendent approved the budget of the Sweetwater union high school district and submitted it to the board of supervisors. On June 26, she followed a like procedure with the budget of San Diego high school district. Both of these budgets indicated that it would be necessary to fix a rate in excess of 75 cents on each $100 of assessed valuation in order to raise the requisite funds. On September 1, 1928, the respondent board fixed the rate of San Diego high school district at 85 cents and of Sweetwater union high school district at 94 cents, and it is the resolution of the board fixing these rates which the petitioners claim is beyond its jurisdiction.

Their contention in this behalf is based upon section 1755 of the Political Code, which section makes it "the duty of every high school board to make and file with the Board of Supervisors of each county in which any part of their high school district is situated, on or before the first Monday of September next succeeding the formation of said district, an estimate of the cost of *purchasing a suitable lot, of procuring plans and specifications and of erecting a suitable building, of supplying* the same with furniture and necessary apparatus, and of fencing and ornamenting the grounds, for the accommodation of the school," unless the board shall have secured temporary quarters or a bond issue has been voted. (Italics ours.) The section further provides that, if the board has leased temporary quarters, they shall either secure a renewal of the lease before the first Monday in September, or submit the estimate mentioned above, and, in the event of their failure to submit such a budget to the board of supervisors, makes it the duty of the county superintendent of schools to supply the omission before the second Monday in September. In 1913 there was added to the section this sentence: "Provided, the total tax for high school purposes shall not exceed seventy-five cents on each one hundred dollars assessed valuation, exclusive of bond and interest rate." It is this concluding language which petitioners say prohibits a levy for the maintenance and support of high schools in excess of 75 cents. Section 1756 of the Political Code, enacted at the same time as section 1755 (i. e., 1909), provides that the board of education of each high school district shall file with the county superintendent of schools an estimate of the total amount necessary to support the high schools of the district, including the amounts necessary for "(a) Teachers' salaries; (b) current expenses; (c) books, magazines and apparatus; (d) sites, buildings and furniture; (e) other miscellaneous expenses." There is no limit designated by this section. In 1921 a new section was added to the Political Code, numbered 1612a, by which it is made the duty of all boards of education both elementary and high school, to prepare a budget showing all the purposes for which they will need money during the next ensuing school year, the amount of which shall be submitted to the county superintendent of schools for approval. When he has approved it and determined the amount of money (by subtracting from the total estimate the income to be received from other sources) which must be provided by a district school tax, he is required to file it with the board of supervisors, whose duty it then becomes "to fix such a rate for such district tax as will produce at least the amount of district tax money requested by the particular district." No limitation of rate is fixed by this section. It does, however, say that "all acts and parts of acts not in harmony with this section are hereby repealed."

Assuming, solely for the purposes of this opinion, that review will lie to test the validity of a resolution such as the one here in question, we are convinced that the levy must be sustained. The usual office of a proviso is to "except something from the enacting clause, or to qualify or to restrain its generality." 25 R. C. L. 984. The United States Supreme Court, speaking through Mr. Justice Story in the case of Minis v. U. S., 15 Pet. 423, 10 L. Ed. 791, states the rule in this manner: "It would be somewhat unusual to find engrafted upon an act making special and temporary appropriation, any provision which was to have a general and permanent application to all future appropriations. Nor ought such an intention on the part of the legislature to be presumed, unless it is expressed in the most clear and positive terms, and where the language admits of no other reasonable interpretation. The office of a proviso, generally, is either to except something from the enacting clause, or to qualify or restrain its generality, or to exclude some possible ground of misinterpretation of it, as extending to cases not intended by the legislature to be brought within its purview. A general rule, applicable to all future cases, would most naturally be expected to find its proper place in some distinct and independent enactment." The concluding sentence of this quotation is especially apt in its application to our problem. The learned jurist, in speaking for the same tribunal in U. S. v. Dickson, 15 Pet. 141, 10 L. Ed. 689, throws still further light upon the functions of a proviso by the use of these words: "* * * We are led to the general rule of law which has always prevailed, and become consecrated almost as a maxim in the interpretation of statutes, that where the enacting clause is general in its language and objects, and a proviso is afterwards introduced, that proviso is construed strictly, and takes no case out of the enacting clause which does not fall fairly within its terms. *In short, a proviso carves special exceptions only out of* the enacting clause; and those who set up any such exception, must establish it as being within the words as well as within the reason thereof." (Italics ours.) Our own Supreme Court, in considering the interpretation to be given to a proviso in the case of People v. Morrill, 26 Cal. 336–355, says: "This proviso is to be read in the light of the subject-matter," using the expression "subject-matter" as synonymous with the legislative field occupied by the enacting clause.

No doubt this general rule of construction is from time to time modified by other rules of construction when necessity arises. But is there such necessity in the present instance? We think not. Section 1755 in its enacting clause gives general power to raise any sum necessary or advisable for a limited purpose, to wit: To supply new buildings and equipment for a newly formed district. Without the limitation expressed in the proviso a general tax for maintenance might be levied and another unlimited tax for the acquisition of ground, structure, furniture and apparatus. Assuming that the proviso has a more far-reaching effect than to say that a rate for the latter purposes shall not exceed 75 cents on each assessed value of $100, we think a fair construction of its terms, according to the announced rule is that, if the rate for example, for maintenance shall be fixed at 50 cents, the rate for the acquisition of new buildings for a new district shall not exceed 25 cents, and, if the rate for maintenance amounts to 75 cents or more, no tax shall be levied to secure land, build, and equip a building. If it were intended that the proviso should have a general effect, the Legislature would undoubtedly have enacted it as a general and independent section rather than to have tied it to a section adopted for very limited purposes. Inferentially, at least, the views we have expressed find support in the case of Esberg v. Badaracco, 202 Cal. 110, 259 P. 730, wherein it was said that the provisions of 1612a, made it mandatory that the board of supervisors raise the amount of money found to be necessary by the estimate prepared under its provisions, and the board was required by the decision to fix a rate of $.97338 on each $100 valuation, instead of that previously determined by the board of supervisors to be sufficient, to wit, $.84729. It is stated in the case just cited that "the law prescribes a tax limit for school purposes," and this is undoubtedly true, but it seems impossible to escape the conclusion that section 1755 does not restrict the kind of a tax here levied.

These conclusions render it unnecessary to determine whether the writ of review will lie.

Resolution affirmed.

We concur: WORKS, P. J.; CRAIG, J.

---

96 Cal. App. 295

MARDEROSIAN v. NATIONAL CASUALTY CO. (Civ. 6465.)

District Court of Appeal, First District, Division 1, California. Jan. 15, 1929.

1. Insurance 🔑73—Newspaper, not its circulation manager, held general agent for insurance company under contract for sale by newspaper of insurance company's policies.

Where contract between insurance company and newspaper recited that newspaper was desirous of securing agency for sale of insurance policies in connection with sale of paper, and that insurance company was to supervise all advertising in newspaper in connection with sale of its policies, and insurance company delivered policies to newspaper for sale, newspaper, and not its circulation manager, was constituted general agent for insurance company.

2. Insurance 🔑130(7)—Insurance company's managers, supervising newspaper's sale of its accident policies, are assumed to have approved circular delivered by newspaper solicitor to insured.

Where contract for sale by newspaper of insurance company's accident policies provided that insurance company's managers should supervise all advertising in connection with sale of policies, it is assumed that managers performed duty in passing on advertising matter, and approved circular delivered by newspaper solicitor to insured, and found such circular complied with state insurance laws.

3. Insurance 🔑665(8)—Evidence that newspaper, selling defendant's policies, and defendant, ignored provision that policy was to become effective on day following indorsement, showed waiver of such provision.

In suit on accident policy, sold by newspaper under contract with insurance company, provision that policies should become effective at noon of day following date schedule was received and indorsed by registrar agent *held* waived, under evidence showing both newspaper and insurer ignored provision in dealing with over 11,000 policies.

4. Insurance 🔑138(1)—Newspaper's failure to procure license to sell insurer's policies held no defense to action by insured against insurer.

In action by insured against insurance company on insurance contract, fact that newspaper selling insurance company's policies had no license from insurance commissioner is no defense.

5. Insurance ⚷92—Evidence showed newspaper was vested with ostensible authority to do everything that insurer and its employees did in making insurance contract sufficient to fix insurer's liability (Civ. Code, §§ 2317, 2334).

Evidence that newspaper and insurance company entered into contract for sale of policies by newspaper, and that policies were sold pursuant thereto, showed insurance company vested newspaper with ostensible authority to do everything that it and its employees did in making contract of insurance with insured, under Civ. Code, §§ 2317, 2334, and such ostensible authority was sufficient to fix insurer's liability on policy.

6. Insurance ⚷78—Newspaper, authorized to take risks without consulting insurer, held insurer's general agent.

Where newspaper was authorized to take risks and enter into contracts of insurance without consulting insurance company, newspaper was general agent of insurance company.

7. Insurance ⚷130(7)—Signing of insurance contract, not stating date when effective, and delivery thereof to general agent, with premium, created contract binding on insurer.

Where solicitor for newspaper, which was general agent for sale of defendant's accident policies, took insured's subscription to newspaper and solicited insurance, handing insured form of insurance policy contract there was offer of insurance by general agent, and signing of contract, containing no notice when policy would become effective, nor provision for physical examination, and delivery thereof to newspaper with full first year's premium, constituted acceptance, and created binding contract between insured and insurer.

8. Insurance ⚷175—Policy issued on valid parol contract of insurance, though not delivered until after loss, is effective from time agreed on in parol agreement, irrespective of delivery.

Where valid parol contract of insurance has been entered into, policy to be issued thereon is simply memorial of prior parol contract, and, even though policy be not delivered until after loss occurs, insurance is deemed effective from time agreed on in oral agreement, irrespective of delivery of policy.

9. Insurance ⚷91—Act of general agent within scope of insurance business is binding on insurer, though in violation of agent's authority, when insured has no notice of limitation on authority.

Where insured has no notice of any limitation on powers of general agent, any act within scope of insurance business is binding on insurance company, although it is in fact in violation of agent's authority.

Appeal from Superior Court, Fresno County; Denver S. Church, Judge.

Action by Mary Marderosian, as administratrix of the estate of Parsiag Marderosian, against the National Casualty Company. Judgment for plaintiff, and defendant appeals. Affirmed.

Gallaher & Jertberg, of Fresno, for appellant.

Theodore M. Stuart, of Fresno, for respondent.

CAMPBELL, Justice pro tem. This appeal is from a judgment in the sum of $1,250, found to be due to plaintiff on a policy of insurance issued by defendant to Parsiag Marderosian, who died as the result of an accident, and of whose estate plaintiff is administratrix. The action was submitted to the trial court upon an agreed statement of facts, and is based upon a contract for accident insurance entered into between P. Marderosian in his lifetime and the defendant. Appellant contends that the judgment in favor of plaintiff is contrary to the stipulated facts and contrary to the law applicable to such facts.

The stipulated facts, summarized as briefly as they may be to an understanding of the issues presented, are that in the month of December, 1925, the defendant and the Fresno Bee, a newspaper published and circulated in the county of Fresno, entered into a written contract containing the following provisions: "Said party of the second part (Casualty Company) agrees to issue to said newspaper 'Travel Only' policies to all those certain readers or subscribers of the newspaper published by said party of the first part (Fresno Bee), whose names and addresses are listed upon blank schedules furnished by said party of the second part for that purpose. Such schedules are to be delivered to a registrar agent to be named by said party of the second part; upon receipt of such schedules said registrar agent shall immediately issue and forward to each person listed upon such schedule a policy to be known hereafter as the 'Fresno Bee Travel and Pedestrian Accident Policy.' * * * Said party of the second part agrees upon receipt of such schedules to have its registrar agent stamp the hour of receipt by him of such schedules and to indorse an acceptance for said party of the second part upon one copy of each quadruplicate set of schedules and to immediately return such indorsed copy to said party of the first part. * * * It is further understood and agreed that the insurance under all such policies shall become effective as of 12 o'clock noon, standard time of the day following the date that the schedule bearing the name of each insured is received and indorsed by said registrar agent and shall continue in force for one year subject to cancellation as hereinafter set out."

Pursuant to such contract entered into between the Fresno Bee and the National Casualty Company, which is the only insurance company that issues insurance through the

Fresno Bee, appellant appointed J. V. Hollett, the circulation manager of the Bee, its registrar agent, and an insurance agent's license to represent appellant was issued to J. V. Hollett by the insurance commissioner of the state of California. On or about January 8, 1927, the solicitor for the Bee called at Marderosian's home, three miles from the city of Fresno, and solicited his subscription to the Bee, and as an inducement explained the insurance to Marderosian and delivered him a circular reading on the first page: "Through arrangement with the National Casualty Company of Detroit, Michigan, one of the oldest and most reliable accident insurance companies in the world, the Fresno Bee now offers all subscribers (new or old) a $7,500 travel accident insurance policy for only $1 a year—over $12,000 already paid Bee subscribers—no medical examination necessary—four policies ranging in price from 50c to $1.25—full particulars contained in this issue." On the inside of the circular there is a description of the four policies, numbered 1, 2, 3, and 4, the amounts payable for various injuries under the policies, and the premiums charged. The prospective insured is cautioned to "examine the coverage in above policies, then select the one you prefer—mention number of policy selected in the coupon when making your application. If you wish to secure additional policies for other members of your family, write for additional application blanks to the Fresno Bee Insurance Department, Fresno, California." Then appears the warning: "Do not wait until the accident happens. Do it to-day! Avail yourself of the opportunity to protect yourself before and not after." There is then printed on the circular that subscribers "may take advantage of any of the travel accident policies by filling out the coupon below and mail with the price of the policy to the Fresno Bee."

After explaining this circular to Marderosian, the solicitor handed him a blank form of the "insurance policy contract" and advised Marderosian that, if he became a subscriber to the Bee, he could take out such insurance whenever he desired. Following such conversation Marderosian gave the solicitor his subscription for the Bee and remained a regular subscriber at the time of his injury and death. On the afternoon of January 17, 1927, Marderosian filled out and signed the "insurance policy contract" and delivered it, together with the sum of $1.25—the specified premium—to the carrier, and notified him it was "for the purpose of accepting insurance under said policy No. 2," which contract and money was accepted by the carrier, who told Marderosian his policy would be mailed to him. The carrier did not return to the Bee office until the morning of January 18th, when he took Marderosian's contract and money to the office of the auto route manager, as he was instructed to do; but, as the manager was away the carrier left the contract and money on the manager's desk, as he had customarily done. The manager was away from his office, and did not return until the morning of January 19th, when he found the Marderosian contract and money, and thereupon, in accordance with the usual business custom of the Bee, the manager delivered the Marderosian contract and money to the insurance department of the Bee, and thereupon Marderosian's name was listed upon the "schedule" (mentioned in the contract between the Bee and the defendant), which "schedule" was thereupon signed by Hollett and the policy No. 2 of the defendant company was about noon of the 19th issued to P. Marderosian and mailed to him.

On January 18th, about 6:15 p. m., while Marderosian was walking on a public highway, he was accidentally struck by an automobile, and received injuries from which he died at about 4 o'clock on the afternoon of January 19th. The Bee, in the usual course of business, remitted to the defendant the premium on the Marderosian policy; but the defendant, on February 21, 1927, denied all liability and returned the premium, but the plaintiff administratrix refused to accept the check, and it was sent back to defendant. Neither the solicitor of the Bee, who sought and procured Marderosian's subscription, nor Marderosian, ever knew of or had ever heard of the contract between the Bee and the defendant, or knew anything concerning its terms, provisions, or conditions, or ever knew of any contract between the Bee and defendant. Marderosian was in every way qualified to procure insurance under "policy No. 2," and no physical examination was required. The general course of business in the issuance by said Bee of policies of insurance in the defendant company is that, following the execution of the contract between the Bee and the defendant, the defendant delivered to the Bee a large number of blank forms of its insurance policies, including "policy No. 2," upon which the signatures of defendant's president and secretary were engraved, and the "said Bee in issuing one of said policies simply filled in the name, age, and address of the insured on page 1 of the policy, and filled in the date at the end of the policy, and said Hollett, or a clerk designated by him, then signed the same with Hollett's name as 'resident agent,' and the policy was then mailed to the insured." By this method, which had always been followed by the Bee, it had, up to January 17, 1927, issued and delivered 11,000 of defendant's policies on which defendant had paid losses aggregating over $12,000. Each of these policies was dated on the date it was countersigned. The method followed by the employees of the Bee concerning the subscription and insurance of Marderosian "was the usual and general course of business of said Bee in said matters, and but for the fact that the said Sehers (said auto route manager) was away from Fresno when the carrier of the Bee delivered Marderosian's 'signed insurance contract' and money to Seher's desk, the schedule bearing Marderosian's name would have been signed by Hollett, and the policy for Marderosian would have been completed, countersigned by Hollett, and mailed to Marderosian on or about noon of January 18, 1927," six hours before his injury.

[1, 2] Appellant contends that under the provisions of the contract the company constituted Hollett, the circulation manager of the Bee, and not the Bee, its agent. In this we do not agree with appellant. On the contrary, the contract clearly discloses that the Bee was made appellant's general agent under the authorities cited. The recitals or the inducement for the execution of the contract declares that the Bee "is desirous of securing an agency for the sale" of certain insurance policies of a kind the defendant is duly licensed to write in California. In other words, the Bee became a sales agent of the defendant. The defendant, not only gave the Bee a large number of its policies to sell, but made the Bee agree to sell not less than 2,000 during the first year. We also find that the contract contains the usual clause found in such contracts, by which the Bee agrees to forward all information relative to claims, and the company on its part agrees to promptly investigate and dispose of all claims on the merits. Furthermore, the "United States Managers" of the defendant were given power to supervise all advertising matter the Bee used in its campaign to sell defendant's policies. Under this provision, in the absence of any contention or showing to the contrary, we must assume that the "United States managers" performed their duty in passing upon the advertising matter used by the Bee, and approved of the particular form of circular that was delivered by the Bee solicitor to Marderosian, and found such circular complied with the state insurance laws. The contract also obligates the Bee not to sell such insurance issued by any other company, and in return defendant obligates itself not to issue such insurance through any other newspaper in Fresno. When the contract containing the foregoing excerpts is read in connection with the stipulated facts, no conclusion can be reached, other than that the Bee was constituted a general agent for the defendant company.

[3] Appellant calls attention to the provision in the contract which recites that the policies to be issued should become effective at noon "of the day following the date" the schedule is received and indorsed by the registrar agent. The stipulated facts show that both parties totally ignored this provision. The facts show that up to January 17th the Bee had issued and delivered over 11,000 policies, and "each and all of these policies was dated on the date it was countersigned." According to Marderosian's policy, Exhibit E, it became effective at noon of the day it is dated. So that in dealing with over 11,000 applicants for policies "the day following" clause was waived by both the insurer and the general agent. It appears that the Bee had even greater powers than are ordinarily vested in a "general agent," as that term is defined in the authorities cited.

[4] As to the fact that the Bee had no license from the insurance commissioner, it may be said that the failure to secure such license is no defense in an action by an insured against an insurance company upon an insurance contract (Goldstone v. Columbia Life & Trust Co., 33 Cal. App. 119, 164 P. 416).

[5] Under the agreed facts the defendant fully vested the Bee with ostensible authority to do everything that it and its employees did in making the contract of insurance with Marderosian. Civ. Code, §§ 2317, 2334. Such ostensible authority alone is sufficient to fix defendant's liability. 1 Cal. Jur. 737.

[6] The Fresno Bee was authorized to take risks and enter into contracts of insurance without consulting the defendant company, and was, therefore, a general agent of defendant.

[7] Again, this is not a case where a person seeks insurance by going to the insurance company, signing an application, and submitting to the usual physical examination. On the contrary, the insurance sought the person, and no application or physical examination was required. When the solicitor of the Bee took Marderosian's subscription to the paper and solicited him to take the insurance, explained and handed him the pamphlet describing the same, together with the form of "insurance policy contract" for him to sign, it constituted the offer of insurance by a general agent, and when Marderosian completed and signed the "insurance policy contract," which contained no notice when the policy would become effective, and delivered it to the carrier of the Bee, together with $1.25 as the full first year's premium, it constituted an acceptance, and a binding contract came into existence between Marderosian, as the insured, and the defendant company as the insurer.

[8-10] Where a valid parol contract of insurance has been entered into, the policy to be issued thereon is simply the memorial of the prior parol contract, and, even though the policy be not delivered until after the loss occurs, the insurance is deemed effective from the time agreed upon in the parol agreement, irrespective of any delivery of the policy. Crawford v. Insurance Co., 125 Cal. 609, 58 P. 177. "If an agent, authorized to accept risks, accepts a risk by parol, promising to deliver the policy, the insurance begins with the acceptance, and the contract in parol continues until the policy is delivered, when it is superseded by the policy." Ferrar v. Western

Assurance Co., 30 Cal. App. 491, 159 P. 609, 611. Where the assured has no notice of any limitation on the powers of the general agent, any act within the scope of the insurance business is binding on the insurance company, although it is in fact in violation of the agent's authority. Wheaton v. Insurance Co., 76 Cal. 415, 18 P. 758, 9 Am. St. Rep. 216, Farnum v. Insurance Co., 83 Cal. 246, 23 P. 869, 17 Am. St. Rep. 233. "Every indulgence not inconsistent with the plain meaning of the contract must be shown to the assured." Raulet v. Insurance Co., 157 Cal. 213, 107 P. 292.

The authorities cited by appellant are not inconsistent with the views here expressed, as the facts in these cases are not analogous to the stipulated facts in the present case.

The judgment is affirmed.

We concur: KNIGHT, Acting P. J.; CASHIN, J.

96 Cal. App. 204

In re MALVASI'S ESTATE.

SPINGOLA v. DONA.

(Civ. 6506.)

District Court of Appeal, First District, Division 1, California. Jan. 9, 1929.

1. Wills 🔑400—Finding on conflicting evidence that testator was of sound mind and competent when executing will is conclusive on appeal.

Determination by jury upon conflicting evidence that testator, at time of executing will, was of sound mind and competent, is conclusive on appeal.

2. Wills 🔑55(1)—Evidence held to sustain finding that testator was competent and of sound mind when executing will.

Evidence in will contest *held* to sustain finding that testator at time of executing will was competent and of sound mind.

3. Wills 🔑324(4)—Evidence held insufficient for jury on issue of due execution of will.

Evidence in will contest relative to due execution of will *held* insufficient for jury.

4. Trial 🔑267(3)—Instructions were properly modified to eliminate issues as to which nonsuit was properly granted.

Where motion for nonsuit on issues relating to due execution of will and undue influence was properly granted, a modification of instruction so as to eliminate such issues from the consideration of the jury was also proper.

5. New trial 🔑159—Deciding motion for new trial without argument was not error, where counsel stated that he did not desire to argue motion.

The fact that court decided motion for new trial without argument thereon at the time the motion was made was not error, where counsel stated at time of making motion that he did not desire to argue it.

6. New trial 🔑44(1)—Failure of juror, in will contest involving unsoundness of mind, to volunteer information that she was Christian Scientist, was not misconduct authorizing new trial.

Failure of juror, in will contest involving incapacity or unsoundness of mind of testator, to volunteer information that she was a Christian Scientist, in order to permit of exercising peremptory challenge, *held* not to constitute misconduct authorizing new trial as depriving contestant of a fair and impartial jury, particularly in view of fact that juror stated on affidavit that she recognized the existence of disease, including mental incompetency.

7. Jury 🔑44—Ordinarily religious belief of prospective juror is immaterial (Const. art. 1, § 4).

Ordinarily the religious belief of a prospective juror is immaterial in accordance with Const. art. 1, § 4, and no duty is imposed on prospective juror to volunteer information on that subject.

8. Jury 🔑44—Juror was not disqualified to try issues in will contest involving unsoundness of mind because she was Christian Scientist (Code Civ. Proc. § 602).

Juror was not disqualified, under Code Civ. Proc. § 602, to try issues in will contest involving incapacity or unsoundness of mind of testator by reason of fact that she was a Christian Scientist.

9. Statutes 🔑253—Law precluding judge from passing on his own disqualification did not take effect until 90 days after final adjournment of Legislature (Const. art. 4, § 1; Pol. Code, § 325; Code Civ. Proc. § 170, as amended by St. 1927, p. 1403).

Under the 1911 amendment to Const. art. 4, § 1, superseding the provisions of Pol. Code, § 325, in so far as in conflict therewith, the amendment of Code Civ. Proc. § 170, by St. 1927, p. 1403, precluding a judge from passing upon his own disqualification, did not take effect until 90 days after final adjournment of Legislature which passed the act.

10. Judges 🔑49(2)—That judge decided former will contest and after subsequent trial expressed opinion as to merits did not disqualify him from passing on motion for new trial.

Neither the fact that the trial judge decided a former will contest without a jury nor the fact that he expressed his opinion relative to the merits after trial of subsequent contest disqualified him from passing upon motion for new trial, in that the expression of opinion prior to hearing of motion for new trial is merely evidence of the fact that judge entertained such opinion, and is not evidence of bias or prejudice.

Appeal from Superior Court, Santa Clara County; P. F. Gosbey, Judge.

Proceeding by Filomena Dona for the probate of the will of Pasquale Malvasi, deceased, wherein John Spingola instituted a contest after probate. Judgment for proponent, and the contestant appeals. Affirmed.

J. J. Dunne, of San Francisco, Richard V. Bressani, of San Jose, and M. H. Farrar, of San Francisco, for appellant.

O. H. Speciale and Owen D. Richardson, both of San Jose, for respondent.

SPENCE, Justice pro tem. This is an appeal from a judgment confirming the probate of a will upon a contest instituted after probate. The will was executed by the testator on March 20, 1925, and left all of his property to the proponent, Filomena Dona, a sister. The deceased was unmarried and left surviving as his heirs a brother, three sisters, and the daughter and sons of a deceased sister. A previous contest before probate, tried before the court without a jury, had been unsuccessful. The present contest was instituted by the appellant, John Spingola, a nephew, and involved the issues of due execution of the will, undue influence, and unsoundness of mind.

On the trial, the court granted a nonsuit as to all grounds of contest except that of unsoundness of mind, and upon this issue the verdict of the jury was against the contestant.

On this appeal there are several specifications of error, which will be discussed in the order in which they are presented by appellant.

[1] It is first urged that the evidence was insufficient to justify the finding by the jury that the deceased was of sound mind. A review of the transcript leads to the conclusion that there was abundant evidence of the soundness of mind of the testator. The most that may be said is that the evidence produced by the appellant created a conflict and was sufficient to justify the action of the trial court in submitting this issue to the jury. The jury determined upon conflicting evidence that the deceased was of sound mind and competent at the time of the execution of the will, and it is well settled that such determination is conclusive on appeal. Estate of Clark, 170 Cal. 418, 149 P. 828; Estate of Nelson, 132 Cal. 182, 64 P. 294.

[2] Without reviewing all of the testimony on this subject, it may be pointed out that the proponent produced the day nurse and the night nurse who were attending the deceased, one of whom was a subscribing witness to the will, the priest who attended the deceased shortly before the making of the will, and the attorney who drew the will, and was also subscribing witness. All these were of the opinion that the deceased was of sound mind, and gave ample reasons to justify their opinions. It is true, as pointed out by appellant, that the will was drawn on the morning of the day upon which the deceased passed away at 5:40 p. m., as a result of lobar pneumonia. He was 63 years of age, had been confined to his bed for 10 days, and was a very sick man. The substance of the testimony of both nurses was that the deceased spoke rationally, answered questions in a lucid manner, and was not delirious, and did not talk incoherently. The priest testified that "he talked rationally, his mind was not wandering; he did not rave; he was a very sick man, but I could understand him and he could understand me and he did not rave;—Pasquale Malvasi on this occasion made to me an actual confession; he told me his state of sins by answering the questions that I asked of him and he received the Sacrament;—if I had been of the opinion that the sick man was not of sound mind, I would not have given confession and communion. I would not have given him absolution if he had not given his confession and if I were of the opinion he was of unsound mind." Mr. Speciale, the attorney who was called to draw the will, testified that the deceased told him that he wanted to make a will. Upon inquiry, the deceased gave him a list of his relatives, and then said, "I want to give everything to my sister Filomena Dona." The attorney asked him whether he desired the other relatives to receive anything, mentioning the names as given him by the deceased, and the deceased said, "No, nothing to the other relatives, everything to my sister Filomena Dona." He requested that the sister be named as executrix, and advised the attorney that his property consisted of the house where he was, some cash, and some Bank of Italy stock. After the execution of the will, he asked the attorney to take the will to his office and hold it for him.

Only a brief review of some of the testimony is here set forth, but such testimony was ample to sustain the finding of competency and soundness of mind. Counsel for appellant points to some similar features in the testimony in this case and that in Estate of Doolittle, 153 Cal. 29, 94 P. 240. There are points of similarity, but there are also many phases in which the testimony in the two cases differs. There the trial court decided on conflicting testimony that the deceased was of unsound mind. Here the jury decided upon conflicting testimony that the deceased was of sound mind. In either event, under the authority of that case, the determination made on conflicting evidence in the trial court cannot be disturbed on appeal.

[3] Appellant next urges that the trial court erred in granting a nonsuit on the issue of due execution of the will. The evidence offered by proponent showed that the will had been duly executed in all particulars. It is contended, however, that the testimony of Mrs. Mary De Marco raised a conflict on the issue of due execution which should have been submitted to the jury. This witness and the other relatives were asked to

leave the room when the attorney arrived. They did so and remained in the kitchen for about an hour during the time that the attorney conversed with deceased and while the will was drawn and executed. There was an open doorway but no door between the dining room and the bedroom in which the will was executed. There was a door between the dining room and kitchen, which was closed most of the time. At some time while the attorney was in the bedroom with the deceased, the nurse went to the kitchen and returned to the bedroom leaving the door open between the kitchen and dining room. The witness Mrs. De Marco testified to seeing and hearing certain things after the door was left open. The witness then testified, "After Speciale had said 'ferma qui' and the nurse had asked the sick man to 'sign here' and Speciale took the paper away, I did not hear anything else said in that room; I was where I could hear and I heard nothing more said." The testimony of this witness could only tend to prove what happened in the bedroom after the door was opened and during the time she was looking and listening through the dining room from her position in the kitchen. It would not tend to prove that there were no acts or statements on the part of the deceased, the attorney, and the nurse connected with the executing of the will, other than those to which this witness testified, and such testimony was not sufficient to raise a conflict of the issue of due execution. The motion for nonsuit was therefore properly granted as to this issue.

[4] Appellant next takes exception to the charge to the jury. It is contended that the trial court erred in giving, refusing, and modifying various instructions. Certain proposed instructions were modified by eliminating therefrom all reference to the issues of due execution of the will and undue influence, as to which issues a motion for nonsuit had been granted. As the motion for nonsuit was properly granted, the modification of the instructions so as to eliminate these issues from the consideration of the jury was also proper. It may be noted that it is not urged that there was error in granting the motion for nonsuit on the ground of undue influence. The remaining errors claimed in connection with the charge to the jury involved instructions relating to testamentary capacity. This was the only issue submitted to the jury, and the charge dealt at length with this subject. From a reading of the entire charge, we conclude that the jury was fully and fairly instructed upon this issue, and that there was no prejudicial error in the giving, refusing, or modification of any of the several instructions referred to by appellant.

[5, 6] It is next claimed that the trial court erred in refusing to grant a new trial. Counsel seems to complain of the fact that the motion for new trial was not given the consideration to which counsel believes the motion was entitled, but was decided without argument at the time the motion was made. There can be no merit in counsel's position in this regard, for the record shows that two motions were presented at the same time, the motion for new trial and a motion for an order to secure the services of some other judge to determine the motion for new trial, and that, at the time of making these motions, counsel for appellant stated that he did not desire to argue either of said motions. Counsel further contends that the court erred in refusing to grant a new trial, on the ground of alleged misconduct of Mrs. Mary G. Post, a juror, in failing to disclose that she was a Christian Scientist on voir dire. Mrs. Post was examined and accepted as a juror by counsel on both sides. She was asked many of the usual questions propounded to prospective jurors and answered them to the apparent satisfaction of all. No questions were asked concerning her religious belief nor concerning her views upon disease or its relation to mental capacity. She was asked, "And in the event that you should find that the testator was of unsound mind at the time that he executed the will, you would not hesitate to render a verdict against the document purporting to be his will, and to set it aside?" To this question she replied "No." Mrs. Post joined in the verdict upholding the will. After the conclusion of the trial, counsel for appellant learned that Mrs. Post was a Christian Scientist. On the motion for new trial, affidavits were filed alleging that Mrs. Post was a Christian Scientist and believer in the doctrines of Christian Science. The affidavits contain numerous passages from "Science and Health," by Mary Baker Eddy. Briefly, counsel takes the position that the followers of this faith deny the reality of disease, and are therefore not qualified to act as jurors in a case in which it is claimed that incapacity or unsoundness of mind is the result of disease, that the juror should have volunteered the information that she was a Christian Scientist on voir dire, and that her failure to disclose her alleged disqualification resulted in depriving appellant of a fair and unpartial jury. Counsel states in his affidavits: "* * * And this affiant respectfully insists that it is not to be doubted that said Mary G. Post would have been challenged peremptorily as a juror by said contestant if the fact had been disclosed that she was a believer in the doctrines of the aforesaid Christian Science." In a counter affidavit of Mrs. Post, she stated that for some years she had been a believer in the doctrines of Christian Science. Among other things, her affidavit stated, "I further depose that the fundamental doctrine or idea of Christian Science regarding sickness or disease is that sickness or disease can be healed thereby and that Christian Science at all times in the past has recognized and does

now recognize the existence of disease, including mental incompetency."

[7, 8] Ordinarily the religious belief of a prospective juror is immaterial and no duty is imposed upon a prospective juror to volunteer information on that subject. Article 1, § 4, of the Constitution of California, provides: "* * * And no person shall be rendered incompetent to be a witness or juror on account of his opinions on matters of religious belief." It is not to be doubted that the state of mind of a prospective juror, resulting from religious belief, or any other cause, might disqualify such person from acting as a juror in a particular case, regardless of the question of general competency to act as a juror. People v. Rollins, 179 Cal. 793, 179 P. 209; People v. Galloway, 202 Cal. 81, 259 P. 332. But in such cases it is the state of mind which is material and which disqualifies and such state of mind is material only in the event that it entitles a party to a challenge for cause. In the present case appellant does not claim that by reason of the state of mind of Mrs. Post he would have been entitled to challenge for cause under any of the provisions of section 602 of the Code of Civil Procedure. It is only claimed that the juror should have volunteered the information concerning her religious belief in order that appellant might have exercised a peremptory challenge. This position is untenable. In any event, it is to be noted that appellant's contention respecting alleged disqualification of the juror was based solely upon the theory that the state of mind of the juror, as a result of her religious belief, was such that the juror did not recognize the existence of disease or mental incompetency. The actual state of mind of the juror was not set forth, except in so far as that state of mind might be implied from her affiliation with the Christian Science Church. The juror's affidavit shows that according to her conception of its doctrines "Christian Science at all times in the past has recognized and does now recognize the existence of disease, including mental incompetency." It is therefore apparent that there was no showing that the juror did not recognize the existence of disease or mental incompetency. We conclude that the juror was not disqualified, and was not chargeable with any misconduct for failure to volunteer information concerning her religious belief, and that appellant was not deprived of a fair and impartial jury.

There is a further appeal by contestant from the order denying the motion of contestant for an order to secure the services of some other judge to preside at the hearing and determination of the motion for new trial. This motion was in its nature a motion to disqualify Judge P. F. Gosbey under the provisions of section 170 of the Code of Civil Procedure on the grounds of alleged bias and prejudice. The motion was presented upon affidavits and counter affidavits, and was heard and determined by Judge Gosbey.

Counsel first contends that, at the time of the hearing of that motion, a judge could not pass upon his own disqualification. Reference is made to chapter 744 of the Statutes of 1927, p. 1403. This act amended section 170 of the Code of Civil Procedure and the amendment provided that "No judge of a court of record, who shall deny his disqualification, shall hear or pass upon the question of his own disqualification. * * *" The bill was approved by the Governor May 24, 1927. The Legislature had adjourned on April 29, 1927. The motion in the present case was heard and determined on May 27, 1927, three days after the approval of the bill by the Governor.

[9] The power of a judge to pass upon his own disqualification prior to the time that the 1927 amendment took effect is not questioned. It is claimed, however, that, under the provisions of section 325 of the Political Code, the amendment was in effect at the time of the hearing of the motion on May 27, 1927. It is unnecessary to pass upon the proper construction of section 325, for the sections of the Political Code relating to the time when a statute takes effect were superseded by the amendment in 1911 of article 4, § 1, of the Constitution, at least in so far as such sections are in conflict therewith. That article provides: "No act passed by the legislature shall go into effect until ninety days after the final adjournment of the * * * legislature which passed such act * * *" with certain exceptions which are of no concern here. By virtue of the foregoing constitutional provisions, the amendment to section 170, as passed by the Legislature in 1927, did not take effect until July 29, 1927, and at the time of the hearing of the motion in this case, on May 27, 1927, a judge had the power to pass on the question of his own disqualification.

[10] With respect to the motion to disqualify, it is further urged that said motion should have been granted on the ground of bias and prejudice. The affidavits and counter affidavits used in connection with this motion are substantially in accord except that the general allegations of bias and prejudice were denied in the affidavit of Judge Gosbey. These affidavits and counter affidavits showed that Judge Gosbey had heard a prior contest of the same will, sitting without a jury, and that his decision had been against the contestants in that proceeding; that in the present contest, after the jury had retired, the judge had an informal discussion with counsel in the courtroom; that in this discussion the judge commented upon the course pursued in the drawing of the will by Mr. Speciale, one of the attorneys and a witness for proponent, and commended Mr. Speciale on the manner in which he had handled the situation at the time he was

called in to draw the will; that, after the verdict was rendered and the jury dicharged, one of the jurors asked the judge what he thought about the verdict, and he replied that he did not see how the juror could have done differently. The conclusion to be drawn from these affidavits is that prior to the hearing of the motion for new trial, the trial judge was convinced that the will had been properly executed and believed that the verdict of the jury sustaining the will was correct.

It is the duty and the practice of trial judges to closely follow the evidence that is presented before a jury. It is but natural and entirely proper that at the conclusion of the trial, the judge should form an opinion with respect to the weight and sufficiency of the evidence and the merits of the controversy. If the holding of such opinion should constitute grounds for disqualification, the judge who tried the cause would be disqualified on the motion for new trial in practically all cases. Although it is no doubt better practice for the trial judge to refrain from expressing any opinion prior to the hearing of the motion for new trial, such expression is merely evidence of the fact that the judge entertains such opinion, and is not evidence of bias or prejudice. Taken singly or collectively, we conclude that neither the fact that the judge decided a former contest without a jury, nor the fact that he expressed his opinion to counsel or the juror as set forth, shows bias or prejudice disqualifying him from passing upon the motion for new trial.

For the foregoing reasons, the judgment and the order denying the motion to disqualify are affirmed.

We concur: TYLER, P. J.; KNIGHT, J.

---

96 Cal. App. 292

McKELLEY v. TURNER, County Auditor.
(Civ. 3619.)

District Court of Appeal, Third District, California. Jan. 14, 1929.

1. Attorney and client 🔑76(1)—Where attorney's authority was withdrawn, his delivery of sheriff's resignation did not effect "resignation" (Pol. Code, § 995, subd. 4).

Where sheriff signed resignation and delivered it to attorney for delivery the following day, and specifically instructed him that the resignation was not to be delivered until such time, and on the same day informed attorney in writing that he withdrew and canceled such resignation, the unauthorized transmission of such resignation by attorney to the clerk of the board of supervisors did not make it effective as a resignation within Pol. Code, § 995, subd. 4.

[Ed. Note.—For other definitions, see Words and Phrases, First, Second, and Third Series, Resignation.]

2. Principal and agent 🔑33—Agent's authority can be terminated before performance.

Authority of agent, not coupled with an interest to do a particular thing, can be terminated by the principal at any time before authorized act is performed.

3. Mandamus 🔑190—County auditor, refusing to issue warrant for salary to either of two persons purporting to act as sheriff, held to have acted in good faith (Code Civ. Proc. § 1095).

Where county board of supervisors, after purported resignation of sheriff, adopted motion purporting to appoint another as sheriff, and both parties thereafter assumed to act as sheriff of the county, the auditor of the county properly refused to issue warrants to either for salary and appearance, and defense in mandamus proceeding was in good faith, as respects liability for costs, under Code Civ. Proc. § 1095.

Original application for writ of mandate by L. O. McKelley against B. J. Turner, as Auditor of the County of Lake. Peremptory writ granted.

Charles Kasch and M. H. Iverson, both of Ukiah, for petitioner.

H. B. Churchill, of Santa Rosa, for respondent.

FINCH, P. J. This is an original application for a writ of mandate, requiring the respondent, as auditor of Lake county, to issue his warrant in favor of petitioner for his salary as sheriff of that county for the month of June, 1928. The only issue of fact raised by the pleadings is whether the petitioner resigned his office as such sheriff on May 17, 1928. A reference was ordered, and the referee took evidence and found therefrom that the petitioner did not so resign. Respondent contends that the evidence does not support the finding of the referee.

[1] It appears from the evidence that during the forenoon of May 17, 1928, the board of supervisors of the county made demand upon the petitioner that he resign the office. He refused to do so, and engaged an attorney to represent him in the controversy. Later in the day the attorney went to the petitioner's home, and, after much persuasion, induced him to sign a form of resignation which the attorney, of his own volition, had prepared in advance. The attorney thereupon proceeded to the courthouse and filed the paper so signed. Petitioner contends that it was filed without his consent and contrary to his express direction. Relative to what occurred at the time he signed the paper, the petitioner testified: "I said, 'I am sick but I will sign it. * * * Don't turn it over until tomorrow,' and he went. I said this, repeating it again, 'Don't turn it over until tomorrow,' and I got to the door just a few minutes after, * * * and I called to Mr. Spurr, he was in the yard, I said, 'Mr. Spurr,

hurry down and tell Howard (the attorney) not to put my resignation in this evening because I don't want it to go in until tomorrow and see how I feel.' * * * I said, 'Mr. Spurr, tell Howard not to put it in, I told him not to put it in until tomorrow. I am afraid he will, he seemed to be in an awful hurry. I can't go any further than this door, rush down and tell him for goodness sake not to put it in today.'" The attorney testified that, within a few minutes after the written resignation was signed and delivered to him, Mr. Spurr, who is his uncle and an old friend of petitioner and who had accompanied the attorney to petitioner's residence for the purpose of inducing him to resign, met him at the courthouse and said, "I just came from Lon's (petitioner's) house, and Lon * * * told me to tell you, or ask you not to present the resignation until in the morning;" that the witness and Mr. Spurr then "talked the matter over and concluded the best thing to do was to present it now, and we both went in the board of supervisors' room * * * and we were both there when it was presented"; that at the time the resignation was handed to him by petitioner, the latter said, "I wish you wouldn't present the resignation until in the morning." The attorney further testified: "That was the conversation had before the resignation was signed. * * * After I got the resignation Mr. McKelley, as I remember it, best of my recollection, he never instructed me or said anything about presenting the resignation until I got the message from uncle Al in the hall. * * * After thinking it over, I don't believe, to the best of my recollection, there was anything said about presenting the resignation; what was said was with reference to the signing of the resignation. * * * That conversation was never talked over with anyone by me and it is hazy in my mind." In view of the uncertainty of this witness, the referee could not well have found against petitioner's contention that he instructed his attorney not to file the resignation on the day it was signed.

After the attorney had filed the resignation in violation of such oral instruction, the petitioner, on the same day, May 17, 1928, caused to be delivered to the attorney a written communication, in which he stated: "I now withdraw and cancel such resignation and request and instruct you to deliver same forthwith to F. R. Minkler, the bearer of this letter."

[2] The writing signed by the petitioner could have become effective as a resignation only upon its delivery to the clerk of the board of supervisors. Pol. Code, § 995, subd. 4; Meeker v. Reed, 70 Cal. App. 119, 123, 232 P. 760; People v. Marsh, 30 Cal. App. 424, 427, 159 P. 191. The mere manual transmission of the writing to the clerk, without authority and contrary to the express direction of the petitioner, was of no effect. The authority of an agent, not coupled with an interest, to do a particular thing, can be terminated by the principal at any time before the authorized act is performed. McGorray v. Stockton Savings & Loan Society, 131 Cal. 321, 63 P. 479. In this case the attorney was not authorized to file the petitioner's resignation until May 18th, and, prior to that time, his authority to file it was terminated.

The findings of the referee are amply supported by the evidence, and the petitioner is entitled to a peremptory writ of mandate as prayed for in his petition.

[3] May 31, 1928, the board of supervisors adopted a motion purporting to appoint John H. Brinkerhoff sheriff of the county. Brinkerhoff took the oath of office June 9, 1928, and thereafter both he and the petitioner have assumed to act as sheriff of the county. The respondent has refused to issue warrants to either of such claimants for salary as sheriff. This was the proper course for the respondent to pursue, and it is hereby found and determined that the respondent appeared and made defense in this proceeding in good faith.

Respondent's motion to set aside the findings of the referee is denied.

It is ordered and adjudged that a peremptory writ of mandate issue out of this court as prayed for in the petition, and that the petitioner recover his costs incurred in this proceeding, to be paid by the county of Lake, as provided by section 1095 of the Code of Civil Procedure.

We concur: PLUMMER, J.; HART, J.

96 Cal. App. 264

LISLE v. SHIPP et al. (Civ. 5548.)

District Court of Appeal, Second District, Division 1, California. Jan. 11, 1929.

1. Mandamus 🔑129—Stockholder of corporation, purchasing stock of another corporation, held not entitled to mandamus to inspect books of other corporation (Const. art. 12, § 14; Civ. Code, §§ 305, 377, 378).

Where director in control of corporation used funds thereof to purchase stock in another corporation for first corporation, stockholder in first corporation, in absence of any equitable considerations arising out of willful or fraudulent mismanagement of his corporation, was not entitled to mandamus to compel inspection of books of corporation whose stock was purchased, under Const. art. 12, § 14, and Civ. Code, §§ 377, 378, but such right belonged to directors of first corporation, under Civ. Code, § 305.

2. Mandamus 🔑129—Identity of management and relationship between corporation and corporation whose stock it owns must be considered, in determining whether books of both may be examined (Const. art. 12, § 14; Civ. Code, §§ 377, 378).

In determining whether authority to compel production of books and papers of corporation and of corporation whose stock it owns shall be exercised, under Const. art. 12, § 14, and Civ. Code, §§ 377, 378, court takes into consideration character of court as court of equity, and close relationship existing between corporations, their identity of management and control, but right will not be exercised, where two corporations are in fact separate and distinct entities.

Appeal from Superior Court, Los Angeles County; Hartley Shaw, Judge.

Mandamus by W. H. Lisle against E. S. Shipp, as president of the Metropolitan Finance Corporation, and another. From a judgment denying an application for writ of mandamus, plaintiff appeals. Affirmed.

Everts, Ewing, Wild & Everts and Kemp, Partridge & Kemp, all of Los Angeles, for appellant.

Fickeisen & Richardson and J. E. Haley, all of Los Angeles, for respondents.

CONREY, P. J. According to the petition of complaint filed in the court below, the following facts appear: Haden Securities Company, Inc., is a California corporation having 10,000 shares, of which petitioner is owner of 200 shares. E. S. Shipp is the owner of more than 5,000 shares, and is president of the corporation. His wife, E. H. Shipp, is the owner of 100 shares, and is the secretary and treasurer of the corporation. Shipp and his wife are two of the three directors, and are, therefore, in practical control of the business of the corporation.

Metropolitan Finance Corporation is a California corporation, wherein Shipp is the owner of a majority of the issued capital stock, and is its president. Defendant Hemphill is the secretary of that corporation. It is alleged that Shipp, being general manager of the Haden Company, sold some of its properties, and invested the proceeds thereof, with other money of the company, amounting in all to the sum of $69,000, by using it for the purchase of stock of the Metropolitan Corporation.

The petition does not allege any facts showing misconduct or want of good faith on the part of the officers of the Haden Company in the above-mentioned transactions. Nevertheless, basing his claim upon his status as a stockholder in the Haden Company, petitioner demanded that he be permitted to inspect the books, files, and properties of the Metropolitan Corporation. That demand having been refused, he made application in the superior court for a writ of mandate requiring that he be allowed to make said inspection. An alternative writ of mandate was issued, and a hearing was had on the merits on the return date. This hearing appears to have occurred in open court, with argument by counsel for the respective parties, and without any return or pleading filed on the behalf of the defendants. It must be presumed, therefore, that the application for the peremptory writ was denied upon the ground that the facts stated by petitioner were insufficient to establish his right to the writ. It is from this judgment that the plaintiff appeals.

It is provided by the Constitution of California (article 12, § 14) that every corporation (with certain exceptions which have no application here) shall keep certain books and records which shall be subject to inspection by "every person having an interest therein." Under the provisions of sections 377 and 378 of the Civil Code, the records of all corporations for profit shall be open to inspection of any bona fide stockholder thereof. There is one exception which we need not discuss, as it does not present any question under this record.

[1] It is manifest that appellant did not come before the superior court claiming any right as a stockholder of the Metropolitan Corporation, in the legal sense of the word "stockholder." So far as the last-named corporation is concerned, his only interest is that indirect interest belonging to him as a stockholder in the Haden Company, which, in turn, is the owner of stock in the Metropolitan Corporation. In the absence of any equitable considerations arising out of willful or fraudulent mismanagement of the Haden Company, which might authorize a stockholder to apply for relief on behalf of the Haden Company and its stockholders, appellant was not in any position entitling him to exercise on behalf of the Haden Company its right of inspection of the books or other properties of

the Metropolitan Corporation. The corporate powers, business, and property of a corporation must be exercised, conducted, and controlled by its board of directors. Civ. Code, § 305. The Haden Company's right to inspect the books and properties of the Metropolitan Corporation is a part of the rights and powers which, at least under ordinary circumstances, are vested exclusively in the board of directors. If there be any possible circumstances which would constitute an exception to this rule, they do not appear in the statement of facts contained in the petition in this case.

[2] So far as appears, there is no California decision where any direct expression of opinion has been made upon the point involved here. In National Bank v. Western Pacific R. Co., 157 Cal. 573, 581, 108 P. 676 [27 L. R. A. (N. S.) 987, 21 Ann. Cas. 1391], the Supreme Court said that stockholders and creditors of a corporation are the only persons who have a right to inspect its books, citing Civ. Code, § 387. But no reference was made to the provisions of the Constitution above mentioned. We are not referred to, and we have not found, any case which throws any light upon the contention of appellant that a stockholder of one corporation is a person having an interest in another corporation merely by virtue of the first corporation's ownership of stock in a separate and independent corporation. We have examined the three decisions of other states, cited by appellant. These are Martin v. D. B. Martin Co., 10 Del. Ch. 211, 88 A. 612, 102 A. 373, State ex rel. Rogers v. Sherman Oil Co., 1 W. W. Harr. (Del.) 570, 117 A. 122, and Woodworth v. Old Second National Bank, 154 Mich. 459, 117 N. W. 893, 118 N. W. 581. These decisions go no further than to hold that, where company A is the owner of all the stock in company B, and in practical control thereof, so that they are in effect operated as one business, and where a stockholder in company A has made some showing to the effect that the officers in control of the plaintiff's own corporation are misusing their powers for fraudulent or otherwise illegal purposes, and the second company is merely an agency and tool through which the first company operates, the right of inspection will be extended to the books of both corporations. As stated in State v. Sherman Oil Co., supra, this rule is based upon the power of a court of equity to disregard mere forms for the purpose of discovering and revealing fraud. In aid of that purpose the court will, under appropriate circumstances, exercise the right to compel the production of the books and papers of both corporations. In determining whether this authority shall be exercised, the court takes into consideration, not only the character of the court as a court of equity, but the close relationship shown to exist between the corporations, and their identity of management and control. But the right will not be so exercised under ordinary circumstances, and where the two corporations are in fact separate and distinct entities. In the case at bar, no facts were presented which entitle the petitioner to act on behalf of the Haden Company, or to assert on his own behalf any right of inspection of the books and properties of the Metropolitan Corporation.

The judgment is affirmed.

We concur: HOUSER, J.; YORK, J.

---

96 Cal. App. 90

McINDOE et al. v. COOLEY et al.

(Civ. 6532.)

District Court of Appeal, First District, Division 1, California. Dec. 31, 1928.

1. Vendor and purchaser 🔑334(7)—Makers not paying sum payee agreed to credit on purchase note because land was not as warranted could not recover it.

Purchasers of land in payment of purchase price executing and delivering to seller notes secured by mortgage on property purchased, discovering that deed contained less number of acres of arable land than called for, whereupon seller agreed that she would give plaintiffs credit for certain sum and indorse such credit on note, could not, after seller's death, without indorsing credit on note in action demanding payment of sum, recover money judgment; they not having paid the same.

2. Vendor and purchaser 🔑341(2)—Makers could not recover sum payee agreed to credit on note on oral promise to pay; complaint not showing promise.

Purchasers of land, suing to recover money judgment for credit which seller had agreed to indorse on note given for purchase price when purchasers discovered tract bought did not contain number of acres of arable land deed called for, could not recover on an independent oral promise to pay sum, where the affirmative allegations of complaint did not show that promise was ever made.

3. Evidence 🔑441(11)—Under complaint seeking recovery of sum payee orally agreed to credit on note, enforcement could not be ordered, since it would vary note by parol (Code Civ. Proc. § 1698).

Complaint alleging that plaintiffs purchased certain lands from defendant's decedent for which note secured by mortgage was given, that seller had subsequently agreed to indorse credit on note because lands did not contain arable acreage that the deed called for, and demanding payment of sum from defendants as executors, which was rejected, could not be sustained to compel executors to allow credit on note and to indorse same thereon as orally agreed by seller, since, when complaint is construed as seeking such enforcement, cause of action pleaded constitutes attempt to alter terms of note which is written contract by an executory parol agreement prohibited by Code Civ. Proc. § 1698.

Appeal from Superior Court, Del Norte County; Stanley Murray, Judge.

Action by W. H. McIndoe and another against Will Cooley and another, as executors of the will and estate of Nettie C. Scott, deceased. Judgment for defendants, and plaintiffs appeal. Affirmed.

George W. Howe, of Crescent City, for appellants.

Childs, Dodd & Carroll and John L. Childs, all of Crescent City, for respondents.

KNIGHT, J. This is an appeal by plaintiffs from a judgment of dismissal entered after a demurrer to an amended complaint had been sustained without leave to amend, in an action to recover upon a rejected claim presented against the estate of Nettie C. Scott, deceased.

The amended complaint sets forth the following facts: On April 29, 1920, plaintiffs purchased certain lands from the deceased, and in payment of the purchase price executed and delivered to her their promissory note for $26,250, secured by a mortgage on the property so purchased. The sale was made on the basis of $250 an acre for all arable land. In October, 1921, plaintiffs discovered that the tract contained a somewhat less number of acres of arable land than the deed called for, and thereupon, the complaint alleges, the deceased agreed that she would give plaintiffs credit for the sum of $3,112.50, and indorse such credit on the note. Mrs. Scott died on May 31, 1924, and in July, 1924, plaintiffs ascertained that she had failed to make the indorsement on the note as agreed; whereupon plaintiffs presented a claim against Mrs. Scott's estate demanding payment of the sum of $3,112.50; and, upon rejection of the claim, commenced this suit. The prayer of the complaint is for a money judgment in the sum of $3,112.50, and for costs and general relief.

[1, 2] The complaint does not allege nor do plaintiffs claim that the sum they seek to recover in the present action, or any part of it or the promissory note or any part of it, have ever been paid to Mrs. Scott or to her estate. All that is alleged and claimed is that, upon the discovery of the fact that there was a shortage in the acreage, Mrs. Scott orally agreed to allow credit therefor on the note. Under such circumstances, it would seem apparent that plaintiffs are not entitled to a money judgment. If the promissory note, or even the amount sued for herein, had been paid, so that it would be made to appear that such payment constituted an overpayment resulting either through mistake or from fraudulent practices, a different situation would be presented; but, as stated, plaintiffs make no claim either in their complaint or in their briefs that the amount that they are now suing for was ever paid to Mrs. Scott or to her estate. Obviously, therefore, they cannot recover that which they have not paid, nor can they recover on an independent oral promise to pay said sum because the affirmative allegations of the complaint show that no such promise was ever made.

[3] On the other hand, if it be assumed that we may treat the allegations of the complaint relating to the presentation and rejection of the claim as surplusage, and totally ignore the prayer of the complaint, and, as the complaint is thus emasculated, construe the same as one to compel the executors to allow the credit on the note and to indorse the same thereon, as orally agreed by Mrs. Scott, the cause of action pleaded would then constitute an attempt to alter the terms of a written contract by an executory parol agreement, which, of course, may not be done. Section 1698, Code Civ. Proc.; Bennett v. Potter, 180 Cal. 736, 183 P. 156. As held, a promissory note is a written contract within the meaning of the foregoing Code section (Molera v. Cooper, 173 Cal. 259, 160 P. 231) and any parol agreement made between the maker and payee to change its terms is ineffectual as being in violation of said Code section (Henehan v. Hart, 127 Cal. 656, 60 P. 426). In the latter case the parties agreed to extend the time of payment of the note; and in our opinion there can be no difference in principle between a parol agreement to extend the time of payment of a note and a parol agreement to reduce the amount of its principal.

The questions of whether or not an action may be maintained for the reformation of the terms of the note, or whether the credit agreed to be given by Mrs. Scott could be successfully pleaded and urged as a payment in case suit on the note were instituted by the payee for its collection, are matters with which we are not here concerned, and therefore need not be considered nor decided.

In further support of the order sustaining the demurrer, defendants contend that in any event the cause of action attempted to be stated is barred by the statute of limitations (subdivision 4, § 338, Code Civ. Proc.), but in view of the conclusions we have reached on the other points involved, this latter question becomes immaterial.

The judgment is affirmed.

We concur: TYLER, P. J.; CASHIN, J.

CITY OF FRESNO v. DILLON et al.
(Civ. 6391.)★

District Court of Appeal, First District, Division 1, California. Dec. 29, 1928.

Rehearing Denied Jan. 28, 1929. Hearing Granted by Supreme Court Feb. 25, 1929.

1. Municipal corporations ⚷173(2)—**Duty of commissioner of finance to collect license fees in city of Fresno held within his official bond; "official duties required of him by law" (Const. art. 11, § 8; Fresno City Charter).**

Under Const. art. 11, § 8, an ordinance of the city of Fresno, imposing on the license collector the duty of collecting license fees, was superseded by the adoption of a new city charter (St. 1921, p. 1821), creating a department of finance, and imposing on the commissioner of finance the duty of collecting such fees, notwithstanding such duty was not transferred by ordinance, and hence the commissioner's duty of making such collection was among the "official duties required of him by law" within his official bond.

2. Municipal corporations ⚷173(2)—**Approval by commissioner of finance of municipal bonds for payment which had already been made rendered commissioner and surety liable on official bond; "official duties required of him by law" (Fresno City Charter).**

Although Fresno City Charter (St. 1921, p. 1821) did not impose on commissioner of finance duty of approving municipal bonds for payment by city treasurer, but commissioner had nevertheless approved bonds according to a custom which had developed, where such bonds were presented to him for approval a second time, the duty of withholding his approval as of an unauthorized claim against the city was among the "official duties required of him by law" under his official bond, and therefore a second approval of bonds which had already been paid rendered him and his surety liable.

Appeal from Superior Court, Fresno County; Charles R. Barnard, Judge.

Action by the City of Fresno against Charles F. Dillon and another. Judgment for plaintiff, and defendants appeal. Affirmed.

Lindsay & Gearhart, of Fresno, and Joe Crider, Jr., of Los Angeles, for appellants.

W. E. Simpson, City Atty., of Fresno, for respondent.

SPENCE, Justice pro tem. The city of Fresno, plaintiff and respondent herein, brought this action against Charles F. Dillon and the bonding company, his surety, upon Dillon's official bond as commissioner of finance of that city.

The complaint contained nine counts relating to shortages in license fees collected, and unauthorized approval of double payments on certain municipal bonds by Dillon during his term of office. Judgment was entered in favor of plaintiff and respondent, from which judgment the defendants and appellants appeal.

Dillon was elected to the office of commissioner of finance of the city of Fresno under the new charter which became operative in 1921. His official bond provided: "Now, if the said Charles F. Dillon shall well, truly and faithfully perform all official duties required of him by law, and all such additional duties as may hereafter be imposed on him as such officer by any law hereafter enacted, then the above obligation to be void, otherwise to remain in full force and virtue."

There was a shortage of $5,533.32 in the license fees collected. Dillon approved claims or demands and caused warrants to be drawn for the payment of certain municipal bonds totaling $6,000, and thereafter, when these bonds in some manner were again presented, Dillon approved claims or demands and caused warrants to be drawn for a second payment of the same bonds.

The liability of Dillon individually for his irregularities is not questioned, but counsel for appellants contends that neither Dillon nor his surety is liable on his official bond as it was not the official duty of Dillon to collect the license fees nor to pay municipal bonds involved. No other question is raised on this appeal.

[1] We will first consider the situation with respect to the license fees above referred to. These license fees were collected under the provisions of Ordinance No. 846, which ordinance became effective several years prior to the adoption of the new charter. At that time Fresno was functioning under its previous charter, which created the office of license collector. The ordinance by its terms made it the duty of the license collector to collect the license fees imposed upon various trades, professions, and businesses. The new charter of 1921 (Stats. 1921, p. 1821) made no mention of the office of license collector. It created a department of finance headed by a commissioner of finance. Section 1 expressly authorized the city to "license for purposes of revenue and regulation, * * * all businesses, occupations, trades, professions, enterprises and projects and persons engaged therein, and for said purposes to assess, levy and collect license fees. * * *" By section 145 it provided that "All * * * city ordinances, * * * now in force and not inconsistent herewith, shall be and remain in force after this charter takes effect until changed or repealed by the proper authority. * * *" Section 38 provided that "the Commissioner of Finance shall have control and jurisdiction over the keeping of accounts and financial records; the auditing of accounts and claims; the levy, assessment and collection of taxes, special assessments, license fees and other revenues. * * *" In section 55 it provided that "All taxes, special assessments and

---

★Opinion adopted by Supreme Court 279 P. 767.

license fees accruing to the city shall be collected by officers and ex-officio officers of the Department of Finance. All moneys received by any officer or employee of the city for or in connection with the business of the city shall be paid promptly into the treasury."

Prior to the adoption of the charter of 1921, a certain Harry Erickson was serving as license collector. Upon the adoption of the charter and the qualification of Dillon, Erickson was appointed by Dillon as a deputy commissioner of finance. The license fees were thereafter paid into the office of the commissioner of finance; it appearing that Erickson was actually placed in charge of the collection of these fees.

Counsel for appellants takes the position that Ordinance 846 remained in force and effect in its entirety after the adoption of the charter of 1921, and that, as the duty of collecting these fees was never transferred by ordinance from the license collector to the commissioner of finance, it was not the official duty of the latter to collect and account for the fees.

With these conclusions we cannot agree. By article 11, § 8, of the Constitution, it is provided that, upon the approval of a charter, by the Legislature, "it shall become the organic law of such city or city and county, and supersede any existing charter and all laws inconsistent therewith." The general provisions of Ordinance 846 imposing the license fees were entirely consistent with the new charter, and the provisions thereof imposing the duty of collecting the license fees were inconsistent but separable. The new charter of 1921 by express terms gave the "control and jurisdiction over * * * the collection of * * * license fees" to the commissioner of finance. Section 38. The effect of this provision was to transfer to the commissioner of finance all duties with respect to the collection of license fees previously imposed by charter or ordinance upon the license collector. It thereupon became the official duty of the commissioner of finance to collect the license fees in question, and further legislation by ordinance was unnecessary for this purpose.

[2] With respect to the unauthorized approval by Dillon of double payments on certain municipal bonds, counsel urges that no liability exists on Dillon's official bond, as Dillon could not legally make payment of these bonds. The bonds in question were issued in 1916 and were "payable at the office of City Treasurer. * * *" Under section 58 of the charter of 1921 it was provided that "Payment by the city shall be made only upon vouchers certified by the commissioner of the appropriate department, or by the presiding officer of the appropriate board or other division of the city government, and by means of warrants on the city treasury, issued by the Commissioner of Finance. The Commissioner of Finance shall examine all payrolls, bills and other claims and demands against the city; and shall issue no warrant for payment unless he finds that the claim is in proper form, correctly computed and duly certified that it is justly and legally due and payable, that an appropriation has been made therefor which has not been exhausted or that the payment has been otherwise legally authorized, and that there is money in the city treasury to make payment. He may require any claimant to make oath to the validity of a claim. He may investigate any claim and for such purposes may examine witnesses under oath, and if he finds it is fraudulent, erroneous or otherwise invalid, shall not issue a warrant therefor, and, if the situation warrants, shall call the matter to the attention of the City Commission for appropriate action."

By virtue of the broad powers and duties of the commissioner of finance under this section and of section 38 of the charter, a custom developed whereby all claims and demands, including those for payments on bonds, were presented to the commissioner of finance for allowance and approval, and the commissioner would then in the case of bonds retain the bonds and issue warrants in favor of the bondholders upon the city treasurer. That this procedure was unnecessary with respect to city bonds, and that the bondholder was entitled to payment by the treasurer without the approval, allowance, or the issuing of a warrant by the commissioner of finance was ultimately determined in a case involving one of these same bonds of the City of Fresno. Commercial & Savings Bank v. Ewing, 66 Cal. App. 231, 225 P. 476. However, during the time the above-mentioned custom was in vogue, Dillon did approve, allow and cause his deputy to issue a warrant for the payment of a group of these bonds to the Pacific Southwest Trust & Savings Bank, which warrant was paid by the treasurer. The face of the warrant did not show what bond payments were covered thereby, but the records in the office of the commissioner of finance did so show. The above bonds mysteriously disappeared from the office of the commissioner of finance, and several of them were again presented to the commissioner by various persons for approval and allowance within 30 days after their original presentation. In each instance Dillon again approved, allowed, and caused his deputy to issue warrants for a second payment of these identical bonds. These warrants were also paid by the treasurer, resulting in the double payment by the city of the bonds in question.

There is no doubt, under the authority of Commercial Savings Bank v. Ewing, supra, that it was the duty of the treasurer to pay these municipal bonds upon presentation without the approval, allowing, or drawing of a warrant by the commissioner of finance, and that it was no part of the official duty of the commissioner of finance to pay said bonds or authorize their payment. This does not, however, foreclose the inquiry in the present case regarding the nature and extent of the official duties of the commissioner of finance.

Sections 38 and 58 of the charter of 1921 gave to the commissioner of finance very broad and general powers with respect to the finances of the city, including the auditing and approving of claims and demands and the issuing of warrants therefor upon the city treasury. Upon the issuing of a warrant by the commissioner of finance, payment by the treasurer apparently followed as a matter of course. Section 130 of the charter of 1921 provided: "Every officer who shall approve, allow or pay any demand on the treasury not authorized by law, ordinance or this charter, shall be liable to the city individually and on his official bond for the amount of the demand so illegally approved, allowed or paid." It is from the above-mentioned sections that the nature and extent of the official duties of the commissioner of finance must be here determined. No case construing similar provisions has been called to our attention. A reading of these sections leads to the conclusion that it was the official duty of the commissioner generally to approve and issue warrants for the payment of authorized claims, and that it was likewise his official duty to withhold approval of and refrain from issuing warrants for the payment of unauthorized claims. The fact that it was not his official duty to pay or approve the payment of these municipal bonds in the first instance does not change the situation in the present case so far as the subsequent unauthorized approval is concerned. These bonds and a record of their approval were retained in Dillon's office. Dillon knew, and the records of his office disclosed, that these bonds had been covered by the warrant previously issued by him. When these bonds disappeared from the office and were presented with new demands shortly thereafter, his action in approving their payment a second time and issuing warrants therefor constituted the approval by Dillon of unauthorized demands against the city in violation of his official duty, for which he and his surety are liable on his official bond as provided in section 130 of the charter.

In the case of County of San Luis Obispo v. Farnum, 108 Cal. 562, 41 P. 445, which case is relied upon by appellants, the court, on page 564 (41 P. 446), in discussing whether it was the official duty of the auditor to pay over to the county certain county funds received by him and which it admittedly was no part of his official duty to receive, pointed out that such duty as existed to pay over these funds "did not arise out of his office, nor was it at all different from the duty which would have rested upon him to pay it over had he been a plain citizen not holding any county office." In the present case the duty of withholding approval of any unauthorized claim or demand was a duty imposed upon Dillon officially and not as a private citizen. Dillon's actions here in approving these unauthorized claims and demands and issuing warrants for their payment constituted the wrongful exercise of the general powers conferred upon him in his official capacity as commissioner of finance by the charter.

Counsel also quotes at length from City of San Jose v. Welch, 65 Cal. 358, 4 P. 207, contending that the situation there is analogous to the present case so far as the collection of license fees is concerned. In that case, however, the bond was conditioned upon the faithful performance of the duties of "city assessor and city clerk, according to the laws and ordinances and regulations passed and approved by the mayor and common council of the city of San Jose." By ordinance the duty to collect the taxes was not placed upon this official but upon the collector, and it was there held that the bond was limited in its terms to the duties cast upon the principal by the mayor and common council, and that the liability of the sureties could not be extended. Here the duty to collect the license fees was imposed by charter upon the commissioner of finance, and no further legislation was necessary to create the liability upon the principal and sureties under the terms of the bond, which covered all duties required by law.

The authorities cited by counsel on the general proposition that the liabilities of sureties are to be strictly construed are entirely in accord with our conclusions here.

We conclude that the charter which created the office of commissioner of finance imposed upon that official, as part of his official duties, the duty of collecting license fees, and the duty of withholding approval of and refraining from issuing warrants upon unauthorized claims or demands against the city, and that these duties were "official duties required of him by law" as provided in his official bond.

The judgment is affirmed.

We concur: TYLER, P. J.; KNIGHT, J.

96 Cal. App. 133

WARWICK v. MACCHIAROLI et al.*
(Civ. 5312.)

District Court of Appeal, Second District, Division 1, California. Jan. 4, 1929.

Rehearing Denied Feb. 2, 1929.

1. **Landlord and tenant ⚷161(2) — Landlord taking possession of apartment house after tenant's default in paying rent became involuntary bailee of tenant's personal property therein.**

Landlord taking possession of leased apartment house owned by him after tenant's default in payment of rent, where house contained furnishings which were personal property of tenant, became involuntary bailee of the property.

2. **Landlord and tenant ⚷161(2)—Tenant taking possession of apartment house with notice of prior tenant's ownership of personal property therein became involuntary bailee thereof.**

Where landlord had taken possession of apartment house after tenant's default in payment of rent, another tenant, who went into possession thereof with notice of defaulting tenant's ownership of personal property therein, became involuntary bailee of defaulting tenant's property.

3. **Appeal and error ⚷910—It may be assumed that defendant not appealing from judgment in action for conversion of personal property was guilty.**

There not being any appeal by certain defendant from judgment in action to recover damages for conversion of certain personal property, it may be assumed without question that such defendant was guilty of conversion of plaintiff's property when she sold it to other parties.

4. **Landlord and tenant ⚷161(3)—Finding that landlord retaking possession on tenant's default converted tenant's personalty left therein held not sustained, where he took no part in conversion by another tenant going into possession.**

Where landlord, who had retaken possession of house upon tenant's default in payment of rent, made no claim against personal property owned by her and remaining in house and did not by any word or act take part in any act of conversion of property by another tenant, who went into possession of the house, finding that he interfered with dominion of defaulting tenant over her property or her possession thereof *held* not sustained; landlord's act having relation to the realty alone, and not being capable of being extended so as to include the personal property.

Appeal from Superior Court, Los Angeles County; Elliot Craig, Judge.

Action by Helen Warwick against Cono Macchiaroli and others. Judgment adverse to named defendant, and he appeals. Reversed, with directions.

Andrew J. Copp, Jr., of Los Angeles, for appellant.

E. O. Leake, of Los Angeles, for respondent.

CONREY, P. J. The plaintiff brought this action to recover damages for conversion of certain personal property of plaintiff by the defendants Macchiaroli and Mrs. Brooke. The appeal from the judgment is by Macchiaroli alone.

The facts hereinafter set forth are either established without conflict, or, where the evidence is conflicting, are stated most strongly in favor of respondent. In June, 1924, respondent was in possession of an apartment house in the city of Los Angeles under a lease which had been made by appellant, who owned the real property only. This lease had been made by appellant to one Tolleson, and had passed by various transfers to the respondent Warwick. Defendant Mrs. Brooke had been one of the intermediate owners of the lease. At the time of the transactions now in question, respondent owned the furnishings of the house, subject to a mortgage owned by defendant Mrs. Brooke, and on the mortgage indebtedness there was money due and unpaid. The terms of the lease are not in the record. The lease was offered in evidence, but was excluded upon the ground, as stated in the objections of respondent's counsel, that the leasehold interest in the premises was not in controversy in this action. All parties are in agreement, however, that respondent was in possession of the premises, and of the furnishings as hereinbefore stated, and that respondent was in default both on the rent and on account of the mortgage indebtedness. On June 14th appellant served upon respondent a notice which we may properly assume was the usual three days' notice to pay rent or vacate the rented premises. Respondent in her testimony admitted that the notice was served, and no question has been raised about its sufficiency.

Respondent neither paid the rent nor vacated the premises. On the morning of June 19th appellant came to the premises. As to what occurred then, respondent says that she "just spoke to him; not a conversation." Soon after noon she went away and did not return until evening. At the time of her departure appellant was watering the lawn. During the afternoon, and in the absence of respondent, appellant accepted from Mrs. Brooke the amount of the rent due, and left her in possession of the premises. Nothing was said or done about the personal property of respondent, except that a trunk and suitcase and some clothing of respondent were put outside of the house by appellant. Those articles were not part of the property involved in the alleged conversion. In the course of the evening, respondent came back to the house and found the door locked, and Mrs. Brooke spoke to the respondent through the window and stated that she could not let respondent in. Respondent called again once or twice at those premises. She testified: "I went back

---

⚷For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

★Rehearing denied.

the following Friday for all my goods—the next Friday night I went back for the rest of them. I took the first portion on the Friday night and they put out the rest on Saturday." Evidently the word "goods" in the foregoing answer does not include the furniture or furnishings of the house, as respondent testified that those never were turned over to her.

It appears that subsequently Mrs. Brooke sold to a third party the personal property, conversion of which is the subject of this action. There is no evidence that appellant had anything to do with Mrs. Brooke's continued possession of the personal property, or with her sale thereof, unless it can be maintained that he had no right to deliver the premises into the possession of Mrs. Brooke without first removing the said personal property. In this connection it must be remembered that Mrs. Brooke knew and understood the interest of respondent in the furniture of the house, and that appellant did not undertake to transfer to Mrs. Brooke any interest in any personal property. Therefore, as to appellant, the case is not one in which a party is to be held liable as for a conversion, because he unlawfully sold and conveyed to a third person the property of another.

It must be conceded that appellant as landlord of the defaulting tenant, after service of the three days' notice and after expiration of that time, had acquired the right of possession of the leased premises. On the other hand, it may be that he was guilty of forcible entry in taking possession thereof in the manner that he did, and that by taking the proper steps Mrs. Warwick might have recovered possession in an action of forcible entry or forcible detainer. California Products Inc. v. Mitchell, 52 Cal. App. 312, 198 P. 646. This, however, she did not elect to do, but seems to have confined herself to an action relating to the personal property. In this action, as indicated above, respondent insisted, and the court held that the subject of the leasehold interest was not involved. Therefore the judgment against appellant, if sustained at all, must rest entirely upon his conduct in relation to the personal property, and in determining the legal results of that conduct we must follow respondent and the trial court in excluding from consideration all questions affecting appellant's right of possession of the real property.

[1-4] We find, then, that appellant was in actual possession of leased property owned by him, after default by his tenant in the payment of rent, and after appellant by proper steps had acquired the right of possession. In the house there were the "furnishings," which were personal property of respondent. By these circumstances appellant became an involuntary bailee of respondent's property. When Mrs. Brooke went into possession of the house, she likewise, with equal notice of respondent's rights in relation to the personal property, became involuntary bailee thereof. Since there is no appeal by defendants Brooke, it may be assumed without question that Mrs. Brooke was guilty of conversion of respondent's property, when she sold it to other parties. But there is no evidence that appellant had anything to do with that sale, or that he did anything to interfere with any interest of respondent in that property. We think, therefore, that the evidence does not sustain the finding of the court that appellant interfered with the dominion of respondent over her property, or with her possession thereof. Appellant was making no claim against respondent concerning respondent's rights in that property, and appellant did not, by any word or act, take part in any act of conversion of the property by Mrs. Brooke. His acts had relation to the realty alone, and under the record before us they cannot be extended so as to include the personal property.

The judgment against appellant is reversed. Finding III is amended by striking therefrom all reference to appellant, and this court now finds that the defendant Macchiaroli did not do or perform any of the acts of conversion described in said Finding III. Finding VII is amended by striking therefrom the following: "The court further finds that it is true that defendant Cono Macchiaroli on or about the said 19th day of June, 1924, made demand upon plaintiff for the payment of the rental of said premises," and by substituting for the words so stricken out the following: "The court further finds that on the 14th day of June, 1924, the plaintiff being then in default by nonpayment of rent due to defendant Macchiaroli on account of the lease of said apartment house premises, the defendant Macchiaroli duly served upon plaintiff a three days' notice in writing requiring payment of the rent, stating the amount due, or possession of the property; but plaintiff did not pay the rent or surrender possession of the premises, but, on the contrary, plaintiff on said 19th day of June, 1924, continued in possession of said premises without the owner's consent and without payment of the rent."

It is directed that, upon the findings as thus amended, judgment be entered in favor of appellant.

We concur: HOUSER, J.; YORK, J.

96 Cal. App. 250

RAUCH et al. v. SOUTHERN CALIFORNIA GAS CO. et al. (two cases). (Civ. 3579, 3580.)★

District Court of Appeal, Third District, California. Jan. 10, 1929.

Rehearing Denied Feb. 9, 1929. Hearing Denied by Supreme Court March 11, 1929.

1. Negligence 🔑6—Generally, violation of statute or ordinance, directly causing injury, constitutes negligence as matter of law.

It is a general rule that violation of a statute or county or municipal ordinance, directly causing injury to another, constitutes negligence as matter of law.

2. Gas 🔑18—Gas company's noncompliance with city ordinance in not filing map showing location of service pipe disconnected by street excavator's blow, held continuing negligence proximately causing explosion.

Gas company, failing to comply with city ordinance in placing and maintaining service pipe beneath street, without filing map showing location thereof, up to time of explosion resulting from disconnection of pipe when struck by one excavating trench for city along side of street, *held* guilty of continuing negligence proximately causing explosion, as against contention that independent act of third person intervened.

3. Negligence 🔑61(2)—Original wrongful act may be so continuous that another's act will be regarded as conjoining therewith to produce accident.

Original wrongful act may be so continuous that act of third person precipitating disaster will be regarded in law, not as independent, but as conjoining with original act to produce accident.

4. Evidence 🔑25(2)—That excavations are constantly being made in and under city streets is matter of common knowledge.

It is a matter of common knowledge that trenches are constantly being dug and excavations being made in and under public streets of cities.

5. Gas 🔑18—Street excavator's failure to notify gas company that he had struck service pipe did not relieve it from liability for explosion in consequence of its negligence in not filing map showing location of pipe.

Failure of one excavating trench for city along side of street to notify gas company that he had struck service pipe some three hours before explosion resulting from disconnection thereof under or near dwelling would not relieve gas company from consequence of its continuing negligence in not filing map showing location of service pipe as required by city ordinance.

6. Gas 🔑18—Ordinance requirement that map showing location of gas service pipes be filed cannot be waived by city's passive acquiescence.

Requirement of city ordinance that map or plan, showing exact location of gas company's service pipes, be filed with city engineer, being a salutary police regulation tending to protect public, public policy forbids its waiver by city's passive acquiescence, though with knowledge of infraction of law.

Appeals from Superior Court, Los Angeles County; John E. Carson, Judge.

Two actions by Albert Rauch and others against the Southern California Gas Company and another. Judgments for plaintiffs, and named defendant appeals. Judgment in one case affirmed, and judgment in the other case modified and affirmed as modified.

Thomas J. Reynolds, of Los Angeles, for appellant.

George M. Pierson, of Los Angeles, for respondents.

H. F. Bridges and A. J. Sherer, both of Los Angeles, for defendant William Huth.

JAMISON, Justice pro tem. By stipulation of the parties, the above cases were consolidated on appeal. The facts in each case, except as to the damages, being the same.

Respondents brought these actions for damages resulting to their property from the explosion of gas, which they claim was caused by the negligence of the appellant gas company. Judgments were rendered in their favor in each of said cases, from which judgments appellant gas company has appealed.

On October 24, 1924, respondents Albert Rauch and Marie Rauch were the owners of a one-story frame dwelling, situated in the city of Glendale, the same being furnished and equipped for housekeeping and being known as 600 South street. Respondents H. V. Zechiel, C. H. Zechiel, and Title Guarantee & Trust Company were beneficiaries and trustee under a deed of trust covering said dwelling. Daniel Stuart held a mortgage against said dwelling, and respondent Niagara Fire Insurance Company was joined as a plaintiff by reason of having paid the loss occasioned by the burning of said premises. On the said 24th day of October, 1924, gas from the mains of appellant accumulated in and under said dwelling and in some unaccounted manner ignited and exploded, wrecking the dwelling and injuring and destroying the furniture and house furnishings therein contained.

It is contended by respondents that the explosion was caused by the negligence of appellant. Appellant was, at the time of said explosion, engaged in the business of supplying gas for heating and lighting purposes in various sections of the city of Glendale, and at said date was supplying gas to said dwelling, and for that purpose appellant had installed a gas meter under said dwelling and connected same by means of a service pipe with its main on South street.

The ordinances of the said city of Glendale provided, in substance, that every corporation owning or having an interest in conduits, tunnels, etc., under the surface of a public

---

★Rehearing denied. Hearing denied by Supreme Court.

street or alley used for supplying gas should file in the office of the city engineer a map showing the exact location of all mains and service pipes installed beneath such streets or alleys, and that no service pipes should be installed at a depth of less than 2 feet below the established grade.

Said ordinance also provided that the corporation desiring to install any pipe for any purpose in or under the surface of any public street should first obtain written permission from the street superintendent so to do; that a written application for such permit should be filed with said street superintendent; that a duplicate plat showing the proposed location of each excavation for such installation should be furnished said street superintendent; that legal authority should be shown to occupy or use said street; and that such duplicate plats shall first be approved by the city engineer.

It appears that on the said 24th day of October, 1924, defendant Huth was engaged in excavating a trench for the city along the west side of Kennelworth avenue, and for that purpose was using what is known as a mechanical excavator; that, when at a point a few feet south of the intersection of Kennelworth avenue and South street, the excavator came in contact with the service pipe leading from appellant's main on South street to said dwelling; that the contact did not break or fracture the service pipe, but dented and bent it; that, prior to starting upon said excavation, defendant Huth requested Smith, the foreman of said city, to locate the mains and service pipes on said avenue and street. Smith referred him to Vertefeuille, an employee of the city. Vertefeuille called up the office of appellant and inquired about the location of the service pipes on said avenue and was informed by Hampton, the dispatcher of appellant, that he would have the information sent to him. Huth testified that thereafter Harry Walters, who was appellant's service foreman, gave him a map or plat showing the locations of the mains on South street, but that it did not show any service pipes, either on Kennelworth avenue, or on South street, and he further testified that Walters told him there were no service pipes on said avenue. Walters denied giving any map or plat to Huth or telling him there were no service pipes on said avenue. Huth also testified that the service pipe was located less than 2 feet below the established grade; that is to say, from 18 to 20 inches below said grade.

The trial court, after quoting the provisions of the said ordinance, relating to the provisions thereof for obtaining a permit for the installation of said service pipe and the requirements that a plat showing the exact location of the service pipe should be filed with the city engineer and that said service pipe should be installed at a distance of less than 2 feet below the established grade, made the following findings with reference to the negligence of the appellant:

"That South Street and Kennelworth Avenue are each and severally public streets of the City of Glendale, California, and that defendant Southern California Gas Company, unlawfully, negligently and carelessly failed to comply with the provisions of said ordinance in this that it caused said service pipe connecting the main with the premises at 600 South Street to be installed without having first filed a plat in duplicate, or otherwise, showing the proposed location thereof; that it showed no legal authority to said superintendent for the installation of said service pipe, that no plats, as therein provided, were approved by the city engineer of the City of Glendale and that said service pipe was installed at a distance of less than two feet below the service of said Kennelworth Avenue and South Street."

The court further found that appellant failed to file with the city engineer, or to keep a record, or make any notation of the exact location of the said service pipe, and that, due to such negligence, the defendant Huth had no notice or knowledge of the location or existence of said service pipe until after he had run into it while digging the ditch aforesaid, that, by reason of said negligence on the part of appellant, gas flowing from said service pipe collected and accumulated in and through said dwelling, and through some unknown means, became ignited and exploded.

It appears from the evidence that, while the excavator did not break the service pipe so as to cause any gas to escape at that point, it did bend the pipe, and that the force of the impact caused a disconnection of the said pipe under or near the said dwelling, from which the gas escaped that caused the explosion.

Appellant, in its brief, filed in this case, admits that it failed to perform the duty imposed upon it by the said ordinance requiring it to file a map or plat showing the location of service pipes in the streets and alleys of the said city of Glendale.

[1] It is a general rule of the law of negligence that a violation of a statute, or a county or municipal ordinance which directly causes injury to another, constitutes negligence as a matter of law. Cal. Jur. vol. 19, p. 632. But, it is claimed by the appellant, and it appears to be the contention mainly relied on by it for a reversal, that the act of the defendant Huth, in striking the service pipe, thereby causing its disconnection and consequent escape of the gas therefrom, was the independent, intervening act of a third person. Thompson, in his Commentaries on the Law of Negligence, vol. 8, p. 21, says: "An efficient intervening cause within the meaning of the principles here involved is a new proximate cause which breaks the connection with the original cause and becomes itself

solely responsible for the result. One of the most valuable tests to apply to determine this question is to determine whether a responsible human agency has intervened sufficient of itself to stand as the cause." And, at page 20, same volume, he further says: "An intervening agency which merely concurs with the cause counted on as a proximate cause of the accident does not prevent the latter from becoming the proximate cause for the purposes of the action."

[2] By the failure of appellant to comply with the ordinances of the said city of Glendale in placing and maintaining its said service pipe beneath said streets, it was guilty of a continuing negligence, and such negligence continued to exist up to the time of the accident. Had the negligent act of appellant ceased to exist prior to the striking of said service pipe by Huth, there would be foundation for the claim of appellant that the act of Huth in striking said pipe was the independent intervening act of a third person.

The testimony of both Huth and Vertefeuille was to the effect that Huth had done all that a reasonably prudent man could have done to ascertain, before beginning said excavation, whether or not he would come in contact with said service pipe, and was led to believe by appellant's employees that there were no service pipes on said Kennelworth avenue.

[3] It is the well-established law that the original wrongful act may be so continuous that the act of a third person precipitating the disaster will, in law be regarded, not as independent, but as conjoining with the original act to produce the accident. Carroll v. Central Counties Gas Co., 74 Cal. App. 303, 240 P. 53; Merrill v. L. A. Gas & Elec. Co., 158 Cal. 499, 111 P. 534, 31 L. R. A. (N. S.) 559, 139 Am. St. Rep. 134; Marton v. Jones, 44 Cal. App. 299, 186 P. 410; Sawyer v. Hooper, 79 Cal. App. 395, 249 P. 530.

[4] It is a matter of common knowledge that trenches are constantly being dug and excavations made in and under the public streets of cities. Therefore, where, as in this case, no record is kept or plat or map made or filed, showing the exact location of appellant's service pipes, it should have anticipated in the ordinary and usual course of human conduct the very thing that happened in this case was likely to happen. Bearing on this question is the case of Sawyer v. Hooper, supra, which was a case for injuries suffered by the explosion of illuminating gas, which flowed into an uncapped gas pipe, through the negligent or careless act of strangers, in turning a device or valve on a gas meter, by means of which gas from the main was permitted to flow into said uncapped gas pipe. The court said:

"The underlying legal proposition here submitted is whether the uncapped gas pipe, together with the conditions present as hereinbefore set forth, can be considered as the proximate cause of the injuries; in other words, the inducing or immediate cause. Abstract statements of the law apparently applicable to the general facts herein might seem to indicate that if no direct negligent act of the defendant was the cause of the injuries to plaintiff, but that such injuries arose from the negligent act of a third person, no liability will attach to defendant. One of the exceptions to such rule is that, where it appears that one has committed a negligent act, which is continuing in its nature, and from which it is or should be anticipated that in the ordinary or natural course of human conduct a succeeding act of negligence directly connected with the first negligent act is likely to be committed by any person and which will result in injury the proximate cause of said injury will include the first negligent act."

[5] Appellant next contends that, admitting that it was negligent, by reason of its failure to comply with the ordinances of the city of Glendale, as aforesaid, that, if it had been notified of the fact that Huth had struck the said service pipe, it would have immediately investigated the condition of the pipe, and that, as the explosion did not occur until some three hours after Huth struck the pipe, appellant could and would have prevented the explosion. Huth testified that no gas escaped from the service pipe at the place where his excavator struck it; that he did not know whether or not the service pipe connected with the said dwelling; that after he struck said pipe he went to said dwelling, but that no one was at home; that there were no indications of escaping gas around the dwelling. It appears that respondents Albert Rauch and Marie Rauch occupied the dwelling, but were away from it during the afternoon and evening and did not return until after the explosion. Huth testified that he notified employees of the city of Glendale that he had struck the said service pipe, but did not notify appellant.

Admitting that it was the duty of Huth to have notified appellant of the fact that he had struck the service pipe, his failure to do so would not have relieved appellant from the consequence of its negligence. Keiper v. Pac. Gas & Electric Co., 36 Cal. App. 362, 172 P. 180; Kimic v. San Jose, etc., Ry. Co., 156 Cal. 379, 104 P. 986; Tompkins v. City Street Ry. Co., 66 Cal. 163, 4 P. 1165. In the case of Keiper v. Pacific Gas & Electric Co., supra, the court said that, where the injury complained of was produced by two separate, distinct, and independent acts of negligence on the part of two separate and different persons, and where the injury could not and would not have been produced by the act of one alone, they were joint tort-feasors, and could be sued jointly or separately, and quoted with approval the following from Wharton

Negligence, page 395: "Where both are sued, the plaintiff may ordinarily dismiss as to either, and if it turn out at the trial that one was not guilty of negligence, he may, on sufficient evidence take a verdict against the other."

[6] Finally, appellant contends that its action in failing to comply with the said ordinances of the said city of Glendale was waived by said city; that it has never filed with the city engineer, as required by said ordinances, a plat or map showing the exact location, or any location of its service pipes; and that this has been acquiesced in by the city.

It is evident that the requirement of said ordinance that a map or plat showing the exact location of appellant's service pipes was a salutary police regulation, tending to assist the protection of the public from the dangers attendant upon the transmission throughout the city of dangerous and highly inflammable substances such as gas. Such being the case, public policy forbids its waiver by passive acquiescence, even though with knowledge of the infraction of the law. Cal. Jur. vol. 19, p. 639; Fresno T. Co. v. Atchison, etc., Ry. Co., 175 Cal. 358, 165 P. 1013; Martello v. Beletich, 59 Cal. App. 533, 211 P. 20; Reinders v. Olsen, 60 Cal. App. 764, 214 P. 268. The facts in the case of Schwartz v. Cal. Gas & Elec. Corporation et al., 163 Cal. 398, 125 P. 1044, relied on by appellant to sustain its contention, that the act of Huth, in running his excavator against the service pipe, was the independent intervening act of a third person are not similar to the facts of this case. In the Schwartz Case, an employee of defendant had dropped a glass insulator from one of the poles and left it there. The accident to the horse in that case would not have happened had the insulator remained where it had been dropped. Some third person, or independent agency, removed it from where it had been dropped, and the accident happened at the point to which it had been removed. In that case, the court held that, had the insulator remained where it had been dropped and had the accident to the horse occurred at that point, the defendant would have been liable for the injuries sustained by the horse. In the case under consideration, there is no evidence that the service pipe was removed from the exact spot where it was originally placed by appellant.

We are of the opinion that the findings of the court that appellant's negligence was the proximate cause of said explosion and damage consequent thereon is supported by the evidence.

The trial court, as part of its judgment in case No. 3579, awarded respondents the sum of $900 as rental value of said dwelling during its reconstruction. It appears that no evidence was offered in the trial of this case regarding said rental value. After the appeal had been perfected, plaintiff moved in the appellate court, under the provisions of section 956a of the Code of Civil Procedure (added by St. 1927, p. 583), for permission to produce such evidence. It was thereupon stipulated by the parties to said action that the rental value of said dwelling was the sum of $450.

The judgment in the aforesaid case No. 3580 is affirmed. The judgment in case No. 3579 is modified by deducting from the amount therein awarded to respondents Albert Rauch, Marie Rauch, H. V. Zechiel, C. H. Zechiel, and David Stuart the said $450, the stipulated rental value of said dwelling, and, as so modified, is affirmed, respondents to recover costs on appeal.

We concur: HART, Acting P. J.; PLUMMER, J.

96 Cal. App. 306

MOORE v. BORGFELDT. (Civ. 6519.)★

District Court of Appeal, First District, Division 1, California. Jan. 16, 1929.

Rehearing Denied Feb. 13, 1929. Hearing Denied by Supreme Court March 14, 1929.

1. Brokers 🔑43(3)—Written memorandum, showing authorization of real estate agent to find purchaser for property, is sufficient within statute (Civ. Code, § 1624, subd. 6).

Mere note or memorandum which shows that real estate agent is authorized to find purchaser for property is sufficient to take contract of employment of real estate broker out of statute of frauds (Civ. Code, § 1624, subd. 6).

2. Brokers 🔑43(3)—Memorandum signed by defendant, containing offer to take trust deed and cash for specified property with commission "in excess of the above amount," held sufficient memorandum of employment of broker within statute (Civ. Code, § 1624, subd. 6).

Memorandum delivered by defendant to broker and signed by defendant, stating that he would take deed of trust for specific amount with designated amount of cash for particular property, subject to loan, and that offer was good for 24 hours, with "commission all over and in excess of the above amount," *held* sufficient memorandum of agreement for employment of real estate broker to take case out of statute of frauds, under Civ. Code, § 1624, subd. 6.

3. Brokers 🔑43(3)—Where memorandum showing authorization of broker is in writing, other terms of contract may be shown by parol (Civ. Code, § 1624, subd. 6).

When requirement of note or memorandum of agreement authorizing real estate broker to sell property, under Civ. Code, § 1624, subd. 6, is complied with in connection with a specific piece of property, the amount of the broker's compensation and agreement to pay compensation, together with other terms of contract of employment, may be shown by parol.

★Rehearing denied. Hearing denied by Supreme Court.

4. Brokers 🔑43(3)—Where broker has written authorization, subsequent changes in terms of employment contract may be shown by parol (Civ. Code, § 1624, subd. 6, § 1698).

Where there is a written note or memorandum showing broker's authorization to sell particular property within requirements of Civ. Code, § 1624, subd. 6, subsequent oral changes in terms of employment are valid under Civ. Code, § 1698, and may be proved by parol.

5. Brokers 🔑43(3)—Broker having written authorization may collect commission, though selling price is changed by oral agreement, if agreement is acted on and deal completed (Civ. Code, § 1624, subd. 6).

Where broker has written authority to act under Civ. Code, § 1624, subd. 6, and selling price is changed by oral agreement, which is acted on and deal completed, broker may collect his commission, notwithstanding the modification of the contract by parol.

6. Brokers 🔑43(3)—Parol evidence of agreement for change in selling price held admissible in broker's action for commission, where original authorization of broker was in writing (Civ. Code, § 1624, subd. 6).

In broker's action for commission, where broker's authorization to sell specific property for defendant was shown by memorandum in writing under Civ. Code, § 1624, subd. 6, containing terms of offer, parol evidence was admissible to show change in original agreement whereby alteration was made in selling price.

7. Brokers 🔑50—Time limit in defendant's written memorandum of employment of broker was waived by defendant's continuing with deal through broker after time expired (Civ. Code, § 1624, subd. 6).

Twenty-four hour limitation on time of offer of property for sale under written memorandum of contract for employment of broker, under Civ. Code, § 1624, subd. 6, *held* waived, where defendant continued with the deal through the same broker after the time expired.

8. Brokers 🔑71—Broker was properly allowed reasonable value of services rendered in selling defendant's property, where original contract, calling for commission of excess over minimum price, was altered by changing form of purchase price (Civ. Code, § 1624, subd. 6).

Where original memorandum of employment of real estate broker under Civ. Code, § 1624, subd. 6, contained statement of offer of purchase with provision for commission to broker of any excess contained over the minimum requirements, and form of purchase price was subsequently changed so that defendant was to receive title to other property in exchange, instead of deed of trust as previously provided, broker, in action for commissions, was properly allowed reasonable value of services rendered, since it became almost impossible to determine under the altered contract how much more was actually received by defendant for his property than his asking price.

9. Contracts 🔑324(2)—Recovery for work and labor under special contract, modified by agreement, should be in indebitatus assumpsit.

Where terms of special contract have been varied or modified by agreement of the parties action for the amount due for work and labor should be in the form of indebitatus assumpsit for reasonable value of services rendered.

10. Work and labor 🔑24(1)—Plaintiff may recover reasonable value of services based on common count, though proof shows written agreement.

Recovery may be had for reasonable value of services in action based on common count, though proof shows written agreement.

11. Appeal and error 🔑1033(9)—Appellant cannot complain that jury might legally have awarded larger verdict in respondent's favor.

Appellant cannot complain that amount of the verdict in respondent's favor is less than that which jury might legally have awarded.

12. Brokers 🔑43(3)—Defendant, who signed sufficient memorandum for employment of broker, obtaining changes in terms thereof under promise to sign further agreement, and accepting broker's services, could not avoid liability for commissions (Civ. Code, § 1624, subd. 6).

Defendant, who signed sufficient authorization for employment of broker, under Civ. Code, § 1624, subd. 6, and thereafter obtained changes in terms of purchase price, accepting services of broker's under unfulfilled promise to sign further agreement, *held* not entitled to escape payment of commission by showing variance in terms of contract, which did not go to fact of employment.

Appeal from Superior Court, City and County of San Francisco; Daniel C. Deasy, Judge.

Action by A. Moore against C. J. Borgfeldt. Judgment for plaintiff, and defendant appeals. Affirmed.

Edward J. O'Brien, of San Francisco, for appellant.

Gerald C. Halsey and Frederick T. Leo, both of San Francisco, for respondent.

BARNARD, Justice pro tem. This action was brought to recover for services claimed to have been rendered to defendant by plaintiff's assignor, one Edward R. Hayden, as a real estate broker. The following facts appear from the evidence: The defendant owned an apartment house at 510 Stockton street, San Francisco, incumbered by a mortgage for $40,000. Early in 1925 he stated to plaintiff's assignor, that he was desirous of selling this property. Although the agent had several prospects, he did not succeed in selling the property, and in October there was another conversation in which the defendant said, "Hayden, I will tell you frankly I am very anxious to sell this property." He priced the property at $90,000, and the agent replied that he would specialize on selling it, and then suggested the possibility of making a trade for what was known as the Lee Garage on Eddy street, in the same city, a property known to the defendant. This Lee Garage was subject to a first mortgage for $45,000 and a second deed of trust for $39,800.

After considerable negotiation, the defendant finally stated what he would do, a memorandum of which was written by the broker, signed by the defendant with his initials, and delivered by him to the broker. This memorandum was as follows: "I will take Lee Garage deed of trust for $39,800.00 and $3,200.00 cash, for 510 Stockton Street, subject to $40,000.00 loan. Offer good for twenty-four hours. Commission all over and in excess of the above amount. Dated December 17, 1925. C. J. B."

Within the period named, the broker secured an acceptance of this proposition from the owner of the deed of trust, and so informed defendant. Thereupon the defendant, desiring to procure better terms, suggested that, instead of the second deed of trust and the $3,200 cash aforesaid, he preferred to obtain, in exchange for his property, the legal title to the Lee Garage itself, subject only to the first mortgage for $45,000. Accordingly, with the knowledge and consent of defendant, the broker proceeded along that line. After about two weeks' further work, the broker secured the consent of all parties concerned, the desired result was accomplished, and the deal put through on that basis, deeds being exchanged on December 31, 1925. As to the broker's part in the deal, the defendant himself testified as follows: "Q. He closed the deal for you didn't he? A. Yes, he closed it." It also appears from the evidence that this broker had acted as agent for the owner of the Lee Garage, and at some time prior to this deal had attempted to sell to the defendant both the Lee Garage and the above-mentioned second deed of trust thereon. The defendant refusing to pay a commission, this action was brought. The complaint contains two counts; the first alleging an agreement to pay a commission of $7,000, and the second for the reasonable value of the services rendered, which is alleged to be $7,000. A trial by jury resulted in a verdict for $2,375 in favor of plaintiff, and this appeal is from such verdict and the judgment based thereon.

[1, 2] Appellant's principal contention is that the memorandum above set forth is not sufficient written authority under subdivision 6 of section 1624 of the Civil Code, and therefore the same should have been excluded from evidence. The claim is that the memorandum is a mere offer to sell, that it is not addressed to any one, does not employ any one to sell the property, and does not agree to pay any commission, merely providing that in a certain event, an excess amount could be collected as a commission from the purchaser of the property. On this point appellant mainly relies on the following cases: Kleinsorge & Heilbron v. Liness, 17 Cal. App. 534, 120 P. 444, Toomey v. Dunphy, 86 Cal. 639, 25 P. 130, and Patterson v. Torrey, 18 Cal. App. 346, 123 P. 224. The argument is made that these authorities fix the law to the effect that a writing authorizing a certain named person to sell one's property is binding without mention of the payment of a commission, and also that such a writing addressed to a certain named person, quoting terms and an agreement to pay a commission, binds the signer, without an express statement of employment, but that this is as far as these cases or any other cases, do or can go. And that, under the statute, no written memorandum is sufficient unless the person claiming the commission is *specifically named* therein.

In our opinion the above cases and the other cases cited do not support this position. In the case of Kleinsorge & Heilbron v. Liness, and in the case of Patterson v. Torrey, it was held that the respective writings relied upon showed only an offer, and failed to show any employment or authority to act. In the case of Toomey v. Dunphy, on the other hand, it was held that the writing, though silent as to compensation, did authorize the agent to sell the property. However, all these cases, and many others, hold that the chief element in the requirement of this statute is that there be some written evidence of the fact of employment, in other words, the authority to act, and that unless some written memorandum exists sufficient to show such authorization, a claim for a commission cannot be maintained.

In Kennedy v. Merickel, 8 Cal. App. 378, at 381, 97 P. 81, 83, the court says: "A writing signed by the owner and addressed to the broker expressly or impliedly acknowledging his authority to act as agent for the purposes of the sale is a sufficient compliance with the statute. * * * It is sufficient if it be shown that the party to be charged has recognized the broker as his agent by a writing subscribed by him." The statute does not require a complete written contract, but a mere note or memorandum showing authorization is enough. It is sufficient if it shows that the agent is authorized to find a purchaser ready, willing, and able to buy or exchange, or one with whom a sale or exchange is actually made. The writing in question here provides for the payment of a commission to be paid by the seller, not some one else, though limited to any excess obtained over a given price. If not expressly, it certainly impliedly gives authority to make the sale. It does not mention the name of the agent, but, while we have found no case holding this is not necessary, none has been cited holding it to be essential. The cases relied on do not go that far. On the contrary, these cases hold that the agreement to pay a commission, and the express or implied authority to act, satisfy the requirements of the statute. And the agreement to pay a commission, in itself, certainly implies authority to act. Under the circumstances surrounding the written memorandum in this case, the authority to act is clear, and there is "some note or memorandum signed by the party to be charged." In the instant case the owner has, in writing, recognized some one as his agent. He delivered the authorization to plaintiff's assignor, in connection with a deal then pending, and then continued with the deal and accepted the results of the broker's labor. The written memorandum being, in our opinion, sufficient to meet the requirements of the statute, it was properly admitted in evidence. And the identity of the agent was properly shown by parol.

[3, 4] A second contention, closely related to the first, is that the memorandum relied upon must be complete in itself, and that it cannot be enlarged or modified by parol. And, further, that, to admit testimony of the other facts above set forth constitutes an attempt to so enlarge and modify the writing as to be, in effect, the substitution of an entirely new oral contract. As we have pointed out, the writing need not be a complete contract, but only a note or memorandum, provided it shows authority to act. When this requirement is met in connection with a definite piece of property, the other terms may be shown by parol. The amount of compensation, and even the agreement to pay a commission, may be so shown. Toomey v. Dunphy, supra. When such other terms may be thus proved, after written authority shown, it follows that changes in the terms may also be so proved, and, where such oral changes have been made and executed, they are valid. Civ. Code, § 1698; Anderson v. Adler, 42 Cal. App. 776, 184 P. 42.

[5-7] Appellant cites Boyd v. Big Three Ranch Co., 22 Cal. App. 108, 133 P. 623, as authority for the proposition that there may not be an oral modification of the memorandum in such a case as this. That case held only that a writing showing authority to sell land could not be orally modified, by making it apply to a different parcel of land. That is very far from holding that, where written authority to act exists, the terms may not be orally modified. For instance, if the selling price be changed by oral agreement, and this is acted upon and the deal completed, it cannot be doubted that a commission may be collected. Twogood v. Monnette, 191 Cal. 103, 215 P. 542. In the case before us we have, in effect, not a substituted agreement, but a change in the selling price; that is, the appellant took as the purchase price of his property, not the property (the deed of trust and the cash) mentioned in the memorandum, but another property (the Lee Garage) closely connected with the original offer. It was the same property being sold, under the same employment, the same original buyer was a necessary party to the sale as consummated, and even the property received by appellant, though different in form, was, in all probability, essentially the same as he had proposed to accept; the changed terms being considered by him as more advantageous to himself. Parol was then properly received to show these changed terms. The evidence shows this was one continuing transaction. The limitation of time mentioned in the writing was waived by appellant's continuing with the deal, through the same broker, after the expiration thereof. Umphray v. Hufschmidt, 73 Cal. App. 140, 238 P. 749; Estes v. Hotchkiss, 63 Cal. App. 284, 218 P. 605.

[8-11] Appellant further contends that the amount fixed by the jury, being apparently the reasonable value of the services rendered, and not the amount alleged to have been agreed upon, shows that the jury really found no agreement as to commission existed, otherwise they would have followed the agreement. There was evidence that the value of appellant's apartment house, which was sold, was $90,000. And that the reasonable value of the services rendered by plaintiff's assignor was the real estate board's rate of five per cent. on the first $5,000 and 2½ per cent. on the balance. This totals $2,375, the amount of the verdict. As we have seen, the terms of this agreement were modified, changing the form of the purchase price received in such a way as to make it almost impossible to tell how much more was actually received by appellant for his property than his asking price. As the court said in Naylor v. Adams, 15 Cal. App., at page 555, 115 P. 338: "It is a settled rule in this state that where the terms of a special contract have been varied or modified by the agreement of the parties, the action for the amount due for work and labor should be in the form of indebitatus assumpsit, and not upon the contract." The proper measure of recovery in this case was the reasonable value of the services rendered. This is especially true, since it is the rule in this state that "a recovery may be had for reasonable value in an action based on a common count although the proof shows a written agreement." Umphray v. Hufschmidt, supra; Naylor v. Adams, supra. The justice of the application of this rule to the instant case is apparent; the appellant having agreed to pay a commission, contingent though it was, and having later, at his own request, and for his own benefit, changed the terms so that the original rate of commission is of most difficult, if not impossible, application. Strictly speaking, however, the result would be the same were this not the rule properly applicable here. While, as a practical matter, it is difficult to tell how much more than his written asking price, appellant actually received, there is some evidence on this point. There was testimony that the property he received was of the value of $90,000, and in his written memorandum he values his own property at $83,000, assuming the trust deed to be worth its face. While a verdict for the difference, or $7,000, might not have approximated justice as closely as the verdict actually render-

ed, it would have been sustained by the evidence, and appellant cannot complain that the amount of the verdict is less than might legally have been awarded by the jury.

[12] If, as claimed by appellant, it was actually understood between himself and the agent that no commission should be paid on the deal as finally put through, it would have been an easy matter for him to protect himself by a few written words. Having signed the memorandum for the apparent purpose of complying with the statute, and being evidently a man of affairs, he should have seen to it that so unusual a situation was covered. The purpose of this statute is to protect the owner of real property, not from every claim of a commission for selling the same, but from claims from persons never by him employed or authorized to act. It is equally the policy of the law to protect a broker who has been so employed or authorized, and who, in good faith, has acted. And where an owner signs a sufficient authorization, asks for and obtains particular changes in terms, keeps the agent at work, promises to sign a further agreement, but neglects to do so, and accepts both the services of the broker and the results thereof (all of which facts are shown by the evidence in this case), he may not escape the payment of a commission by showing variations in the terms not going to the fact of employment. And this must have been within the intention of the Legislature, or they would have provided that the entire contract must be in writing, and not merely "the same, or some note or memorandum thereof."

As conceded by appellant, the verdict of the jury has settled all conflicts in the evidence. For the reasons given, the grounds urged for reversal are without merit.

The judgment is affirmed.

We concur: TYLER, P. J.; KNIGHT, J.

CALIFORNIA REPORTER

274 PACIFIC REPORTER

206 Cal. 263

GRIFFIN et ux. v. KENT. (L. A. 10882.)

Supreme Court of California. Jan. 25, 1929.

Appeal and error 🔑607(1)—Appeal will not be dismissed for delay in giving notice of intention and requesting transcript, without notice of order denying new trial (Code Civ. Proc. § 953a and § 953d, as added by St. 1927, p. 86.

In absence of written notice of order denying motion for new trial or waiver thereof, under Code Civ. Proc. § 953d, as added by St. 1927, p. 86, motion to dismiss appeal for failure to comply with provisions of section 953a, as to time for notice of intention to appeal and request for transcript, and court rules as to filing transcript, will be denied.

In Bank.

Action by C. W. Griffin and wife against A. H. Kent. From a judgment for plaintiffs and an order denying a new trial, defendant appeals. On motion to dismiss the appeal. Motion denied.

Carl V. Hawkins and D. L. Strickler, both of Long Beach, John B. Haas, of Los Angeles, and John D. Hume, of Long Beach, for appellant.

Knight & Goddard, of Long Beach, for respondents.

WASTE, C. J. Judgment for the plaintiffs was entered in this action on January 23, 1928. A motion for new trial, made and brought on for hearing on February 27, was denied by the court on March 1, 1928. Notice of appeal from the judgment and from the denial of a new trial was filed on March 5, and the defendant filed a bond to stay execution pending appeal.

Notice to the clerk of intention to appeal and requesting that a transcript be made up and prepared was not given until October 5, 1928, seven months after the notice of appeal was filed; but the court reporter completed a transcript of the proceedings and filed it with the clerk of the trial court on the 15th day of June. The clerk at once mailed to the attorneys for each of the parties a notice stating that the transcript had been filed and would be presented to the judge who conducted the trial on the 22d day of June. On that day, no objections being offered, the judge settled and approved the transcript. On September 5, 1928, the plaintiffs, as respondents, filed in this court a notice of motion to dismiss the appeal on various grounds, the substance of which was that the defendant and appellant had failed and neglected to comply with the provisions of section 953a of the Code of Civil Procedure, and that the transcript was not filed with the clerk of the Supreme Court, as prescribed by the rules. The motion came on regularly for hearing in this court on October 8. On that day the appellant offiered, and there were filed in this court, a clerk's transcript which had been prepared by the clerk of the lower court two days before, and the reporter's transcript already referred to. The certificate of the clerk of the trial court discloses that no steps were taken by the respondents in the court below to terminate proceedings for the preparation of a record on appeal.

In making the motion to dismiss, the respondents have entirely overlooked the recent amendment to the Code of Civil Procedure, which provides that the notice of entry of judgment or of order denying a motion for a new trial, required by the provisions of section 953a of the same Code, "must be given in writing, unless written notice thereof be waived in writing or by oral stipulation made in open court and entered in the minutes." Code Civ. Proc. § 953d, added by Stats. 1927, p. 86. Notice of the order denying the motion for a new trial was not given in this case, and there is nothing to show that such notice was waived in the manner required by the statute. The precise situation here presented, and the application of the new section, was before the District Court of Appeal when this motion to dismiss was made, and the decision was rendered just before the submission of the question here. It disposes of the motion to our entire satisfaction.

On the authority of Attkisson v. Reynolds (Cal. App.) 270 P. 686, the motion to dismiss is denied.

We concur: SHENK, J.; RICHARDS, J.; SEAWELL, J.; PRESTON, J.; LANGDON, J.; CURTIS, J.

206 Cal. 273

BOYER v. UNITED STATES FIDELITY & GUARANTY CO. (two cases).
(L. A. 8716.)

Supreme Court of California. Jan. 26, 1929.

1. Evidence 🔑506—Experts' opinions that statements in application for life policy, that insured was brother of female beneficiary, were material to acceptance of risk, held inadmissible.

Insurance experts' opinions that statements in applications for life insurance policies, that insured in one of them was a brother of woman named as beneficiary, were material to acceptance of risk and hazard assumed by insurer, *held* properly stricken.

2. Insurance 🔑124—Insurance policies are governed by same general rules as all contracts.

Insurance policies are governed by the same general rules which pertain to all contracts.

3. Insurance 🔑124—Meeting of minds is prerequisite to valid insurance policy.

To execute a valid insurance policy, there must be a meeting of the minds.

4. Insurance 🔑138(1)—Parties to insurance contract may make any agreements they see fit, and courts will enforce terms thereof, if not against public policy or specific law.

Subject to rule that provisions of insurance policy must not be against public policy or in contravention of specific provisions of law, parties to contract may make such agreements as they see fit, and courts will enforce terms mutually agreed upon.

5. Insurance 🔑151(2)—Life policy and application constitute contract.

Life insurance policy and the application therefor constitute the contract.

6. Insurance 🔑298—Words "Relationship Brother," in application for life policy, held "statement" within agreement that any false statement with intent to deceive would bar recovery.

In woman's application for life insurance policy, naming man as beneficiary, words "Relationship Brother," first of which was printed and second typewritten, *held* a "statement" within preceding agreement that recovery would be barred "if any one of the following statements * * * is false and made with intent to deceive."

[Ed. Note.—For other definitions, see Words and Phrases, First, Second, and Third Series, Statement.]

7. Contracts 🔑143—Court can enforce only agreements made by parties.

Court can enforce only such agreements as were made by the parties to the contract.

8. Insurance 🔑298—False statement in woman's application for life policy that male beneficiary was her brother held made with intent to deceive, within agreement barring recovery in such case (Civ. Code, § 1709).

Statement in woman's application for life insurance policy that male beneficiary, who was only a friend, was her brother, *held* not a mere mistake, but made "with intent to deceive," within preceding agreement that recovery would be barred if any of following statements were false and made with such intent, though not made with intent to injure insurer; latter's position being altered to its risk within Civ. Code, § 1709.

9. Insurance 🔑298—Materiality of false statement intended to deceive is immaterial, where policy bars recovery if false statement is material to acceptance of risk "or" made with intent to deceive.

Where woman's application for life insurance policy provided that any false statement would bar recovery if material to acceptance of risk "or" made with intent to deceive, materiality of false statement that male beneficiary was applicant's brother is immaterial, if made with such intent.

10. Evidence 🔑28—It is common knowledge that one cannot obtain policy on life of another, in whom applicant has no insurable interest, but not that rule is otherwise where applicant obtains policy on his own life.

It is a matter of common knowledge that one may not obtain an insurance policy on the life of another, in whom applicant has no insurable interest, but not that rule is otherwise where applicant obtains policy on his own life.

11. Trial 🔑136(3)—It is court's duty to construe written instruments.

It is the duty of the court to construe written instruments as a matter of law.

12. Insurance 🔑256(1)—One inducing issuance of void policy by deceitfully false statement cannot compel insurer to accept risk and revive policy by changing beneficiary (Civ. Code, § 2612).

One practicing deceit on insurance company by making false statement in application, thereby inducing issuance of policy, which is void from beginning under Civ. Code, § 2612, cannot thereafter compel company to accept risk and revive policy by merely changing beneficiary.

13. Insurance 🔑256(1)—Provision of life insurance application that any false statement, if material to risk, or if made with intent to deceive, bars recovery on policy, held valid (St. 1917, p. 957, § 6).

Provision of application for life insurance policy that right to recover under policy issued on basis of application should be barred if any statement material to acceptance of risk or hazard assumed by company is false, or is false and made with intent to deceive, *held* valid, under St. 1917, p. 957, § 6.

In Bank.

Appeals from Superior Court, San Diego County; W. P. Cary, Judge.

Actions by G. M. Boyer, as administrator of the estate of Dora Mockabee Rose, also known as Dora M. Rose, deceased, against the United States Fidelity & Guaranty Company, which actions were consolidated for purposes of trial and appeal. Judgments for plaintiff, and defendant appeals. Reversed. Superseding opinion of District Court of Appeal in 266 P. 307.

Joe Crider, Jr., of Los Angeles, and Horace W. B. Smith, of San Francisco, for appellant.

Wright & McKee, C. M. Monroe and L. N. Turrentine, all of San Diego, and Perry F. Backus, of Los Angeles, for respondent.

PER CURIAM. These causes, consolidated for purposes of trial and appeal, were, upon petition of the plaintiff and respondent, taken over after decision by the District Court of Appeal, Second Appellate District, Division 1, Wood, J. pro tem., writing the opinion, in order that we might more fully examine into and consider the questions of law presented. Further consideration has served only to impress us with the correctness of that court's conclusion, and we therefore adopt as and for the decision of this court, with such additional observations as will hereinafter appear, the following portions of the opinion of the District Court of Appeal:

"Defendant issued to Dora M. Rose an accident insurance policy on August 16, 1920, in the principal sum of $15,000. Dr. C. E. Calm was named as beneficiary in the policy. On August 19, 1920, Charles Emil Calm, the same Calm named as beneficiary in the Rose policy, applied for and obtained from the defendant an accident policy in the principal sum of $15,000; the beneficiary being Dora M. Rose. At the expiration of one year from the receipt of her policy, Dora M. Rose, by rider attached thereto, changed the beneficiary to her estate. On May 22, 1923, Dora M. Rose and Dr. C. E. Calm were killed in an automobile accident, Dora M. Rose surviving Dr. Calm by two hours. The administrator of the estate of Dora M. Rose filed two actions to recover the policies. By stipulation, the actions were tried together before the court without a jury, and the same evidence was received in both cases. Appeals by defendant in both actions are now before us. The determination of the cases depends upon the construction to be given to the written applications for the policies signed by the insured in view of the stipulated facts and uncontradicted testimony. At the head of each of the applications, we find these words: 'I hereby apply to the United States Fidelity & Guaranty Company for a Policy to be based upon the following representation of facts: I understand and agree that the right to recovery under any policy which may be issued upon the basis of this application shall be barred in the event that any one of the following statements, material either to the acceptance of the risk or the hazard assumed by the Company is false, or in the event that any one of the following statements is false and made with intent to deceive. I agree that this application shall not be binding upon the Company until accepted either by the Secretary at the Home Office or by an agent duly authorized to issue policies.' Then follow fifteen items, all in narrative form except the eighth. In these items the applicants set forth personal data such as is usually found in applications for insurance policies, the first giving the name of the insured, the second, the residence, etc. Item 8 of the Rose application is as follows: 'Policy to be paid in case of death by accident under its provisions to Dr. C. E. Calm, Resident California Club. Relationship, Brother. Age 55.' After the fifteenth item, the date appears, followed by the signature of the applicant. In the application signed by Dr. Calm three days later, the same words are found, except for the variations occasioned by supplying the personal data of the applicant. In item 8, Dr. Calm named Dora M. Rose as the beneficiary, and gave the relationship as that of sister. It was stipulated at the trial that Dr. Calm and Dora M. Rose were not brother and sister. By the testimony of Ruby Aikman, the driver of the automobile at the time of the accident, it was shown that the witness knew Dr. Calm and Dora M. Rose for some time before either of them made application to the defendant; that they introduced themselves to her, and represented to her that they were friends and not brother and sister. It was further shown that, at the time the applications were presented to defendant, Dr. Calm was a married man. The administrator of the estate of Dora M. Rose promptly furnished defendant with written proof of the accidental deaths; whereupon defendant investigated the facts and learned that Dr. C. E. Calm and Dora M. Rose were not brother and sister. Defendant then tendered to the administrator the amount of the premiums paid, and served written notice that the policies were void. The tender was refused.

[1] "At the trial defendant produced two witnesses, Warren Griffith and George A. Calkins, who qualified as experts in matters of insurance, and testified that, according to the usage and custom of insurance companies, in August, 1920, applications for insurance would not be accepted if made under the circumstances shown in evidence. They further testified that they were of the opinion that the statements contained in the applications to the effect that Dr. Calm was a brother of Dora M. Rose were material to the acceptance of the risk and to the hazard assumed by the defendant. At the close of

the evidence, that part of their testimony giving their opinion on the subject of the materiality of the statements was stricken out by the court upon motion of plaintiff. The court did not err in so doing. 25 Cyc. 937. In Penn Mutual Life Ins. Co. v. Mechanic's Savings Bank & Trust Co., C. C. A., 72 F. 413, 38 L. R. A. 33, 70, it is said: 'The great weight of authority in this country, however, is against the view that an insurance expert may be asked his own opinion whether the undisclosed or misrepresented facts were material to the risk. * * * The better authorities, however, seem to sustain the rule that the insurance experts may testify concerning the usage of insurance companies generally in charging higher rates of premium or in rejecting risks, when made aware of the fact claimed to be material.'

[2-5] "Insurance policies are governed by the same general rules which pertain to all contracts. There must be a meeting of the minds. Subject to the rule that their provisions must not be against public policy or in contravention of specific provisions of law, parties to the contract may make such agreements as they see fit, and the courts will enforce the terms mutually agreed upon. The policy and the application therefore constitute the contract. In McKenzie v. Scottish U. & N. Ins. Co., 112 Cal. 556, 44 P. 922, the court said: 'Parties may contract as they please. When a condition precedent is adopted by them in their contract, the courts will not inquire as to its wisdom or folly. * * * In Wood v. Hartford Ins. Co., 13 Conn. 533, 35 Am. Dec. 92, a leading case on the subject of warranty, Sherman, J., said: "If a house be insured against fire, and the language of the policy is 'warranted, during the policy, to be covered with thatch,' the insurer will be discharged if, during the insurance, the house be covered with wood or metal, although his risk is diminished; for a warranty excludes all argument in regard to its reasonableness, or the probable intent of the parties."' In Jeffries v. Life Ins. Co., 22 Wall. 47, 22 L. Ed. 833, this language is found: 'It is the distinct agreement of the parties, that the company shall not be deceived to its injury or to its benefit. The right of an individual or a corporation to make an unwise bargain is as complete as that to make a wise bargain. The right to make contracts carries with it the right to determine what is prudent and wise, what is unwise and imprudent, and upon that point the judgment of the individual is subject to that of no other tribunal.'

[6] "In her application for the policy, Dora M. Rose agreed that recovery would be barred 'if any one of the following statements * * * is false and made with intent to deceive.' If the words 'Relationship Brother' constitute a 'statement,' and were made 'with intent to deceive,' plaintiff cannot, in view of the rule just set forth and the stipulation of the parties, prevail in the action. It is not necessary to decide whether the words amount to a warranty or representation, since the contract uses the word 'statement.' The entire application consists of fifteen items, preceded by the agreement hereinabove set forth and followed by the signature of the applicant. Item 8 appears in the midst of the others, all of which contain statements of fact. If it were in narrative form there could be no doubt but that a statement was made. For instance, if the language used were 'The relationship is that of brother,' it could not possibly be contended that a statement was not made. Manifestly the two words 'Relationship Brother' were used for the sake of brevity. Plaintiff has attached to his brief an exact copy of the application. It appears therefrom that the word 'Relationship' is printed and the word 'Brother' is in typewriting. By filling in the space following the word 'Relationship' as she did, the applicant doubtless meant to state to defendant that Dr. Calm bore the relation of brother to her. It was clearly the intention of the defendant to obtain, and of the applicant to impart, information on the subject of the relationship between the insured and the beneficiary. Considering the application as a whole, we are of the opinion that the applicant intended that all of the matter set forth over her signature was given to the defendant as information and as such was to be treated as statements.

[7-11] "Next is presented the question whether the statement concerning the relationship of the beneficiary was made 'with intent to deceive.' Plaintiff argues that, in order to bar a recovery, there must be shown an intent to injure defendant. It was not so provided in the contract, and as has been seen, the court can enforce such agreements only as were made by the parties. If the parties had agreed that the intent referred to in the application was an intent to deceive the company to its injury, it would have been a simple matter to add to the application appropriate language to that effect after the word 'deceive.' Such language, embracing a different idea and an additional condition, cannot be supplied by the court. Doubtless the parties meant to agree that if the false statement were made knowingly and intentionally, the recovery would be barred. If, on the other hand, the statement were made inadvertently, it would not bar recovery, even though false, because there would be no intent to deceive. An example of such a false statement could be found in an error on the point of the age or the residence of the beneficiary. Erroneous statements by Dora M. Rose in her application that Dr. Calm was 54 rather than 55 years of age, and that he lived at a club other than the California Club, would doubtless be false statements, but not necessarily made with intent to deceive. They might be mistakes resulting from incorrect information on the part of the ap-

plicant. The statement on her part, however, that Dr. Calm, a married man and only a friend, bore the relation of brother to her could not possibly have been a mere mistake. There could be no inadvertence here. She must have intentionally stated as true that which she knew to be untrue. Section 1709 of the Civil Code provides: 'One who wilfully deceives another with intent to induce him to alter his position to his injury or risk, is liable. * * *' Here the position of defendant was altered to its risk, and this was brought about by the false statement of the applicant, which must have been intentionally and wilfully made. Plaintiff cannot escape the result of the provision of the application by claiming that the false statement was not material, if indeed it be held that the statement in question was immaterial, since the contract provided that a false statement would void the policy in either of two events, if the false statement should be material to the acceptance of the risk, or if made with intent to deceive. By the plain agreement of the parties, the materiality of the false statement is of no consequence if it was made with the intent to deceive. It is a matter of common knowledge that one may not obtain an insurance policy upon the life of another in whom the applicant has no insurable interest. It is not so generally known, however, that the rule is otherwise where the applicant obtains the policy on his own life. 14 Cal. Jur. 468; 14 R. C. L. 920. It can be well argued that the applicant in the case at bar made the false statement in question in the fear that the application would be refused if the truth were known. Such action on her part would certainly be taken with intent to deceive. Our conclusion on this point will necessitate a reversal of the judgment, notwithstanding the finding of the trial court: 'That the description of the beneficiary Dr. C. E. Calm as a brother of the insured, Dora M. Rose, when he was not a brother was not a statement material either to the acceptance of the risk or to the hazard assumed by the defendant, or a false statement made with intent to deceive the defendant.' It is the duty of the court to construe written instruments as a matter of law. The facts, which are extremely simple, were established by stipulation or by undisputed testimony. There was nothing for the trial judge to do as a trier of fact. His duty was to draw a legal conclusion from the instrument before him and the stipulation as to the relationship between the insured and the beneficiary. That a false statement was made with intent to deceive is the only reasonable conclusion that can be drawn therefrom. What has been said with reference to the application for the Rose policy applies with equal force to the application of Dr. Calm. * * *

[12] "It cannot be successfully argued that the situation of the parties was changed by the act of Dora M. Rose in changing beneficiaries a year after the policy was issued. Section 2612 of the Civil Code is as follows: 'A breach of warranty, without fraud, merely exonerates an insurer from the time that it occurs, or where it is broken in its inception prevents the policy from attaching to the risk.' In Wolverine Brass Works v. Pacific Coast Casualty Co., 26 Cal. App. 183, 146 P. 184, it is said: 'The above-mentioned warranties being false, the policy issued in reliance upon them was in our opinion, void ab initio.' One who has practiced deceit upon an insurance company by making a false statement and thus has induced the issuance of a void policy cannot thereafter, by merely changing the beneficiary compel the company to accept her as a risk and give life to the void policy. * * *"

[13] As indicated in that portion of the opinion hereinabove adopted, the application upon which the respective policies sued on were issued contained an introductory clause which provided in part that the applicant understood and agreed "that the right to recovery under any policy which may be issued upon the basis of this application shall be barred in the event that any one of the following statements, material either to the acceptance of the risk or the hazard assumed by the company is false, *or* in the event that any one of the following statements is *false and made with intent to deceive*." (Italics ours.) That such an agreement might reasonably be exacted of an applicant for accident insurance is set at rest by section 6 of an act (Stats. 1917, p. 957) having to do with the provisions of policies of accident and health insurance. The section reads: "The falsity of any statement in the application for any policy covered by this act shall not bar the right to recovery thereunder unless such false statement was made with actual intent to deceive or unless it materially affected either the acceptance of the risk or the hazard assumed by the insurer." The similarity between the statutory provision and the introductory clause of the form of application employed by the appellant is immediately apparent. Said clause, reading in the disjunctive, constitutes an express agreement between the parties that any false statement as to a material matter, whether intentionally falsified or not, shall bar recovery on the policy; or, in the alternative, that any false statement, whether material or not, made with *intent to deceive* shall likewise bar recovery. The authorities cited by the District Court of Appeal amply support its conclusion that the parties to an insurance contract may, with certain well-defined exceptions not here involved, "make such agreements as they see fit and the courts will enforce the terms mutually agreed upon." In this regard the case of Wilkinson v. Standard Accident Insurance Co., 180 Cal. 252, 260, 180 P. 607, recognizes the right of par-

ties to insurance contracts to provide that the intentional falsification of an immaterial matter shall preclude recovery on the policy. It is there stated: "It is undoubtedly true * * * that an agreement between insurer and insured that the falsity of any statement in an application for insurance will avoid the policy, is binding; and that in such case the question of its materiality is of no consequence." The case of Van Cleave v. Union Cas. & S. Co., 82 Mo. App. 668, 680, tends strongly to substantiate the further conclusion of the District Court of Appeal that an intentional false statement of a matter well within the knowledge of the applicant must be held to have been made "with intent to deceive."

Inasmuch as the judgments, for the reasons above stated, must be reversed, we have not found it necessary to definitely decide whether a representation or statement of relationship of the designated beneficiary to an assured is "material either to the acceptance of the risk or the hazard assumed." However, we are not thereby to be understood as having found appellant's contention in this regard to be entirely without merit. In our opinion the contention presents a subject upon which reasonably prudent men might well differ. We can readily perceive of circumstances under which such a representation as to the relation sustained between the beneficiary and assured might be a consideration of considerable moment to the insurer.

The judgments are, and each is, reversed.

---

206 Cal. 791

K. E. BOONE, Petitioner, v. W. S. KINGSBURY, Surveyor General of the State of California and Ex Officio Register of the State Land Office, Respondent. (S. F. 12707.)★

Supreme Court of California. Dec. 31, 1928.

Rehearing Denied Jan. 28, 1929.

In Bank.

Application for writ of mandate prayed to be directed to respondent, as Surveyor General of the State of California, to require him to issue permits to prospect for oil, etc., upon tidal and submerged lands. Writ granted.

Rehearing denied: SHENK and CURTIS, JJ., dissenting.

Faries & Williamson, David R. Faries, Frederick W. Williamson, Edwin Heizman and McIntyre Faries, all of Los Angeles, for petitioner.

A. L. Weil and Morrison, Hohfeld, Foerster, Shuman & Clark, all of San Francisco, and Roy Maggart, Geo. B. Bush, Thomas A. Joyner, and Philip C. Farman, all of Los Angeles, amici curiæ.

U. S. Webb, Atty. Gen., for respondent.

PER CURIAM. The questions presented by the petition herein were fully considered in our discussion of cases S. F. No. 12707 to No. 12766 (Cal. Sup.) 273 P. 797, both inclusive, all of which were considered together in one opinion, this day filed. Upon the authority of what we said in our consideration of said cases considered in one opinion, and more particularly with respect to what we said in that portion of said opinion bearing directly upon the instant case, the petition of K. E. Boone for a writ of mandamus commanding the Surveyor General of the state to issue to petitioner Boone a permit to prospect for oil and gas upon the tide and submerged lands described in his petition is granted, and the writ will issue. It is so ordered.

---

206 Cal. 792

H. E. SHUDDE, Petitioner, v. W. S. KINGSBURY, Surveyor General of the State of California and Ex Officio Register of the State Land Office, Respondent. (S. F. 12708.)★

Supreme Court of California. Dec. 31, 1928.

Rehearing Denied Jan. 28, 1929.

In Bank.

Application for writ of mandate, prayed to be directed to respondent as Surveyor General of the State of California to require him to issue permits to prospect for oil, etc., upon tidal and submerged lands. Writ granted.

Rehearing denied: SHENK and CURTIS, JJ., dissenting.

Faries & Williamson, of Los Angeles, for petitioner.

Arthur W. Eckman, Paul M. Gregg, and Jerry H. Powell, all of Los Angeles, amici curiæ.

Harry A. Chamberlin, of Los Angeles, in pro. per.

U. S. Webb, Atty. Gen., for respondent.

PER CURIAM. For similar reasons as assigned in Boone v. Kingsbury, Surveyor General of the State of California, etc. (Cal. Sup.) 273 P. 797, S. F. No. 12707, this day filed, the Surveyor General of the state is commanded to issue to petitioner, H. E. Shudde, a permit to prospect for oil and gas upon the tide and submerged lands described in his petition. The writ will therefore issue.

★For opinion on rehearing, see Boone v. Kingsbury, 273 P. 819.

206 Cal. 793

Charles M. WORKMAN, Petitioner, v. W. S. KINGSBURY, Surveyor General of the State of California and Ex Officio Register of the State Land Office, Respondent. (S. F. 12728.)★

Supreme Court of California. Dec. 31, 1928.

Rehearing Denied Jan. 28, 1929.

In Bank.

Application for writ of mandate, prayed to be directed to respondent as Surveyor General of the State of California to require him to issue permits to prospect for oil, etc., upon tidal and submerged lands. Writ denied.

Rehearing denied: SHENK and CURTIS, JJ., dissenting.

Clarke & Bowker, of Los Angeles, for petitioner.

Faries & Williamson, of Los Angeles, amici curiæ.

U. S. Webb, Atty. Gen., for respondent.

PER CURIAM. For the reason assigned and upon the grounds stated in our opinion this day filed, in which we considered together cases S. F. Nos. 12707 to 12766, 273 P. 797, both inclusive, the application of Charles M. Workman for a writ of mandamus commanding the Surveyor General of the state of California and ex officio register of the state land office to issue to him a permit to prospect for oil and gas upon the lands described in his said petition, wherein said lands are included within the boundaries of lands described in the respective petitions of Boone and Shudde, as therein considered, is denied, and the petition is dismissed.

---

206 Cal. 794

HICKEY BROS. CO. et al., Petitioners, v. W. S. KINGSBURY, Surveyor General of the State of California and Ex Officio Register of the State Land Office, Respondent. (S. F. 12729.)★

Supreme Court of California. Dec. 31, 1928.

Rehearing Denied Jan. 28, 1929.

In Bank.

Application for writ of mandate, prayed to be directed to respondent as Surveyor General of the State of California to require him to issue permits to prospect for oil, etc., upon tidal and submerged lands. Writ denied.

Rehearing denied: SHENK and CURTIS, JJ., dissenting.

Arthur W. Eckman, Paul M. Gregg, and Jerry H. Powell, all of Los Angeles, for petitioner.

Faries & Williamson, of Los Angeles, for petitioner Shudde.

Harry A. Chamberlin, of Los Angeles, in pro. per.

U. S. Webb, Atty. Gen., for respondent.

PER CURIAM. For similar reasons and upon similar ground as stated in the case of Charles M. Workman v. W. S. Kingsbury, Surveyor General of the State of California, etc. (Cal. Sup.) 273 P. 797, S. F. No. 12728, this day filed, the application for the writ is denied, and the petition is dismissed.

---

206 Cal. 795

R. W. and Thelma I. HARTHORN et al., Petitioners, v. W. S. KINGSBURY, Surveyor General of the State of California and Ex Officio Register of the State Land Office, Respondent. (S. F. 12730.)★

Supreme Court of California. Dec. 31, 1928.

Rehearing Denied Jan. 28, 1929.

In Bank.

Application for writ of mandate, prayed to be directed to respondent as Surveyor General of the State of California to require him to issue permits to prospect for oil, etc., upon tidal and submerged lands. Writ denied.

Rehearing denied: SHENK and CURTIS, JJ., dissenting.

Arthur W. Eckman, Paul M. Gregg and Jerry H. Powell, all of Los Angeles, for petitioners.

U. S. Webb, Atty. Gen., for respondent.

Faries & Williamson, of Los Angeles, amicus curiæ.

PER CURIAM. For similar reasons and upon similar grounds as stated in the case of Charles M. Workman v. W. S. Kingsbury, Surveyor General of the State of California, etc. (Cal. Sup.) 273 P. 797, S. F. No. 12728, this day filed, the application for the writ is denied, and the petition is dismissed.

---

206 Cal. 796

Harry A. CHAMBERLIN, Petitioner, v. W. S. KINGSBURY, Surveyor General of the State of California and Ex Officio Register of the State Land Office, Respondent. (S. F. 12743.)★

Supreme Court of California. Dec. 31, 1928.

Rehearing Denied Jan. 28, 1929.

In Bank.

Application for writ of mandate, prayed to be directed to respondent as Surveyor General of the State of California to require him to issue permits to prospect for oil, etc., upon tidal and submerged lands. Writ denied.

★For opinion on rehearing, see Boone v. Kingsbury, 273 P. 819.

Rehearing denied: SHENK and CURTIS, JJ., dissenting.

Harry A. Chamberlin, of Los Angeles, in pro. per.

Faries & Williamson, of Los Angeles, for petitioner Shudde.

Jerry H. Powell, Paul M. Gregg, and Arthur W. Eckman, all of Los Angeles, for petitioner Hickey Brothers Company.

U. S. Webb, Atty. Gen., for respondent.

PER CURIAM. For similar reasons and upon similar grounds as stated in the case of Charles M. Workman v. W. S. Kingsbury, Surveyor General of the State of California, etc. (Cal. Sup.) 273 P. 797, S. F. No. 12728, this day filed, the application for the writ is denied, and the petition is dismissed.

---

206 Cal. 797

Kittle C. BALLARD et al., Petitioners, v. W. S. KINGSBURY, Surveyor General of the State of California and Ex Officio Register of the State Land Office, Respondent. (S. F. 12766.)★

Supreme Court of California. Dec. 31, 1928.

Rehearing Denied Jan. 28, 1929.

In Bank.

Application for writ of mandate, prayed to be directed to respondent as Surveyor General of the State of California to require him to issue permits to prospect for oil, etc., upon tidal and submerged lands. Writ denied.

Rehearing denied: SHENK and CURTIS, JJ., dissenting.

Robertson & Crawford, for petitioners.

U. S. Webb, Atty. Gen., for respondent.

Faries & Williamson and David R. Faries, all of Los Angeles, amicus curiæ.

PER CURIAM. Upon the grounds and for the reasons stated in the opinion this day filed in cases S. F. Nos. 12707 to 12766 (Cal. Sup.) 273 P. 797, both inclusive, the application of petitioners herein is denied, and the petition is dismissed.

This order is made without prejudice to commence a proceeding in a court of competent jurisdiction for the purpose of determining such rights as petitioners may have, if any, that are not concluded by our opinion filed as aforesaid. All questions therein determined which may have a bearing on the rights asserted by petitioners are to be regarded as the law of this case and are conclusive thereon.

---

206 Cal. 259

PEOPLE v. POKRAJAC. (Cr. 3171.)†

Supreme Court of California. Jan. 25, 1929.

Rehearing and Modification of Opinion Denied Feb. 21, 1929.

1. Jury 🔑31(11)—Statute regulating trial of issue of insanity held not unconstitutional as denying jury trial (Pen. Code, § 1026, as added by St. 1927, p. 1149).

Pen. Code, § 1026, as added by St. 1927, p. 1149, regulating procedure when plea of not guilty by reason of insanity is interposed, *held* constitutional as against contention that it prevents a trial by a fair and impartial jury.

2. Criminal law 🔑656(8)—Commendation of jury after verdict of guilty but before trial by same jury on plea of insanity held ground for new trial (Pen. Code, § 1026, as added by St. 1927, p. 1149).

Action of court in commending jury on rendition of verdict of guilty in homicide prosecution before trial of issue of insanity by same jury, under Pen. Code, § 1026, as added by St. 1927, p. 1149, *held* prejudicial and ground for new trial.

3. Criminal law 🔑624—Defendant has burden of proving insanity by preponderance of evidence on trial of issue after verdict of guilty in homicide prosecution (Pen. Code, § 1026, as added by St. 1927, p. 1149).

Defendant who has interposed plea of insanity, under Pen. Code, § 1026, as added by St. 1927, p. 1149, has burden of proving insanity at time of homicide by a preponderance of evidence on trial of issue after verdict of guilty.

In Bank.

Appeal from Superior Court, Fresno County; Denver S. Church, Judge.

Ilija Pokrajac was convicted of murder and of assault with intent to commit murder. From the judgment of conviction, and from an order denying his motion for a new trial, he appeals. Reversed.

E. A. Williams, Jr., of Fresno, for appellant.

U. S. Webb, Atty. Gen., Wm. J. Cleary, Deputy Atty. Gen., and Glenn M. De Vore, Dist. Atty., Rae B. Carter and Claude Minard, Deputy Dist. Attys., all of Fresno, for the People.

PER CURIAM. The defendant was charged by an information in three counts with the murder of Elmer L. Gustafson, and with assaults on Neal Hultslander and Lorenzo F. Luckie with intent to commit murder. He entered a plea of not guilty and a plea of not guilty by reason of insanity, but, during the selection of the jury, made no attempt to examine the jurors touching their qualifications to try the issue of his sanity. The immediate circumstances connected with, and the events leading up to, the various offenses charged were fully shown, and the jury returned a verdict finding the defendant guilty of the

---

★For opinion on rehearing, see Boone v. Kingsbury, 273 P. 819.

† Rehearing and modification of opinion denied.

charges contained in the first two counts of the information. Over the objection of the defendant, the court thereupon ordered the question of the state of mind of the defendant at the time he committed the offenses to be forthwith submitted to the same jury. The defendant's counsel then, for the first time, demanded the right to examine the jurors on a voir dire as to their qualifications to try the defendant on the issue as to his sanity at the time the offenses were alleged to have been committed, and the privilege of exercising peremptory challenges and challenges for cause, which were denied. On submission of the issue raised by the insanity plea, the jury returned its verdict that the defendant was sane at the time he committed the acts. Defendant made a motion for a new trial on various statutory grounds, which was denied, and judgment on the first count of the information was entered imposing the death penalty on the defendant for the murder of Gustafson.

On this appeal two points are urged. The first is that the law (Pen. Code, § 1026, added by St. 1927, p. 1149, regulating the procedure when a plea of not guilty by reason of insanity is interposed) under which the defendant was tried and convicted is unconstitutional in that it prevents a trial by a fair and impartial jury. The second is that the trial court committed reversible error by commending the jury in open court for rendering its verdict of guilty at the conclusion of the first phase of the trial and before submitting to it the issue of defendant's state of mind at the time he committed the acts complained of.

[1] At the time this case was argued, counsel for the appellant, in submitting it, asked that the court consider as made and advanced by him all the points to be made in the arguments in other capital cases then awaiting argument and submission in which the constitutionality of the law, supra, relating to pleas of not guilty by reason of insanity, was involved. We have done so. The decisions in those cases have been handed down. People v. Coen (Cal. Sup.) 271 P. 1074; People v. Troche (Cal. Sup.) 273 P. 767; People v. Leong Fook (Cal. Sup.) 273 P. 779. They hold the law valid in all respects, and specifically and conclusively answer every contention raised by appellant's first point. We deem it unnecessary, therefore to further consider that phase of the case. See, also, People v. Hickman (Cal. Sup.) 268 P. 909.

The jury returned its verdict finding the defendant guilty of the killing of Gustafson and of the assault on Hultslander, but not guilty of the assault on Luckie. Although there remained the necessity of the further trial of the defendant on his insanity plea, the trial judge immediately proceeded to fix the time for pronouncing judgment. He then thanked the counsel for the defense, appointed by him, for the able manner in which he had guarded the rights of the defendant, and, turning to the jury, he said: "And you, gentlemen of the jury, I wish, on behalf of the People of the State of California, to commend you for your courageous and faithful work in this case in rendering a verdict which, undoubtedly, is the correct one." Counsel for the defense then called the attention of the court to the matter of the further trial of the defendant, and the court promptly designated the same jury to try that issue. He also told the jury to disregard his remarks as having no bearing on the question of the defendant's insanity about to be submitted to them. Although the defendant and his counsel were present in court at the time, no exceptions were taken to the remarks of the court, but, on the following day, before proceeding with the trial of the insanity plea, counsel for the defendant, "for the purpose of the record," cited the remarks "as prejudicial to the substantial rights of the defendant." The court thereupon, and at considerable length, stated to the jury that what had been said on the previous day should not "bear in any way directly, or indirectly, upon whether the defendant in this case was sane or insane at the time" of the commission of the offenses.

[2, 3] The consensus of opinion of the majority of the members of this court is that the remarks of the trial judge in thus commending the jury were highly prejudicial to the rights of the defendant, and were of such a nature that their effect could not be erased and was not removed by the subsequent statement of the court. While there is substantial evidence tending to support the findings of the jury that the defendant was not so insane at the time of the commission of the offenses as to fail to know the distinction between right and wrong, there is a material conflict in the testimony on that point. The appearance and demeanor of the defendant during the days of the trial were no doubt observed by the jurors, and the immediate circumstances and the events leading up to the homicide were such as to indicate that the defendant might have been insane at the time he committed the acts charged. While it is true that, under the present procedure, all question of the insanity of the defendant at the time of the commission of the offenses charged was removed from the consideration of the jury during the trial of the issue raised by the plea of not guilty, the minds of the jurors should not have been subjected to the influence of the opinion of the trial judge. It is common knowledge that jurors are most anxious to ascertain, if possible, the ideas of the judge upon the bench during the trial of causes. The trial court's statement to the jury of his approval of the rendition of the verdict of guilty brought satisfaction to the jurors with their action, and they thus entered upon the trial of the second issue of the defendant's case knowing that the trial judge was satisfied of the guilt of the defendant. Under such circumstances, but one conclu-

sion can be drawn, and that is that the remarks of the trial court were highly prejudicial and cast an undue burden on the defendant, who was compelled to prove, by a preponderance of the evidence, that he was insane at the time of the homicide.

The order denying defendant's motion for a new trial and the judgment of the court are, and each is, reversed, and a new trial is ordered.

PRESTON, J. I concur in the judgment but not in the reasoning pursued to reach this result. The opinion treats merely a symptom, overlooking the disease itself. It is not at all likely that the remarks of the court had anything to do with the verdict. The fact is that the plea of insanity has been destroyed. The first trial is the effective proceeding. The second hearing is colorless and may as well be omitted altogether. The defendant is convicted irrevocably by the first trial where the evidence of insanity so far as possible is excluded. I said in my dissent in People v. Leong Fook (Cal. Sup.) 273 P. 779, that innocent people would be convicted under this procedure. The case before us is confirmation of that statement. A demented man has been convicted and sentenced to suffer the extreme penalty.

McCARRON v. GOODWIN, City Manager.

Supreme Court of California. Jan. 31, 1929.

Abatement and revival ⚷69—Cause must be dismissed, where suggestion of death is filed with Supreme Court and it appears action is abated thereby.

Where suggestion of death of plaintiff and appellant, supported by certificate of record of death, was presented to Supreme Court and it appeared that action was abated by reason of such death, cause must be dismissed.

Appeal from Superior Court, Santa Clara County; F. B. Brown, Judge.

On petition for rehearing. Case dismissed. For former opinion, see (App.) 269 P. 977.

Owen D. Richardson and William H. Johnson, both of San Jose, for appellant.

Archer Bowden, City Atty., of San Jose, for respondent.

WASTE, C. J. There having been presented to this court and filed herein a suggestion of the death of the plaintiff and appellant, supported by a certificate of the record of death, and it appearing that the action is abated by reason of such death, it is ordered that the cause now under submission be and the same is hereby dismissed.

---

206 Cal. 246

CALPETRO PRODUCERS' SYNDICATE et al. v. CHARLES M. WOODS CO.
(L. A. 9069.)

Supreme Court of California. Jan. 22, 1929.

1. Evidence ⚷397(1)—Matters implied in written contract cannot be contradicted by parol evidence (Civ. Code, § 1625).

That which is implied by law becomes as much a part of contract as that which is written therein, and matters imported into written contract by legal implication therefore cannot be contradicted by parol evidence, under Civ. Code, § 1625.

2. Evidence ⚷441(9)—Parol testimony held inadmissible to vary or contradict implied warranty of title in written contract for sale of personal property (Civ. Code, §§ 1625, 1765, 1927).

Parol testimony, to the effect that buyer took personal property solely at his own risk, *held* inadmissible to vary or contradict implied warranty of title in written contract for sale of personal property, under Civ. Code, §§ 1625, 1765, 1927, especially where contract expressly excluded verbal understanding.

3. Appeal and error ⚷1177(1)—Buyer's action on implied warranty of title should be remanded on reversal of judgment for defendant, where it did not clearly appear that judgment of bankruptcy court adjudging interest in third party bound defendant.

Buyer, maintaining action on implied warranty of title on sale of personal property, *held* not entitled to have judgment rendered in his favor on appeal on reversal of judgment for defendant, where judgment of federal court, adjudicating interest of bankrupt third party in the property sold, was not clearly shown to be binding on defendant; but case should be remanded for new trial.

In Bank.

Appeal from Superior Court, Los Angeles County; John L. Fleming, Judge.

Action by the Calpetro Producers' Syndicate, a partnership, and others, as individual partners, against the Charles M. Woods Company. Judgment for defendant, and plaintiffs appeal. Reversed and remanded.

Superseding opinion in 267 P. 359.

F. G. Athearn, Athearn, Chandler & Farmer, Frank R. Devlin, Walter Hoffman, Haven, Athearn, Chandler & Farmer, Milton T. Farmer, and Philip H. Angell, all of San Francisco, for appellants.

Hyams & Himrod, of Los Angeles, and Frank English, of San Francisco, for respondent.

PRESTON, J. This is an action upon an implied guaranty of title upon the sale of personal property. Defendant had judgment. Plaintiffs have appealed.

The appeal is determined by the proper application of a rule of evidence. Plaintiffs purchased from the defendant, upon April 6, 1923, under a written conditional sales contract, certain oil-drilling machinery, which contract not only on its face shows that the writing contained all the terms and conditions of sale and purchase, but in it is found a clause making this fact certain, which reads as follows: "It is expressly understood this proposal made in duplicate contains all agreements pertaining to property herein specified, there being no verbal understanding whatsoever, and when signed by purchaser and approved by an executive officer or local manager of the Charles M. Woods Company becomes a binding contract between the parties hereto."

It appears, however, that prior thereto, and on or about January 3, 1923, defendant herein had, under a like contract, agreed to sell this identical personal property to one J. E. O'Hea. However, on the said 6th day of April, 1923, said O'Hea was, by the District Court of the United States for the Southern District of California, declared a bankrupt. Soon thereafter the trustee of said bankrupt made claim to the personal property involved in this action by reporting it as a part of the assets of said estate and posting notices upon the property itself.

Thereafter, and on or about April 16, 1923, appellants herein, acting presumably under a provision of the said sales contract with respondent, requiring them to protect respondent's title thereto, filed in the said bankruptcy proceedings a petition styled, "Petition for Order of Reclamation from Trustee," in which petition they sought to have the claims of said bankrupt estate adjudged groundless and respondent's and their own rights to said property confirmed. At the time this petition was filed appellants had not made all the payments called for under said sales contract, although they later made them according to the terms of their covenant, so the title to said property, as between the parties hereto, was at said time in respondent. The trustee answered and a hearing was had on this issue before the referee, in which J. A. Smith, the secretary and treasurer of respondent, testified as a witness at the instance of appellants. The result of this hearing was an order and decree of said referee in bankruptcy, dated June 29, 1923, that the bankrupt's interest in said property had not been forfeited by respondent, and that, subject to the unpaid portions of the purchase price due from O'Hea to respondent, the beneficial interest in said property was vested in the said bankrupt, and that appellants here had no interest therein except as assignees of respondent by virtue of their contract of sale.

A review of this order of the referee was sought and obtained in the District Court, and on January 15, 1924, the findings and order of the referee in said matter were in all respects confirmed. A judicial sale of said property thereafter occurred in said bankruptcy proceedings, at which appellants became the purchasers, buying in the property, the subject of this action, in connection with other property and property rights, for the sum of $25,000, which said sale was confirmed on May 25, 1925.

On April 5, 1924, appellants brought the present action, setting up said written contract of sale, the bankruptcy of said O'Hea, the action of the trustee of his estate, and the order and judgment of the referee respecting said property, the confirmation of said order by the District Court, and the further fact that respondent had full notice of the proceedings taken in said bankruptcy proceedings and should be bound by the judgment entered therein, and prayed for judgment against respondent in the sum of $25,000, plus interest and costs, to which respondent filed its answer and amended answer, denying liability and basing its principal defense upon the ground that appellants took the title to said property subject to any claim or claims that might be made thereto by said O'Hea and his representatives, and expressly, but orally, waived a guaranty of title thereto.

The court sustained the defenses made by respondent, and, among other things, found that appellants knew of the previous sale of said personal property to O'Hea under a conditional sales contract and were familiar with all the terms and conditions of said sale and knew that respondent had retaken possession of said personal property and had attempted to foreclose or terminate all rights of O'Hea under said contract, and at all times knew all the facts concerning the retaking of possession of said personal property by respondent, and the foreclosure proceedings in connection therewith, and further found that it was understood and agreed between respondent and appellants that the appellants should take possession of said personal property subject to any claims or infirmities in the said proceedings had against said O'Hea, and that they would be satisfied with the title of respondent so secured by said proceedings, and waived any express or implied warranty of title to said personal property on the part of respondent. The court further found that, while it was true that J. A. Smith, the secretary and treasurer of respondent, was called as a witness and asked certain questions as to the steps taken to forfeit the rights of said O'Hea, yet said witness was not allowed to answer the questions so propounded, and found still further that respondent did not at any time during the pendency of said proceedings in the bankruptcy court receive notice from appellants that the trustee in bankruptcy was asserting any title or right to the possession of said property, nor was it informed of the nature of said proceedings in bankruptcy with relation to said property, nor did it at any time receive a request or demand from appellants to appear in said proceedings, nor did it at any time receive from appellants an opportunity to so defend, nor did it at any time receive notice that it would be held responsible for any damages or detriment suffered by appellants. Judgment upon these findings passed for respondent.

Parol evidence was the sole resort for the testimony upon which the court predicated its findings that respondent refused to warrant the title to said property, and that appellants expressly waived the implied guaranty of title given by section 1765 of the Civil Code. The important question, then, is: Was it proper under this written contract for the court to permit an excursion into the domain of parol evidence to establish a waiver of the implied warranty of title above mentioned?

To justify this position taken by the court, respondent depends upon the case of Miller v. Van Tassel, 24 Cal. 459, 464–465. This decision was followed in this respect in Johnson v. Powers, 65 Cal. 179, 3 P. 625, and referred to approvingly in Hull v. Ray, 80 Cal. App. 284, 292, 251 P. 810. Said case of Miller v. Van Tassel must therefore receive consideration at our hands. It must be admitted that language found therein upholds the action of the court. Said action was brought by the vendee of an American jack to recover back from the vendor the purchase money, on the ground that the vendor had no title at the time of the sale. The whole writing with respect to the transaction read as follows: "This is to certify that I have sold to William Miller my brown Maltese Jack, for $1,000. N. Van Tassel." The contention was made that, inasmuch as the bill of sale or memorandum above quoted was a part of the contract of sale, its terms could not be varied by parol; hence it was not competent for the vendor to show by parol that the vendee expressly waived a warranty of title and agreed to take the animal at his own risk. The court rejected this contention, and held that a warranty of title was presumed by the law to exist whether the contract was in writing or verbal, and such warranty had its existence independent of the contract of sale, and was imputed because of possession by the vendor; being independent of the contract of sale, its existence could be shown by parol whether the contract of sale was in writing or verbal. The general conclusion, that parol evidence was admissible, reached in that case was correct, and could have been based alone upon the evident fact that the writing did not contain all the terms and conditions of the contract of sale. Kreuzberger v. Wingfield, 96 Cal. 251, 255, 31 P. 109; Williams v. Ashurst Oil, etc., Co., 144 Cal. 619, 624, 78 P. 28; United Iron Works v. Outer Harbor, etc., Co., 168 Cal. 81, 84, 141 P. 917. But the main reasoning upon which the conclusion was actually based is not in harmony with later expressions of this court.

[1] That a warranty is as much one of the elements of sale and as much a part of the contract of sale as any other portion of the contract, and is not a mere collateral undertaking, was held in Germain Fruit Co. v. Armsby Co., 153 Cal. 585, 594, 96 P. 319. We cannot give the holding in that case full credit and at the same time uphold the pronouncement of the court as to the nature of the warranty in Miller v. Van Tassel, supra. See, also, to the same effect, United Iron Works v. Outer H., etc., Co., supra, at page 85 of 168 Cal. (141 P. 920), where the court quotes from 2 Mechem on Sales, § 1254, as follows: "The rule is well settled that where the parties have reduced to writing what appears to be a complete and certain agreement, importing a legal obligation, it will, in the absence of fraud, accident or mistake, be conclusively presumed that the writing contains the whole of the agreement between the parties, and parol evidence of prior, contemporaneous or subsequent conversations, representations or statements will not be received for the purpose of adding to or varying the written instrument. If, therefore, such a writing exists between the parties, and it contains no warranty at all, no warranty can be added by parol; if it contains a warranty of some kind or to some extent, parol evidence will not be admitted to extend, enlarge or modify that which the writing specifies."

The holding in the two last-mentioned cases was approved in the recent case of Nimmo v. Fitzgerald, 202 Cal. 565, 568, 261 P. 1015, 1016, where an attempt was made to introduce parol evidence to vary a written contract so as to show an express warranty, the court using the following language: "Exclusion of the testimony on the ground that defendants were attempting to vary the terms of the written contract by parol evidence was likewise proper. Defendants contend that where, as here, the written contract is silent, evidence is admissible to prove a parol warranty, said warranty being collateral to the written contract. Such is not the law of this state."

From this line of cases it will be seen that this court has repeatedly held that a warranty not contained in a written instrument cannot be inserted therein by parol. Neither can a warranty that is found within the writing be varied in that manner. But this does not exclude from the contract the warranty the law writes therein. On the contrary, the pronouncement of these cases is but the converse of the question we have before us, and foreshadows a departure from the reasoning in Miller v. Van Tassel, supra.

But other decisions of our courts have spoken directly upon the question before us. For example, in the case of Standard Box Co. v. Mutual Biscuit Co., 10 Cal. App. 746, 750, 103 P. 938, 939, it is said: "It is a well-settled principle that that which is implied by law becomes as much a part of the contract as that which is therein written, and if the contract is clear and complete when aided by that which is imported into it by legal implication, it cannot be contradicted by parol in respect of that which is implied any more than in respect of that which is written."

In Peterson v. Chaix, 5 Cal. App. 525, 527, 90 P. 948, 954, it is said: "There is another principle to be observed, namely, that whatever the law implies from a contract in writing is as much a part of the contract as that which is therein expressed; and to the extent that the contract, with that which the law implies, is clear, definite and complete, it cannot be added to, varied or contradicted by extrinsic evidence. * * *"

In Kullman, Salz & Co. v. Sugar Apparatus Mfg. Co., 153 Cal. 725, 731, 96 P. 369, 371, it is said: "But the general principle of law, well settled, is that where a complete written contract is made, oral representations or warranties, and implied warranties, and all oral negotiations are merged in the written contract, and by its terms the parties must be bound. (Civ. Code, § 1625, etc.)" The above statement is quoted with approval in Monahan v. Watson, 61 Cal. App. 417, 421, 214 P. 1001. See, to the same effect, California D. & M. Co. v. Crowder, 58 Cal. App. 529, 531, 533, 209 P. 68; 17 Cyc. 570; also the recent case of LaFrance v. Kashishian (Cal. Sup.) 269 P. 655.

Thus the cases of Miller v. Van Tassel, supra, and Johnson v. Powers, supra, on this point have been practically receded from by this court. In the LaFrance Case, above cited, plaintiff, a lessee, was suing the lessor for a violation of the implied warranty of title to the premises. The lease was silent as to any guaranty of ownership of the premises by the lessor, but the plaintiff relied upon the implied warranty of title given by section 1927 of the Civil Code. Defendant sought to show by parol testimony that plaintiff agreed to accept such title as the defendant had, and to take possession of the premises subject to all infirmities therein, and had been conceded a reduced rental in view of that fact, well knowing his title rested merely upon tax proceedings. But this court upheld the lower court in the rejection of such parol testimony, saying: "But the weight of authority, especially as bearing upon a matter such as is here presented, is to the effect that an implied stipulation in a contract is of as great force as though it were fully set forth therein, and such implied stipulation may no more be contradicted or varied by parol evidence than may be that which is clearly expressed." This we conceive to be the doctrine that must be applied here.

The case of Johnson v. Powers, supra, in so far as it upholds the case of Miller v. Van Tassel, supra, is subject to the same misconception of the nature of the implied warranty above pointed out. The same is true of the case of Hull v. Ray, supra.

[2, 3] We therefore conclude that parol testimony, to vary the terms of the written contract, the subject of this action, was inadmissible; hence the findings of the court below, to the effect that appellants waived the implied warranty of title given by the statute, are without legitimate support in the record. This conclusion makes necessary a reversal of the cause. We have been asked, however, not only to reverse the judgment of the court below, but also to direct a judgment in favor of appellants and against respondent. This we feel disinclined to do. The binding character of the judgment of the federal court upon respondent is not absolutely certain, in view of the nature of the proceedings and of the findings of the court. This fact, and other reasons not necessary to dwell upon, render the amount of damage suffered by appellants uncertain. Neither party should, therefore, be denied a full opportunity to present its position on these questions upon a second trial.

The judgment is reversed.

We concur: WASTE, C. J.; RICHARDS, J.; CURTIS, J.; LANGDON, J.; SEAWELL, J.; SHENK, J.

---

206 Cal. 266

NOYES v. BANK OF ITALY. (L. A. 8152.)

Supreme Court of California. Jan. 25, 1929.

1. Bankruptcy 🔑184(2⅛)—Chattel mortgages 🔑61—Unacknowledged chattel mortgage is void as against mortgagor's creditors, and hence inadmissible against his trustee in bankruptcy (Civ. Code, § 2957).

Chattel mortgage, not acknowledged as required by Civ. Code, § 2957, is void as against mortgagor's creditors, and hence inadmissible in evidence against mortgagor's trustee in bankruptcy in latter's action to recover mortgaged property.

2. Bankruptcy 🔑185—Bankruptcy Act safeguards general creditors' rights against one seizing property under unacknowledged chattel mortgage before commencement of bankruptcy proceedings by giving trustee status of lien creditor (Bankr. Act, § 47(a) (2), amended by Act June 25, 1910, § 8; 11 USCA § 75; Civ. Code, § 2957).

Bankruptcy Act, § 47(a) (2), amended by Act June 25, 1910, § 8 (11 USCA § 75), safeguards rights of bankrupt's general creditors as against one seizing property under chattel mortgage, not acknowledged as required by Civ. Code, § 2957, before commencement of bankruptcy proceedings, by giving trustee status of lien creditor.

3. Chattel mortgages 🔑61—Unacknowledged chattel mortgage is void as to mortgagor's prior, as well as subsequent, creditors (Civ. Code, § 2957).

A chattel mortgage, not acknowledged as required by Civ. Code, § 2957, is void as against persons extending credit to mortgagor before, as well as after, execution of mortgage.

4. Bankruptcy 🔑303(2)—Unacknowledged chattel mortgage is inadmissible to show mortgagee's good faith in bankrupt trustee's action to recover mortgaged property (Civ. Code, § 2957).

Chattel mortgage, not acknowledged as required by Civ. Code, § 2957, is inadmissible, in action by mortgagor's trustee in bankruptcy to recover mortgaged property, to show mortgagee's good faith; such mortgage being void as to mortgagor's creditors, regardless of mortgagee's good or bad faith.

In Bank.

Appeal from Superior Court, San Diego County; C. N. Andrews, Judge.

Action by C. W. Noyes, trustee in bankruptcy of the estate of Paul Petrich, doing business as the Coronado Fish Company, against the Bank of Italy, a corporation. Judgment for plaintiff, and defendant appeals.

Superseding opinion 259 P. 60.

Ward, Ward & Ward, of San Diego, and Haas & Dunnigan, of Los Angeles, for appellant.

Morris Binnard, of San Diego, for respondent.

PER CURIAM. This is an appeal from a judgment on a verdict in favor of the plaintiff for the sum of $10,000 in an action for conversion.

The facts essential to a proper disposition of the appeal are undisputed. Paul Petrich, plaintiff's bankrupt, conducted a wholesale and retail fresh fish and fish-canning business at San Diego under the name of Coronado Fish Company. On August 10, 1923, an involuntary petition in bankruptcy was filed against him by his creditors. He was adjudicated a bankrupt, and on October 22, 1923, the plaintiff was appointed the trustee of the bankrupt's estate. On November 3, 1923, as such trustee, the plaintiff demanded possession of the property described in the complaint. Upon a refusal of the defendant to surrender the same, this action was brought.

[1] During the canning season of 1921 and 1922, the defendant advanced to Petrich about $22,000 with which to conduct his business. On March 23, 1923, there remained due to the defendant the sum of $8,705.65, on which day the defendant obtained from Petrich a promissory note for the unpaid balance and a chattel mortgage securing the same covering the personal property involved in this action. This chattel mortgage was filed for record on March 26, 1923, but it lacked the formality of an acknowledgment as required by section 2957 of the Civil Code. On July 28, 1923, the defendant took possession of said personal property assuming to act under the terms of said chattel mortgage. Thereafter, on August 28, 1923, the defendant caused a sale to be conducted as provided by law for the sale of mortgaged chattels, as a pledge, at which sale the personal property was bought in by the defendant for the sum of $3,000; there being no other substantial bids. In the trial court the defendant sought, and now seeks, to justify the taking, retention, and sale of said personal property by reason of the terms of said chattel mortgage. To that end the defendant, under appropriate allegations in its answer, offered said chattel mortgage in evidence, to which offer the plaintiff objected on the ground that said mortgage was void as to the bankrupt's creditors whom the plaintiff represented, and therefore inadmissible in evidence against him as trustee. The court excluded the proffered mortgage, sustained the objection and instructed the jury that there was no issue under the proof on the question of conversion and that the only question for the determination of the jury was the value of the property converted. The pivotal point in the case is whether the trial court committed error in so instructing the jury, for it is conceded by the plaintiff that, if the court committed error in this respect, the judgment should be reversed. It is insisted by him, however, that the ruling of the court in excluding the chattel mortgage was proper under the provisions of section 2957 of the Civil Code and decisions of this court interpreting the same and that, since there was therefore no evidence in the record justifying the withholding and sale of said personal property by the defendant, the instruction was proper.

We think the position of the plaintiff is well taken. Section 2957 of the Civil Code provides: "A mortgage of personal property is void as against creditors of the mortgagor and subsequent purchasers and incumbrancers of the property in good faith and for value, unless: * * * 2. It is acknowledged or proved, certified, and recorded in like manner as grants of real property." It is a conceded fact in this case that said chattel mortgage was not acknowledged as required by the Code section, and was void to the extent therein provided. As applied to the facts in the present case, the said mortgage under the plain intent of the statute was "void as against creditors of the mortgagor," Petrich, and must be so declared unless some one of the considerations urged by the defendant would require a contrary conclusion.

[2] It is conceded by the parties that no question is involved herein as to whether the chattel mortgage or the act of the defendant in taking possession of the property created a voidable preference under the Bankruptcy Act. Nor is it claimed by the defendant that the evidence is insufficient to sustain the verdict fixing the value of the property at the sum of $10,000. It is insisted, however, that it was not shown that any of the creditors of the bankrupt were in position to attack the mortgage in that it did not appear that any of them were creditors who had acquired a lien upon the mortgaged property by virtue of some legal proceeding or who had come armed with some process authorizing seizure of the property and that a mere creditor at large may not attack the mortgage. It is urged that the case of Loosemore v. Baker, 175 Cal. 420, 166 P. 26, citing Ruggles v. Cannedy, 127 Cal. 290, 53 P. 911, 59 P. 827, 46 L. R. A. 371, is directly in point and is controlling here. We think a sufficient answer to the contention lies in the fact that whatever the status of the creditors may be in this case, the Bankruptcy Act has supplied the deficiency which the defendant claims to have existed and has vested the trustee in bankruptcy with all the rights, remedies, and powers of a judgment creditor holding an execution duly returned unsatisfied. Section 47 (a) 2 of the Bankruptcy Act, amended by Act June 25, 1910 (chapter 412, § 8, 36 Stats. at L. 838, 840; Comp. Stats. 1913, §§ 9586, 9631; U. S. Code [USCA] tit. 11, § 75), provides: "And such trustees, as to all property in the custody or coming into the custody of the bankruptcy court, shall be deemed vested with all the rights, remedies, and powers of a creditor holding a lien by legal or equitable proceedings thereon; and also, as to all property not in the custody of the bankruptcy court; shall be deemed vested with all the rights, remedies, and powers of a judgment creditor holding an execution duly returned unsatisfied."

Interpreting said section 47 (a) 2 of the Bankruptcy Act, the Supreme Court of the United States has held that the trustee acquired a lien status as of the time when the petition in bankruptcy was filed. Bailey v. Baker Ice Machine Co., 239 U. S. 268, 36 S. Ct. 50, 60 L. Ed. 275. See, also, Martin v. Commercial National Bank (C. C. A. 5th Circuit) 245 U. S. 513, 38 S. Ct. 176, 62 L. Ed. 441; 4 Cal. Jur. pp. 59, 60, 62, 63, and cases cited.

Even if it be assumed that a mortgage void as to creditors pursuant to the plain terms of the statute could be transformed into a valid mortgage by the mortgagee's seizing the mortgaged property or by otherwise taking possession of the same with the consent of the mortgagor and thus shut out general creditors or creditors not possessing a lien or armed with process, yet we are satisfied that it was the intention of the Bankruptcy Act to safeguard the rights of such general creditors by giving the trustee the status of a lien creditor and also to prevent the mortgagee from defeating the rights of the creditors of the bankrupt by contending that such creditors were general creditors only. It seems reasonable to conclude, also, that the purpose of the Bankruptcy Act in vesting power in the trustee to attack a chattel mortgage void under the statute was to render ineffectual as to creditors the act of the mortgagee in taking possession of the property before the commencement of the bankruptcy proceedings. In other words, the trustee was intended to be placed in the position of a lien creditor who would, but for the bankruptcy proceeding, be entitled to attack the alleged void mortgage and to enable him to protect the interests of general creditors against invalid liens, unlawful transfers, etc. Collier on Bankruptcy (12th Ed.) vol. 1, p. 728, et seq. Therefore, since it was competent for the plaintiff to commence the present action for conversion and since the proffered chattel mortgage was void as to creditors under the statute, there was no error in excluding the mortgage and as matter of law instructing the jury that there was no issue for the jury to determine on the question of conversion.

[3] It is next contended by the defendant that the court erred in refusing to instruct the jury that the verdict should be limited to the amount of the claims which arose from credit being extended to Petrich after the mortgage was executed. The schedule of claims shows that some of the claims arose prior to the execution of the mortgage. The position of the defendant in this connection is stated by its counsel as follows: "But, conceding for the purpose of this argument, that the trustee does stand in a position to challenge this mortgage; i. e., conceding that general creditors, without first having obtained a lien on the chattels, can attack and question the validity of this mortgage, nevertheless, it is our contention that the mortgage would be void, if at all, only as to creditors whose claims arose after the mortgage was given and before possession was taken. For that reason, if for no other reason, appellant should have been permitted by the trial court to introduce in evidence the mortgage and the proceedings thereunder." Counsel then call attention to the fact that in Ruggles v. Cannedy, supra, at page 299 of 127 Cal. (53 P. 915) the court left this question open in the following language: "Whether it [the chattel mortgage] is void against a creditor who extended credit before the making of the mortgage does not here call for decision"—also that in the case of Loosemore v. Baker, supra, the point was not decided, and the inference is drawn that the question is an open one in this state. But such is not really the case. Commenting on the scope of the term "creditors" as used in section 2957 of

the Civil Code, this court said, in Cardenas v. Miller, 108 Cal. 250, at page 258, 39 P. 783, 785 (49 Am. St. Rep. 84): "The term *creditors* is general, and applies to creditors existing prior to the mortgage, as well as subsequent." In Old Settlers Investment Co. v. White, 158 Cal. 236, 110 P. 922, the question of the application of section 2973 of the Civil Code to a prior creditor was involved. The sheriff, representing a prior creditor, levied an execution and had judgment in the trial court. Although the case was reversed for other reasons, it was stated that a creditor who became such prior to the execution of the void mortgage necessarily parted with consideration without notice of the mortgage and could cause a levy on the personal property involved without paying the mortgage debt. In the Matter of Hansen, 268 F. 904, the District Court of the United States, in and for the Southern District of California, in a bankruptcy proceeding involving the question of the validity of a chattel mortgage, noted that in the case of Ruggles v. Cannedy this court had declined to determine the question. The court in the Hansen matter reviewed numerous authorities, and came to the conclusion that the term applied to prior as well as to subsequent creditors. The reasoning for this conclusion is well stated in Pierson v. Hickey, 16 S. D. 46, 91 N. W. 339. Section 4379 of the Compiled Laws of South Dakota, in the identical language of our statute, provided: "A mortgage of personal property is void as against creditors of the mortgagor, and subsequent purchasers and incumbrancers of the property in good faith for value, unless, * * * " etc. In that case the court reversed a judgment which gave priority to the lien of an unrecorded chattel mortgage as against the lien of an execution levied by an antecedent creditor. At page 47 of 16 S. D. (91 N. W. 340), it is stated: "By the use of the word 'subsequent' it is clear that the legislature intended to qualify only the words 'purchasers and incumbrancers,' and, as no restriction is placed upon the word 'creditors,' all persons of that class are included, whether antecedent or subsequent to the execution of the mortgage. Section 4652 of the Compiled Laws defines the meaning of the word 'creditor' to be 'one in whose favor an obligation exists, by reason of which he is, or may become, entitled to the payment of money,' and to exclude from the protection of the statute all whose debts were in existence when the mortgage was executed would restrict the legislative policy, and require an unwarranted qualification of the word 'creditors.' The injury that an unfiled chattel mortgage may occasion an antecedent creditor is likely to arise from the apparent unincumbered ownership of the property in the possession of his debtor, justifying the inference of perfect security, and inducing delay in the enforcement of his claim. Were none but subsequent creditors within the purview of the statute, the judgment creditor may also be injured by the levying of an execution on property described in a secret mortgage, instead of the unincumbered property of the judgment debtor; and to protect such, as well as subsequent creditors, is the plain purpose of the enactment. * * * The great weight of authority is to the effect that such statutes apply not only to creditors who become such subsequently to the execution of the mortgage, but also to those whose debts existed before that time. [Citing many cases.]"

[4] It is further contended by the defendant that the chattel mortgage should have been received in evidence to show the good faith of the mortgagee. Good faith is not an element bearing on its admissibility. The Code section makes the mortgage void as to those mentioned, regardless of the good or bad faith of the mortgagee.

Furthermore, we discover no error in the order of the trial court overruling the demurrer to the complaint.

The judgment is affirmed.

PRESTON and LANGDON, JJ., being disqualified, do not participate in the foregoing opinion.

96 Cal. App. 214

DEAN v. MIDLAND FARMS CO. et al.

(Civ. 6509.)

District Court of Appeal, First District, Division 1, California. Jan. 9, 1929.

Appeal and error 🔑110—Order granting new trial in action to declare trust tried by court without jury held not appealable (Code Civ. Proc. § 963, as amended in 1915).

Order granting new trial from judgment for plaintiffs in action to declare a trust and for an accounting, tried by the court without a jury, was not appealable under Code Civ. Proc. § 963, as amended in 1915.

Appeal from Superior Court, City and County of San Francisco; E. P. Shortall, Judge.

Action by W. E. Dean against Midland Farms Company and another. From an order granting a new trial after judgment for plaintiff, plaintiff appeals. Appeal dismissed.

John Anthony McGee, of San Francisco, for appellant.

Robt. H. Schwab, of Sacramento, for respondents.

SPENCE, Justice pro tem. This is an action to declare a trust and for an accounting. The cause was tried by the court without a jury, and judgment was entered in favor of the plaintiff and against defendants. Upon motion by defendants, the court made its order granting a new trial, from which order plaintiff appeals.

Since the amendment in 1915 of section 963 of the Code of Civil Procedure, an order granting a new trial is no longer an appealable order, except "in an action or proceeding tried by a jury where such trial by jury is a matter of right." McGoldrick v. Visalia Midway Oil Co., 58 Cal. App. 280, 208 P. 334. See, also, Diamond v. Superior Court, 189 Cal. 732, 739, 210 P. 36; Furlow Pressed Brick Co. v. Balboa Land & Water Co., 186 Cal. 754, 760, 200 P. 625; Nason v. Shinjo, 72 Cal. App. 530, 237 P. 559.

This cause does not fall within the class of cases in which an appeal from an order granting a new trial is permitted.

The appeal is dismissed.

We concur: TYLER, P. J.; KNIGHT, J.

BALDWIN et al. v. PACIFIC ELECTRIC RY. CO. et al.★

McGUFFIN v. SAME.

(Civ. No. 3647.)

District Court of Appeal, Third District, California. Jan. 17, 1929.

Hearing Granted by Supreme Court Feb. 14, 1929.

1. Railroads ⟹348(1)—In action for death in crossing accident, evidence justified conclusion that night was dark.

In action against railroad for death in accident at crossing, evidence *held* sufficient to justify jury in concluding that night was dark.

2. Railroads ⟹350(5)—It cannot be said as matter of law that "railroad crossing" sign located within few feet of rails was of any significance in protecting users of highway.

Where post bearing cross-arms on which are written words "railroad crossing" was located within very few feet of rails and partly behind telephone or telegraph pole, court cannot say as matter of law that it was of any significance whatever in affording protection to users of highway.

3. Evidence ⟹595—From fact that motorist turned left to avoid red light at railroad crossing inference may be drawn that he mistook light for automobile tail-light.

From facts showing that automobile driver turned to left to avoid striking red light, swung from gate at railroad crossing, inference may be drawn that light was mistaken for tail-light of another automobile, since inference which may be drawn from facts does not fall within terms of cases having to do with conjectures.

4. Railroads ⟹348(6)—Evidence held insufficient to show that deceased was familiar with railroad crossing.

In action for death of motorist at railroad crossing, evidence *held* sufficient to show familiarity of deceased with crossing, where it was shown that he had been over it a few times, but not often.

Appeals from Superior Court, Orange County; Z. B. West, Judge.

On petition for rehearing. Application denied.

For former opinion, see 273 P. 155.

Bertrand J. Wellman, of Los Angeles, and Norval N. Edwards, of Orange, for appellants.

E. E. Morris and Frank Karr, both of Los Angeles, and S. M. Reinhaus, of Santa Ana, for respondents.

PER CURIAM. [1] The statement in the petitioner's application for a rehearing herein that there is other testimony in the record that there was a full moon on the night of May 18, 1924, other than that shown by the World's Almanac, is correct. But what we have said in our main opinion, that there was sufficient testimony in the record to justify the jury in coming to the conclusion that the night was dark, as well as the conclusion that the night was light, is a matter which we think cannot be reasonably questioned. However, as petitioners have set forth the testimony introduced by the defendants to show that the night was light, and that the conditions were such that the railroad crossing and gates should have been perceived by the occupants of the automobile that came in collision with the electric car, we are under the necessity of calling attention to the testimony of other witnesses from which the contrary conclusion might be drawn. The witness McKarley testified that the weather was "rather dark"; that the weather was "misty"; that the crossing was "dark." The witness Charles Bates testified that the weather was "dark and gloomy"; that the crossing was "dark"; that he heard no whistle. McKarley also testified that he heard no whistle. Bates testified that the light in the tower did not illuminate the crossing. The witness Handley testified that he heard neither bell nor whistle. The witness Meade testified: "I should say it was a dark night." This witness, however, further testified that as to conditions he paid little attention. The witness Bessie Handley, who was driving an automobile a short distance in the rear of the one coming in collision with the electric car, testified: "The weather was extremely dark." The witness Albert A. Parker, after testifying as to the sobriety and industry of the deceased, said: "It was rather dark all along the road; there were places it was foggy, and some fog just this side of where the accident

---

★Superseded by opinion of Supreme Court 281 P. 380.

occurred." The testimony of these witnesses, whether correct or incorrect, does not appear to have been shaken upon cross-examination, and is sufficient to support a finding that it was dark at the crossing, and even foggy, just as stated by the witness Parker. Whether it was, in fact, light at the crossing or dark, was a matter for the jury, and therefore what we have said as to the court's instructions relative to the maintenance of gates, and the law which we have cited relative to the maintenance of gates across a highway at nighttime, unquestionably applies. In the case of the testimony which we have cited the court could not assume that the conditions were such as to reveal the presence of the gate in time for an automobile to stop, without the gate being properly lighted. These are questions of fact, and presented conditions which render a giving of instruction No. 29 prejudicially erroneous, for the simple reason that the jury might, and we think would ordinarily, infer therefrom that no obligation whatever rested upon the defendants to have the crossing gate properly lighted.

[2, 3] Petitioners also call our attention to the existence of a post bearing two cross-arms on which is written the words "Railroad Crossing," and that this is shown by a photograph introduced in evidence. If the perspective of the photograph is correct, this post with the cross-arms was located within a very few feet of the rails of the electric road, and partly behind a telephone or telegraph pole. The location of this post and cross-arms is so close to the electric railroad that the jury might very readily conclude that it would give no adequate warning to an approaching automobile driver in time to stop before reaching the track. Instead of being placed some distance from the track where the sign might serve some useful purpose, it appears to be so close that we cannot say, as a matter of law, it is of any significance whatever in affording protection to users of the highway. Again, it is argued that it is only conjecture that the one red light, swung from the gate in the position which we have heretofore stated, might readily have been mistaken for the tail-light of another automobile, and so misled the deceased. The physical facts show that the driver of the fatal car turned to the left to avoid striking the red light. That is just exactly what an automobile driver always does in attempting to pass a machine traveling in front of him. And the testimony is to the effect that the fatal car was on the left side of the improved portion of the highway, or what is sometimes called the concrete slab. As pointed out in our main opinion, the red light was in a position very similar to that which the red tail-light of a car would be if the red light is over the left fender of the machine—the place where it is very commonly located. From these facts the inference might very readily be drawn which we have stated. An inference which may be drawn from facts does not fall within the terms of cases having to do with conjectures.

[4] Again, petitioners argue that the testimony shows the deceased familiar with the crossing. We stated in our opinion that there was no testimony showing such fact. That there was no such testimony as to justify the conclusion of the court that the deceased was familiar with the crossing, we will set it forth. Testimony of Mrs. McGuffin: "Q. Had you ever been over that road before, Mrs. McGuffin? A. Well, we wasn't regular travelers over it but had been over it sometimes. Q. You and your husband had been over this road? A. Occasionally; not very often. Q. Over this crossing before? A. Once in a while; not very often." We submit that this testimony does not show familiarity with the crossing; much less is it sufficient to warrant the court in giving an instruction which assumes such knowledge.

In the case of Record v. Pennsylvania R. Co., 75 N. J. Law, 311, 67 A. 1040, and Id., 76 N. J. Law, 800, 72 A. 62, the testimony of the plaintiff himself was: "That he had been over this road only once or twice before, and that he did not remember this crossing, which was not upon an embankment, but flush with the street." These cases were cited in our main opinion and show that the testimony relied upon by petitioners is wholly inadequate to justify the conclusion that the deceased was familiar with the crossing, and so instruct as a matter of law.

In the case of Christman v. Southern Pacific Co., 38 Cal. App. 196, 175 P. 808, referred to in our main opinion, where the court gave an instruction as to the duty to stop, look, and listen, and uses the language, where one has complete knowledge that he was approaching a railroad crossing, it also appears from the opinion that "prior to the day in question the plaintiff had driven over this crossing eight or ten times and knew that the railroad track was there." The distinction between the circumstances is so apparent as to render comment unnecessary.

The petition for rehearing is denied.

96 Cal. App. 259

EVANS v. BANK OF ITALY. (Civ. 6481.)

District Court of Appeal, First District, Division 2, California. Jan. 11, 1929.

1. Banks and banking ⚷299—Savings bank is bound to exercise only ordinary care and diligence.

Savings bank, having in some respects different duties and liabilities than a commercial bank, is bound only to exercise ordinary care and diligence.

2. Banks and banking ⚷301(3)—Savings bank, charging customer's account and notifying him of attachment, was not liable because of subsequent payment on writ of execution.

Where savings bank, after garnishment in attachment suit was served on it, charged its customer's account with amount named in the writ and notified him in writing as to service of writ of attachment, it exercised ordinary care sufficient to relieve it from liability because of subsequent payment on writ of execution.

3. Banks and banking ⚷301(6)—Depositor failing for more than 70 days after notification of attachment to inform bank that he was not person named therein was estopped to question court's jurisdiction (Code Civ. Proc. § 1962, subd. 3).

Where depositor in savings bank, after being notified that writ of attachment had been served on bank, failed for a period of 70 days to advise bank that he was not the person named as defendant in the attachment suit, he was estopped, under Code Civ. Proc. § 1962, subd. 3, from thereafter questioning jurisdiction of court in attachment suit at time final judgment was ordered and execution issued.

Appeal from Superior Court, City and County of San Francisco; Walter Perry Johnson, Judge.

Action by Henry Evans against the Bank of Italy. Judgment for defendant, and plaintiff appeals. Affirmed.

J. E. White, of San Francisco, for appellant.

Louis Ferrari and J. J. Posner, both of San Francisco, for respondent.

STURTEVANT, J. The plaintiff commenced an action against the defendant to recover a sum of money theretofore deposited with the defendant. The defendant appeared and answered, and a trial was had before the trial court sitting without a jury. The trial court made findings in favor of the defendant and, from a judgment entered thereon, the plaintiff has appealed, and has brought up the judgment roll.

The plaintiff makes the contention that, on the findings as written, the trial court should have ordered judgment for him as prayed. This contention is made because the findings show the following facts: On March 26, 1927, the plaintiff deposited with the defendant in its savings department the sum of $300; on June 30, 1927, interest accrued in the sum of $3; on December 29, 1927, the plaintiff applied to the bank to withdraw therefrom $303, but his application was refused. In reply, the defendant calls to our attention that the findings also show the following facts: On the 5th day of August, 1927, an attachment was served on the defendant attaching all moneys due from the defendant to Henry Evans; that thereupon the defendant notified the plaintiff in writing of said service of said writ of attachment and that defendant had debited the plaintiff's account with the amount of said attachment, to wit, the sum of $302, that being the amount of the attachment, interest, and costs; that the plaintiff received said notice in writing and failed and neglected to communicate with the defendant or notify this defendant that plaintiff was not the said Henry Evans mentioned in said writ of attachment. On the 5th day of October, 1927, the defendant was served with a writ of execution in the attachment suit. On that date the plaintiff had not notified the defendant that he was not the Henry Evans mentioned in the attachment suit, and thereupon defendant paid to the sheriff so levying the writ of execution $302. On the 15th day of December, 1927, for the first time, the plaintiff notified the defendant that he was not the Henry Evans defendant in the attachment suit. The trial court also found as a fact that Henry Evans, this plaintiff, is not the Henry Evans named as defendant in the attachment suit. The defendant further calls to our attention that the trial court made a finding to the effect that the defendant was not negligent in doing what it did, and that the plaintiff is estopped.

The plaintiff contends that the reply so made by the defendant is insufficient, and he cites and relies on Janin v. London & S. F. Bank, 92 Cal. 14, 27 P. 1100, 14 L. R. A. 320, 27 Am. St. Rep. 82; Hatton v. Holmes, 97 Cal. 208, 31 P. 1131; Los Angeles Inv. Co. v. Home Sav. Bank, 180 Cal. 601, 182 P. 293, 5 A. L. R. 1193; Union Tool Co. v. Farmers', etc., Nat. Bank, 192 Cal. 40, 218 P. 424, 28 A. L. R. 1417. Those cases are not in point. Each involved a forged instrument. Moreover, in no one of those cases did it appear that when the forged instrument was presented the bank stayed its hand as to payment, personally notified the depositor in writing, and retained the moneys 60 days after the presentation of the forged instrument and before payment. Those authorities, standing alone, are not decisive of the instant case.

[1-3] The duties and liabilities of a commercial bank and a savings bank are not necessarily the same, and in some respects are

different. Kelley v. Buffalo Savings Bank, 180 N. Y. 171, 72 N. E. 995, 69 L. R. A. 317, 105 Am. St. Rep. 720. A savings bank is bound to exercise ordinary care and diligence only. 7 C. J. 871; Krishkan v. New York Savings Bank, 93 Misc. Rep. 52, 156 N. Y. S. 298; Langdale v. Citizens' Bank of Savannah, 121 Ga. 105, 48 S. E. 708, 69 L. R. A. 341, 344, 104 Am. St. Rep. 94, 2 Ann. Cas. 257. When the garnishment in the attachment suit was served on the defendant, it exercised ordinary care in charging the plaintiff's account with the amount named in the writ, and it exercised ordinary care when immediately thereafter it notified the plaintiff in writing of the service of the writ of attachment. The defendant was not bound to appear in the attachment suit on behalf of this plaintiff. 28 C. J. 275, § 386; Morrison v. New Bedford Institution for Savings, 7 Gray (73 Mass.) 269; Webster v. City, 2 Allen (84 Mass.) 123; Chicago, etc., R. Co. v. Meyer, 117 Ind. 563, 19 N. E. 320; Baltimore & O. S. W. R. Co. v. Adams, 159 Ind. 688, 66 N. E. 43, 60 L. R. A. 396. In the latter case, at page 398 (159 Ind. 691, 66 N. E. 44), the court said: "We need not here undertake to state the measure of the garnishee's duty in all cases, but it may be said, so far as the main action is concerned, that, where the principal defendant has personal knowledge of the suit, the former is not bound to go further than to look to the jurisdiction, act fairly, and make a full disclosure. In Wigwall v. Union Coal & Min. Co., 37 Iowa, 130—a case much like this—it was said: 'The defendant in this case has once paid the amount due plaintiff to a creditor of his, whereby plaintiff has had the full benefit of it. The defendant ought not to be required to pay the amount a second time, unless guilty of some negligence or wrong toward the plaintiff. The finding of facts shows that the defendant answered truly and fully every known fact, and also stated that the plaintiff herein, its creditor, claimed to be the head of a family, whereby the debt sought to be garnished would be exempt. The plaintiff herein was a party to the case, and was fully notified of the garnishment proceedings. It was his duty to furnish defendant the information and means to prove the fact, or himself to prove it.'"

In the instant case there is no question whatever but what the defendant acted fairly and made a full disclosure. At the time the writ of attachment was served, it was not required that the attachment creditor should contemporaneously cause to be served a summons. Therefore there is no question involved, at that stage of the proceedings, of jurisdiction of the persons or jurisdiction of the subject-matter. However, the question still remains whether the court in the attachment suit had jurisdiction of the person of the defendant at the time that a final judgment was ordered and execution issued. As to that question, the defendant contends that the plaintiff is estopped. The trial court so held. We think it did not err. After the writ of attachment was served and this plaintiff was notified of the service, he stood by in silence for the period of 70 days without advising this defendant that he was not the Henry Evans named as defendant in the attachment suit. In the foregoing facts are found all of the elements of a complete estoppel. Code Civ. Proc. § 1962, subd. 3; Biddle Boggs v. Merced Mining Co., 14 Cal. 279. The plaintiff's attempt to distinguish the facts in the instant case from the rule in the case cited is not sound. He assumes facts not found. He places a duty on the defendant which rested on the plaintiff, as we have shown above.

We find no error in the record. The judgment is affirmed.

We concur: KOFORD, P. J.; NOURSE, J.

---

95 Cal. App. 490

Amelia LENCIONI, Administratrix, Plaintiff and Appellant, v. FIDELITY TRUST & SAVINGS BANK OF FRESNO, Defendant, Cross-Complainant and Respondent, and Minnie Helene Setchel, Cross-Defendant, Cross-Complainant and Appellant, and Amelia Lencioni et al., Interveners, Cross-Complainants and Respondents. (Civ. 6261.)

District Court of Appeal, First District, Division 1, California. Jan. 12, 1929.

Appeal by cross-complainant from a judgment of the Superior Court of Fresno County, Charles R. Barnard, Judge, in an action for an accounting. Reversed.

F. de Journel and Conley, Conley & Conley, all of Fresno, for appellant.

Cosgrave & Barstow, of Fresno, for respondent Fidelity Trust & Savings Bank of Fresno.

Harris & Hayhurst, of Fresno, for interveners, cross-complainants, and respondents Amelia Lencioni et al.

PER CURIAM. Rehearing is denied. It is true the opinion ([Cal. App.] 273 P. 103) quotes from the opinion on the former appeal (69 Cal. App. 325, 231 P. 366) in which the judgment for nonsuit was reversed and the cause remanded for trial to permit the defendant and cross-complainant bank to establish, if it could, the allegations regarding estoppel, and to disprove the evidence offered in support of the claim of cross-complainant Minnie Helene Setchel. While the fact that the final trial was had before a different judge was not called to our attention, it will be noted that the opinion states: "The same facts summarized in the quotation from the opinion on the former appeal as given by Mrs.

Setchel in her deposition were again testified to by her on the issues raised by reason of the appearance in the action of the interveners;" and, further, "we have not only considered the testimony set out in the briefs of appellant, respondent bank, and the interveners and cross-complainants, but have read the entire record"; it follows therefore that the evidence adduced at the trial of the case originally, from which we have quoted, is not given the character res adjudicata.

---

96 Cal. App. 243

In re CLARK'S ESTATE.

CLARK v. CLARK et al.

(Civ. 6338.)

District Court of Appeal, Second District, Division 1, California. Jan. 10, 1929.

1. Executors and administrators 🔑194(1, 7)—Order for family allowance rests within trial court's discretion, which will not be reversed on appeal unless abused.

Generally order for family allowance rests within sound discretion of trial court, and, unless abuse of discretion be clearly apparent, order will not be disturbed on appeal.

2. Executors and administrators 🔑176—Discontinuance after distribution of estate of family allowance to widow receiving substantial income held discretionary and not error because of widow's appeal from order in course of distribution "during progress of settlement of estate" (Code Civ. Proc. § 1466).

Where practically all assets of estate had been distributed and widow was awarded property from which she would receive income between $300 and $400 per month and owned home worth $25,000, order discontinuing family allowance was within trial court's discretion, and was not error as made "during progress of settlement of estate," under Code Civ. Proc. § 1466, by widow's appeal from order made in course of distribution of estate to prevent final distribution for purpose of having family allowance continue.

[Ed. Note.—For other definitions, see Words and Phrases, Second Series, During Progress of Settlement.]

3. Executors and administrators 🔑176—Claim to family allowance during settlement of estate should be determined in light of circumstances when discontinuance was made (Code Civ. Proc. § 1466).

Claim by widow to family allowance "during progress of settlement of estate," under Code Civ. Proc. § 1466, should be determined in light of facts and circumstances existing as of time order discontinuing allowance was made.

Appeal from Superior Court, San Diego County; Charles C. Haines, Judge.

Proceeding by Eliza S. Winn Clark against Dillard H. Clark, Jr., and others. From an order discontinuing allowance to plaintiff, plaintiff appeals. Affirmed.

Crouch & Sanders and John W. Willmott, all of San Diego, for appellant.

Wright & McKee, of San Diego, for respondents.

HOUSER, J. The question involved in this appeal relates to the legality of a judgment or order by which a former order of allowance made to the widow of the deceased was reduced in amount and later altogether discontinued.

It is conceded that the parties to the appeal are bound by the findings of fact which were made by the trial court, and which, so far as are here material, may be briefly stated as follows: Besides the widow, the decedent left surviving him two children by a former wife. His estate in California was valued at approximately $300,000. By his will decedent left the widow a life interest in $40,000—the bulk of the remainder of his estate to his children. After all claims against the estate had either been "allowed or provided for," there remained a value of $200,000 for distribution among the heirs. In addition to the estate in California, decedent left an estate in Oklahoma, consisting of surface rights in 160 acres of land, unproductive mineral rights in other lands, and approximately 10 per cent. of the mineral rights in the said 160 acres, which at that time were producing oil and gas. The widow waived her rights under the provisions of the will of deceased and elected to claim such interest in the entire estate of the testator as by law she might be entitled to receive. In Oklahoma she laid claim to and was awarded an undivided one-third interest in the estate left by the testator therein; from which at the time the order here in question was made she had received the sum of $7,000 in advancements upon her distributive interest, and within a short time would be in receipt of an income from the remainder of the estate in Oklahoma amounting to between $300 and $400 per month. Of the estate in California, up to the time the order in question was made, the widow had received as family allowance a total of $14,600, which had been paid to her at the rate of $750 per month for one year, and thereafter at the rate of $500 per month. A claim interposed by the widow in this state, that $200,000 of the California estate of the decedent was community property and that she was entitled to an undivided one-half thereof, was by the court denied. At that time it was shown that the widow was the owner and in possession of the home, of the value of $25,000, formerly held in joint tenancy and occupied by her and the deceased. It also appeared that the home was very expensive to maintain; that the deceased was a retired officer of the United States Army with the rank of major, and that he and his wife "moved in good circles of society"; that the widow was "far advanced in age, feeble and somewhat crippled, a woman of culture and refinement * * * not capable of earning a livelihood." It further appeared that the petition of the children of decedent to distribute the estate and the petition by them to reduce and discontinue the family allowance were heard together by the trial court, and that, upon the hearing of such petitions, it was determined by said court that all the estate of the decedent was his separate property and passed under his will; that no part of same was community property; that the respondent had no interest therein; and distribution was accordingly ordered of practically the entire estate to the children of decedent, except such thereof as was necessary to pay claims, taxes, and expenses of administration; that such sums as theretofore had been paid to the widow as "family allowance" were reasonably necessary and proper.

From such facts the trial court drew the following conclusions of law:

"That in view of the practical total distribution of this estate being ordered at this time to persons other than the respondent, the family allowance to the widow should be discontinued, but in a reasonable way, so as to allow her a reasonable time in which to make adjustments and provide for her future maintenance.

"That the respondent should receive the $500 monthly allowance which will accrue to her on the 28th day of October, 1927, under the former order by this court; that she shall thereafter receive further sums as follows, and no more: The sum of $250 on the 28th day of November, 1927, and on the 31st day of December, 1927, the sum of $158.33; and that from and after January 1st, 1928, the family allowance be discontinued."

The point presented by appellant is that the trial court erred in reducing and finally discontinuing the family allowance, for the reason that distribution of the estate had been ordered to others than the widow.

Section 1466 of the Code of Civil Procedure contains the provision that: "If the property set apart is insufficient for the support of the widow and children, or either, the court or a judge thereof must take such reasonable allowance out of the estate as shall be necessary for the maintenance of the family, according to their circumstances, during the progress of the settlement of the estate. * * *"

What is meant by the expression, "during the progress of the settlement of the estate," has heretofore received consideration from courts of appellate jurisdiction. In the matter entitled In re Dougherty's Estate, 34 Mont. 336, 86 P. 38, in effect it was held primarily that the facts and circumstances surrounding a petition relating to the granting of a family allowance to the widow of the deceased should control, that the widow was entitled to a family allowance for such time only as was reasonably necessary to settle the estate, and that the trial court was justified in refusing any such allowance after the estate should have been reasonably ready for distribution. And those principles of law in substance were affirmed in the later case of In re Eakins' Estate, 64 Mont. 84, 208 P. 956. See, also, Estate of Treat, 162 Cal. 250, 256, 121 P. 1003.

[1] It is a general rule, attested by many authorities, that, at least so far as the amount is concerned, an order for family allowance rests within the sound discretion of the trial judge; and, in consequence, unless an abuse of discretion be clearly apparent, the order will not be disturbed on appeal. In re Lux, 100 Cal. 593, 605, 35 P. 341; Estate of Bump, 152 Cal. 274, 92 P. 643; Estate of Cowell, 164 Cal. 636, 130 P. 209; Estate of Nelson, 167 Cal. 321, 139 P. 692.

In the case last cited, the original family allowance was $500 per month. Upon partial distribution, but $7,600 remained in the estate, of which amount $1,600 was then due the widow for accrued allowance. Held, not an abuse of discretion for the court to reduce the family allowance to the sum of $50 per month.

[2, 3] Considering the facts hereinbefore outlined, together with the authorities to which attention has been directed, it would seem clear that the trial court was acting within its discretion herein. With the exception of certain claims pending against the estate, all the assets of the estate had been distributed. Although the legality of the order of distribution was subject to inquiry by appeal, all intendments favored the judgment, and the trial court was justified in assuming that its judgment was sound and would be upheld by the appellate court, as in fact it has been, and that judgment is now final. The contention on the part of the appellant that the widow was entitled to a family allowance "during the progress of the settlement of the estate," or until the estate was finally settled, should be determined in the light of the facts and circumstances existing as of the time the order in question was made. In the Montana case (In re Dougherty's Estate, 34 Mont. 336, 86 P. 38) it was apparent that the widow, who was the administratrix of the estate, was preventing a final distribution of the estate solely for the purpose of having the family allowance (theretofore ordered by the court) paid to her, to the end that the assets of the small estate would be exhausted exclusively in her favor and that the other heirs of the deceased would receive no part of the estate. As hereinbefore indicated, the ruling was a denial of such assumed right—in other words, the language of the statute should receive an interpretation consonant with right and justice. If in all cases were the words of the statute

to be literally construed, it would always be possible for the widow, upon one pretext or another, to prevent the closing of the estate, and thus exhaust its resources to the injury of the other heirs. For example, if it be assumed that, as is here urged by appellant, an appeal from an order made in the course of the distribution of an estate would have the effect of tolling the statute in favor of the payment of the family allowance "during the progress of the settlement of the estate," it is apparent that for the refusal by the trial court to make any imaginable order requested by the widow of the testator, an appeal might be attempted or taken which would have the effect of delaying the final distribution of the estate and result in a continuance of the payment of monthly amounts to the widow as "family allowance"; and that sort of thing might be many times repeated, and so long as any funds or assets remained in the estate.

This court is of the opinion that the judgment and orders should be affirmed. It is so ordered.

We concur: CONREY, P. J.; YORK, J.

96 Cal. App. 248

LAVERS v. JONES. (Civ. 5537.)

District Court of Appeal, Second District, Division 1, California. Jan. 10, 1929.

1. Bills and notes 🔑448—Maker, compelled to pay note on comaker's refusal, could not recover on note from comaker, but had remedy for money paid.

Where one of two makers was compelled to pay note on comaker's refusal to pay it, obligation was discharged, and no recovery on note could be had by maker who paid it, or his assignee, as against comaker, but he had a cause of action for money paid out for the use and benefit of comaker.

2. Bills and notes 🔑534—Maker compelled to pay note on comaker's refusal held not entitled to recover attorney's fees from latter.

One of two makers compelled to pay note on comaker's refusal to pay it could not recover attorney's fees from comaker in judgment against latter for money paid out and received for latter's use and benefit.

3. Assignments 🔑31—Maker's general assignment of title and interest in note held sufficient assignment of his cause of action against comaker for money paid out.

General assignment, by one of two makers compelled to pay note on comaker's refusal to do so, of all his right, title, and interest in and to the note, *held* sufficient assignment of said maker's cause of action against comaker for money paid out and received for latter's benefit, in view of maker's testimony that parties intended to transfer all of maker's rights in transaction.

Appeal from Superior Court, Kern County; Erwin W. Owen, Judge.

Action by F. Lavers against Guy Jones. Judgment for plaintiff, and defendant appeals. Modified and affirmed.

Emmons & Aldrich, of Bakersfield, for appellant.

Brittan & Brittan, of Bakersfield, for respondent.

HOUSER, J. The facts are that defendant and one Brown executed a promissory note in favor of a bank. On maturity, and after the refusal of defendant Jones to pay the note, it was paid by Brown. Thereupon the bank assigned to Brown all its interest in the note, which in turn Brown assigned to plaintiff. From a judgment in favor of plaintiff, defendant appeals.

The complaint contained two causes of action. By the first, in substance, the facts hereinbefore set forth were alleged. By the second, in addition to such facts, plaintiff alleged that on the date when Brown paid the note defendant became indebted to him "for money paid out and received for the use and benefit of the defendant at his special instance and request in the sum of $1027.79 and for which amount said defendant agreed to pay."

[1, 2] As to the first cause of action, appellant's contention that as the note was paid by Brown, the obligation was discharged, and consequently that no recovery on the note could be had by Brown or his assignee as against the comaker of the note, finds support in the cases of Yule v. Bishop, 133 Cal. 574, 62 P. 68, 65 P. 1094, and McDonough v. Nowlin, 17 Cal. App. 45, 118 P. 463. However, in each of those authorities a pleading such as is stated by plaintiff in the second cause of action is directly authorized and recognized as proper in a case of the nature of that here under consideration. For its legality, therefore, the judgment must rest on the second cause of action. As drawn, the judgment includes an item of $150 for attorney's fees. No authority has been produced by which the recovery of attorney's fees has been authorized in a situation such as is here presented.

[3] Appellant also contends that the record does not disclose that the second cause of action was ever directly and in express terms assigned to plaintiff. We think, however, that the general assignment of all the right, title, and interest of Brown in and to the note in question, together with the testimony of Brown on the subject, sufficiently sustains the position of plaintiff to the effect that the parties to such assignment contemplated the transfer to plaintiff of all the rights of Brown in the transaction. 3 Cal. Jur. 261; Goldman v. Murray, 164 Cal. 419, 129 P. 462.

Appellant's other objections are covered by the fact that on examination of the transcript of the record made in the lower court it satisfactorily appears that the evidence supports the findings, and that the conclusions of law thereon are in accordance with the law as indicated in the authorities to which reference has been had.

It is the conclusion of this court that the judgment should be modified by striking therefrom the item of $150 allowed as attorney's fees. As thus modified, it is ordered that the judgment be and it is affirmed; neither party to recover his costs on appeal.

We concur: CONREY, P. J.; YORK, J.

---

96 Cal. App. 318

HUTCHINGS v. SOUTHWESTERN AUTOMOBILE INS. CO. OF LOS ANGELES.

(Civ. 5439.)

District Court of Appeal, Second District, Division 1, California. Jan. 17, 1929.

1. Insurance 🔑389(2)—Policy covering automobile against embezzlement held not avoided by assured's noncompliance with provision requiring registration, where no inquiry concerning registration was made.

Right of recovery on policy covering embezzlement of automobile *held* not defeated by fact that automobile was not registered in plaintiff's name at time insurance policy was issued, as required by policy making registration in owner's name at time of issuance of indorsement condition precedent, since insurer waived provision by failure to inquire of assured as to the registration or to investigate records in office of motor vehicle department, where assured was actually the owner of the car.

2. Insurance 🔑372—Provisions of policy as to acts required of assured may be waived.

Though it is the duty of the assured to comply promptly with provisions of policy as to acts required of him, law is well established that such requirements may be waived.

3. Insurance 🔑558(1), 559(1)—Delay of assured in giving notice and failure to swear to written statement of loss held waived by answer admitting notice; letter acknowledging receipt and denial of liability.

Delay of assured in giving notice of loss under embezzlement policy covering automobile and failure to swear to written statement of loss *held* waived by insurance company by answer admitting receipt of due notice of loss and by letter acknowledging receipt of claim and subsequent letter refusing claim on ground that car was not properly registered.

Appeal from Superior Court, Los Angeles County; Harry R. Archbald, Judge.

Action by William R. Hutchings against the Southwestern Automobile Insurance Company of Los Angeles. Judgment for defendant, and plaintiff appeals. Reversed.

Clark & Law, Law & Overholt, all of Los Angeles, for appellant.

L. J. Styskal, of Los Angeles, for respondent.

HOUSER, J. This appeal is from a judgment in favor of the defendant.

Plaintiff was the owner of an automobile which he sold to one Brown on an installment contract. Nine days thereafter the defendant issued to plaintiff an insurance policy, which, among other things, purported to insure plaintiff against the embezzlement of the automobile by Brown. One of the covenants contained in the insurance policy was the following:

"It is a condition precedent to any right of recovery hereunder or under the policy to which this endorsement is attached, that the automobile hereby insured has, at the time of issuance of this endorsement and the attached policy, been lawfully registered with the Motor Vehicle Department of the State of California in the name of the said vendor as the legal owner, and the name of the said vendee as the registered owner thereof."

[1] It is urged by respondent that the fact that, at the time the insurance policy was issued, the automobile was not registered in the name of plaintiff had the effect of voiding the policy. With reference to the situation covered by such "condition precedent" in the policy, the case of Raulet v. Northwestern National Insurance Co., 57 Cal. 213, 107 P. 292, would appear to be controlling in principle. In that case the insurance policy, which covered certain furniture, contained a clause in substance that, if the insured property either was, or should become, "encumbered with a chattel mortgage," the policy should be void. It appeared that, at the time the policy was issued, there was in fact a chattel mortgage upon the property to secure the payment of rent for the building in which the furniture was located. Although primarily it was held that such a mortgage did not come within the spirit of the provision of the insurance policy to which attention has been directed, it was also held in effect that such a provision was in the nature of a "veritable trap for the unwary," and, before it could be binding upon the assured, "the company should be required to call specifically to the attention of the policy holder" the provision in question. Among other things, the court said:

"The courts, while zealous to uphold legal contracts, should not sacrifice the spirit to the letter nor should they be slow to aid the confiding and innocent. The defendant should either have made inquiries in reference to the chattel mortgage, required a written application covering by question and answer all the material provisions of the policy, or have consulted the records in the recorder's office where it would have been apprised of the encumbrance."

See, also, Coniglio v. Connecticut Fire Ins. Co., 180 Cal. 596, 599, 182 P. 275 (5 A. L. R. 805); Sharp v. Scottish Union, etc., Co., 136 Cal. 542, 545, 69 P. 253, 615; 14 Cal. Jur. 522.

In the case of Coniglio v. Connecticut Fire Ins. Co., 180 Cal. 596, 599, 182 P. 275, 276 (5 A. L. R. 805), among other things, it is said: "* * * It is to be remembered that contracts of this sort are to be interpreted in the light of the fact that they are drawn by the insurance companies and are rarely, if ever, understood by the people who pay the premiums. Every rational indulgence must be shown the assured."

In the instant case it was stipulated that plaintiff was actually the owner of the automobile. At the time the policy was issued it did not appear that any inquiry, either oral or in writing, was made of plaintiff as to whether the automobile had been registered in the name of plaintiff. Nor was any evidence introduced on the trial which would tend to show that the records in the office of the motor vehicle department were consulted by the defendant for the purpose of determining the facts affecting the registration of the automobile. In such circumstances, adopting the language of the court in the case of Raulet v. Northwestern National Ins. Co., 157 Cal. 213, 107 P. 292, to which reference has been had, "considering the nature of the contract and the relation of the parties, there should be no difficulty in reaching the conclusion that this provision was waived and it therefore constitutes no bar to recovery."

[2, 3] The insurance policy in question contained a further provision in substance that, "in the event of loss" of the automobile, the assured should "forthwith give written notice" thereof to the defendant, and within ten days after the giving of such notice file with the defendant a "signed and sworn statement, showing the items and dates," etc. It is now the contention of the respondent that, because plaintiff failed to comply literally with such requirements, the defendant was relieved from liability under the terms of the contract between the parties. It appears that the loss of the automobile was discovered on or about April 30, 1924. With reference to the required notice of such loss to the defendant, the allegation of plaintiff's complaint was:

"That on or about the 8th day of May, 1924, the plaintiff herein duly notified said defendant of said fraudulent concealment and embezzlement of said automobile, and furnished said defendant satisfactory proof thereof."

The answer of the defendant to such allegation was that defendant "admits that on or about the 8th day of May, 1924, plaintiff herein duly notified said defendant of said fraudulent concealment and embezzlement of said automobile, but denies that at that time, or at any time, or at all, the plaintiff has ever furnished the defendant with any proof of such fraudulent concealment and embezzlement, or has furnished said defendant with any satisfactory proof of said fraudulent concealment and embezzlement."

In addition to such admission that the defendant was "duly notified" of the loss of the automobile, it appears that on May 12, 1924, the defendant wrote a letter to plaintiff as follows:

"Acknowledging copy of contract of Frank Brown for which you wish to enter claim under the embezzlement clause of our policy—

"Please be advised we have entered this claim on our records.

"We are enclosing herewith Proof of Loss which we will ask you to kindly fill in, sign and return to us in order to complete our file."

On May 18, 1924, in response to such letter, plaintiff did "*fill in, sign and return*" to the defendant the "Proof of Loss" required by the defendant and referred to in its communication to plaintiff, but failed to swear to such statement. In addition thereto, at the time when the defendant finally refused to allow the claim of plaintiff for loss of the automobile, defendant formally notified plaintiff in writing that, "in view of the fact that this car *was not properly registered* at the time of sale, * * * we cannot assume liability for the payment of this claim."

Although, as urged by respondent, on the happening of a loss, as a general rule it is the duty of the assured to promptly comply with the requirements of the policy on his part to be performed, it is just as well established law that such requirements may be waived. This court is of the opinion that the admissions in the answer by the defendant, together with the facts hereinbefore set forth, constituted a waiver by the defendant of its right to an immediate notice by plaintiff of the loss of the automobile as well as to a "signed and *sworn* written statement showing items and dates," etc.

The judgment is reversed.

We concur: CONREY, P. J.; YORK, J.

96 Cal. App. 337

SOUTHERN CALIFORNIA EDISON CO. v. INDUSTRIAL ACCIDENT COMMISSION OF CALIFORNIA et al. (Civ. 6139.)

District Court of Appeal, Second District, Division 2, California. Jan. 18, 1929.

Master and servant 🔑405(6)—Commission held under evidence to have no basis for award to injured employee of additional living expenses while being treated (Workmen's Compensation Insurance, and Safety Act, §§ 1, 12(4) (b).

In view of Workmen's Compensation, Insurance, and Safety Act (St. 1917, p. 831), §§ 1, 12(4) (b), as to treatment of injured employee, and as to including "market value" of board, lodgings, and other advantages received by him as part of his remuneration in determining his average weekly earnings, it is not within the province of the Commission to award him excess living expenses while being treated outside a hospital at places other than where he was employed; there being no showing that such expenses were reasonable, and no basis being furnished from which may be computed the market value of the accommodations furnished him when working at his employer's camp.

Proceeding under the Workmen's Compensation Act by Robert Jansen, employee, opposed by the Southern California Edison Company, employer. To review an award by the Industrial Accident Commission for extra living expenses while being treated outside a hospital, the employer applies for certiorari. Award annulled.

Roy V. Reppy and E. W. Cunningham, both of Los Angeles, for petitioner.

G. C. Faulkner, of San Francisco, for respondents.

CRAIG, J. The respondent Robert Jansen was employed by the petitioner herein as a rigger and boiler maker on February 19, 1925, on which date he was injured in the course of and arising out of his employment. Prior to his injury he resided at one of the petitioner's mountain camps at Big Creek, where he was furnished board and lodging. When so injured the respondent Jansen was removed to and confined for treatment at petitioner's hospital at Big Creek until August 8, 1925, when he was placed in a hospital at Los Angeles for further hospital and medical treatment by petitioner's chief surgeon, and there remained until May 11, 1926. On June 12, 1926, Jansen filed an application with the Industrial Accident Commission for adjustment of claim, and, after hearing therein, was awarded $20.83 per week, with interest, and hospital and surgical treatment to cure and relieve him from the effects of his injury. Said claim was numbered 6205. On October 28, 1926, the applicant again returned to the Los Angeles hospital, where he remained until May 6, 1927. On September 21, 1927, he filed a second application for adjustment of claim, which was numbered 23538, wherein it was recited that: "A question has arisen with respect to the liability of the employer or insurance carrier, and the general nature of the claim in controversy is, question of liability for extra living expenses on account of medical treatment." At the hearing of this latter application it appeared that payments previously ordered, totaling $2,814.36, had been made, and were still being made. The applicant then testified, and it was found by the Commission that Jansen was treated "but not in the hospital" on August 10, 1926, May 12 to October 27, 1926, inclusive, and May 6 to August 2, 1927, inclusive, a total of 259 days; that, while so receiving treatment and residing outside of a hospital, he incurred expenses at Los Angeles for two rooms at 75 cents per day, meals at $1.50 per day, and that his daily expenses for laundry, car fare to the hospital, and for a man to help him bathe, were 35 cents, 10 cents, and 25 cents, respectively. It further appeared that during a portion of the 259 days the applicant resided at San Francisco, where two rooms cost him $26.25 per month, and that he there expended $1.85 per day for meals, and $1 per week for laundry. On December 13, 1927, the respondent Commission rendered findings consolidating the claims numbered 6205 and 23538, reciting that: "Said applicant was under medical treatment and observance for a period of 259 days in the city of Los Angeles, California, * * * and during said period of 259 days the applicant was not confined in any hospital. * * *" A "supplemental award for excess living expenses" was rendered in the sum of $427.35, upon the basis of a difference in living expenses of $1.05 at the labor camp, and $2.70 at Los Angeles, per day. Upon application of petitioner for a rehearing upon this latter award, which was granted, it was contended that the applicant was entitled to board and lodging at the camp only when working, that there was no showing as to what would have been the cost of maintenance while being treated at Big Creek outside of the camp, or that such expense was, or would have been, higher at Los Angeles; that the Commission was without authority to assume and make an award upon the theory that the applicant might select and enjoy expensive quarters according to his personal taste. At the rehearing it was admitted that the "applicant demands the difference between his living expenses at Big Creek, at the time of his injury, and his living expenses while under treatment for said injury at Los Angeles, during 259 days spent outside of the hospitals." The second award was modified, allowing a total of $401.45, upon a basis of the difference between $1.15 daily expense at Big Creek, and $2.70 at Los Angeles.

The petitioner contends that these excess living expenses during 259 days outside of any hospital constituted no part of the medical, surgical, and hospital treament contemplated by the Workmen's Compensation, Insurance, and Safety Act (St. 1917, p. 831, as amended), and were not allowable; that there is no evidence of the applicant having resided at the labor camp on the date of the injury; that none but men actually at work for the petitioner at Big Creek were permitted to live at the camp, and that Jansen lived there temporarily only, when so employed.

It appears that the Commission consolidated the two applications and based its supplemental award of excess living expenses upon the whole record, notwithstanding the fact that it had previously finally rendered findings and awarded compensation, with which petitioner herein fully complied, upon the evidence first introduced concerning the question of injury and disability. The respondent Commission in its briefs dwells entirely upon the severity of Jansen's injuries, and a general history of the case, but cites no authorities, and we find no evidence in the record, tending to support an award of any excess over the market value of maintenance at the labor camp. Nor do we observe any finding tending to sustain respondent's assertion that: "The giving of this same medical treatment at Big Creek would not have necessitated this additional expense to the employee." What the expense to an injured employee might have been at Big Creek does not appear by evidence nor finding. As provided by section 1 of the act, the injured employee was entitled only to "full provision for such medical, surgical, hospital and other remedial treatment as is requisite to cure and relieve from the effects of such injury"; and subdivision 4 (b) of section 12 provides that: "In determining such average weekly earnings, there shall be included overtime and the *market value of board, lodging, fuel, and other advantages received by the injured employee, as part of his remuneration, which can be estimated in money.*" That the applicant received full medical, surgical, hospital, and other remedial treatment, appropriate to his necessities, is not denied. The part of his remuneration to which he was entitled, when not residing at a hospital, at petitioner's expense, would be the *market value* of his board, lodging, and other advantages, when his employment ceased by reason of the injury. The allowance to the applicant, therefore, would be the difference if any between the labor camp charges of $1.15 per day when actually at work, and the cost of like advantages elsewhere, if employed. Yet, while there is abundance of evidence as to amounts actually expended by the injured employee for rooms, board, etc., at Los Angeles, we are able to find no scintilla of evidence as to whether or not his accommodations in said city were in any way similar to those furnished by petitioner, or were more luxurious, nor is there any evidence as to their general market value. "Market value" has been defined as "the price or sum for which an equivalent could be reasonably and fairly purchased at or near the place where the property should have been delivered," at or about the time. Redhead Bros. v. Wyoming Cattle Inv. Co., 126 Iowa, 410, 102 N. W. 144. This same rule was adopted by our Supreme Court in Bullard v. Stone, 67 Cal. 477, 480, 8 P. 17. Since there is no showing that the items expended by the employee and attempted to be incurred for the account of his former employer were reasonable, and no basis is furnished from which the market value of his accommodations may be computed, we think it was not within the province of the Industrial Accident Commission to make the award of which complaint is made.

The award of excess expenses is annulled.

We concur: WORKS, P. J.; THOMPSON, J.

96 Cal. App. 314

HARKINS v. BRUNS et al. (Civ. 6538.)

District Court of Appeal, First District, Division 1, California. Jan. 17, 1929.

1. Pleading ⚷345(1)—Presentation of material issue by answer precludes entry of judgment on pleadings.

Judgment on pleadings cannot be taken, where material issue is presented by the answer.

2. Pleading ⚷345(2)—In action by lessee against lessors and sublessee, sublessee's denial of allegations of complaint as to execution and performance of original lease held not to raise material issue, precluding judgment on pleadings.

Entry of judgment on pleadings in action for declaratory judgment by lessee against his lessors and sublessee *held* not erroneous as to sublessee by virtue of his denial of the execution of the original lease and of plaintiff's performance of the terms thereof, as alleged in the complaint, since such allegations were immaterial as to the sublessee and his denial of the same did not raise an issue of fact.

3. Pleading ⚷84—One defendant, answering separately, need not answer allegations relating solely to the other defendant.

Where complaint is directed against two persons, and the liability of one involves facts which are not material to the liability of the other, and the parties plead separately, neither is required to answer those allegations which relate solely to the other.

Appeal from Superior Court, City and County of San Francisco; John J. Van Nostrand, Judge.

Action by William George Harkins against J. H. Bruns, Frank Granucci, and others.

From an adverse judgment, defendant last named appeals. Affirmed.

Devoto, Richardson & Devoto and Anthony S. Devoto, all of San Francisco, for appellant.

Max Mayer, of San Francisco, for respondent.

TYLER, P. J. Action for declaratory relief based upon certain written leases. The complaint alleges, in substance, that plaintiff and defendant J. H. Bruns entered into a lease for the term of ten years, commencing on the 26th day of December, 1916, and ending December 26, 1926, covering certain premises located at Nos. 2011 and 2015 Mission street, and known as McKinley Market; that in the said lease an option was reserved in favor of the plaintiff, providing that, in the event all the terms and conditions were faithfully and satisfactorily performed, the lessee should have the first option or right of a lease for another term of ten years upon the expiration of the lease, the rent, if not agreed upon, to be fixed by arbitration, said option to be exercised by the lessee 15 days before the expiration of the lease. At the time of the execution of this instrument, defendant Bruns was the owner of said premises, but he subsequently sold the same to defendant Lachman Bros. Investment Company, a corporation, which is the present owner thereof. The complaint, proceeding, alleges that plaintiff has faithfully and satisfactorily performed and carried out all the terms and conditions of the lease so as to entitle him to exercise the option contained therein, but that defendant Lachman Bros. now refuses and neglects to agree with plaintiff concerning the rent covered by said option, and has neglected and refused to refer the said matter to arbitration. The allegations of the complaint, so far as defendant Frank Granucci is concerned, allege that plaintiff entered into a lease with him for the premises above described for a term of five years, commencing November 21, 1921. This lease contained a renewal option for five years, similar in substance to that contained in plaintiff's lease. Judgment was prayed for declaratory relief, to determine what the rights of plaintiff herein are under and by virtue of the said option contained in the lease executed with defendant Bruns, and also for declaratory relief to determine the rights and obligations of plaintiff under and by virtue of the option contained in the lease executed between plaintiff and defendant Granucci, said option being given in reliance of the option contained in the lease of plaintiff. Defendants Bruns and Lachman Bros. interposed a demurrer to the complaint upon various grounds. Their demurrers were sustained, and, plaintiff failing to amend, the default of plaintiff as against them was entered, and the action was by stipulation subsequently dismissed as to these defendants. Defendant Granucci filed an answer in which he denied, upon information and belief, the execution of a lease between plaintiff and defendant Bruns, and he likewise denied that the lease contained the option of renewal as above set forth, or that plaintiff had faithfully performed the terms of his lease entitling him to the exercise of the renewal option. He admitted the execution of the lease between himself and plaintiff, and that such lease contained the option of renewal above referred to.

He further alleged that he had exercised the right given under the option, but that plaintiff has refused and neglected to give him a further lease of said premises for five years, as contained and agreed in his lease. Under this condition of the record plaintiff moved for judgment against Granucci on the pleadings. The motion was granted, and judgment was rendered construing the option contained in his lease as prayed for in the complaint. The court adjudged and decreed that the words "first right or option" appearing in the option clause in such lease did not create an absolute obligation on the part of plaintiff to lease the premises in question, but that said words, "first right or option," signified and meant the defendant Granucci had merely a first or preferential right to lease said premises from plaintiff upon complying with all the conditions in the lease and the option clause, in the event only that plaintiff again desired to lease the premises. Appellant does not here complain of the correctness of this construction of the option clause, contenting himself merely with the claim that the court erred in granting the motion for judgment on the pleadings, it being his contention that his denial raised a material issue of fact which he was entitled to have tried, and which precluded the court from rendering judgment on the pleadings.

[1-3] It is true that such a judgment cannot be taken where a single material issue is presented by the answer. Summerville v. Stockton Milling Co., 142 Cal. 529, 544, 76 P. 243; Norris v. Lilly, 147 Cal. 754, 82 P. 425, 109 Am. St. Rep. 188. The present case, however, does not present such a situation. The complaint contained separate allegations concerning the different defendants. Appellant's denials were directed solely to allegations concerning the lease existing between his codefendants and plaintiff, which in no manner, so far as the record shows, concerned his rights. Appellant was not required in his answer to deny such allegations, as they were immaterial as to him, and the fact that he did so did not constitute them material allegations, or raise an issue of a material fact. The allegations which he denied might well be stricken from the pleadings without leaving them insufficient as to him. There was no denial by appellant of any fact ma-

terial to him. The allegations in the complaint which related to appellant's lease with plaintiff and the declaratory relief sought by plaintiff based thereon were separate and distinct from those relating to the lease with the other defendants. Under such circumstances, there was no denial by appellant of any matter in the complaint which was material to him, and, he having admitted by his pleading all the allegations which concerned him, the court properly granted the motion. Where a complaint is directed against two persons, and the liability of one involves some facts which are not material to the liability of the other, and the parties plead separately, neither is required to answer those allegations which relate solely to the other. Hibernia Sav. Soc. v. Dickinson, 167 Cal. 616, 140 P. 265.

This being the sole question presented on the appeal, from what we have said it follows that the judgment should be, and it is hereby, affirmed.

We concur: KNIGHT, J.; CASHIN, J.

---

96 Cal. App. 322

SAN JOAQUIN LIGHT & POWER CORPORATION v. COSTALOUPES et al.

(Civ. 5868.)

District Court of Appeal, First District, Division 1, California. Jan. 18, 1929.

1. Electricity 🔑11—Customers held not excused from performance of contract to use and pay for electrical energy for operation of motor on premises by fact that their manufacturing plant was destroyed by fire during contract period.

Customers, who entered into written agreement with power company to take, use, and pay for electrical energy for specified period at minimum rate for operation of motor located on specified premises, *held* not excused from performance by fact that factory buildings and machinery composing the defendant's manufacturing plant, for the operation of which the electrical energy was used, were destroyed by fire and were not rebuilt, since the subject-matter of the contract was the sale and delivery of electrical energy to the customer, irrespective of its use.

2. Electricity 🔑11—Damages for customer's breach of contract to take and pay for electricity held not difference between contract and resale price (Civ. Code, § 3311).

Measure of damages for customer's breach of contract to take and use power company's electricity for three year period, to be paid for at minimum rate, *held* not determined by difference between contract price and proceeds of resale of electrical energy, under Civ. Code, § 3311, applicable to damages for breach of contract for sale of personal property.

3. Partnership 🔑55—Nonexistence of partnership is not conclusively shown by debtor and creditor relation, or provision of contract denying partnership.

That relation of debtor and creditor exists between parties, and that contract between themselves expressly declares that they are not partners, does not of itself establish that no partnership was created.

4. Partnership 🔑17—Parties whose intent to act as partners appears from contract are partners in fact.

Partnership relation between parties to contract exists, if intent of parties appears to do those things which constitute partnership, though they did not intend their relationship to be called that of partners.

5. Partnership 🔑9(2)—Contract of debtors to deliver cheese products to creditor, who was to sell them, paying salaries, deducting advances, and dividing profits, held to make creditor partner in business.

Contract between creditor and debtors, whereby debtors were to ship cheese to creditor's warehouse to be sold by creditor, with provision for advances, payment of creditor's agent, and division of profits remaining over salaries, subject to prior liquidation of advancements, *held* to make creditor a partner of the debtors.

6. Partnership 🔑5—Right to participate in profits is evidence that business is carried on in behalf of person asserting claim thereto, and may indicate partnership.

Right to participate in profits of business affords urgent evidence that trade, in which profits have been made, was carried on for or in behalf of person asserting the claim to the profits, and may indicate partnership.

7. Partnership 🔑5—Agreement to divide profits implies agreement for division of losses, unless contrary is stipulated (Civ. Code, § 2404).

Agreement to divide the profits of a business implies an agreement for corresponding division of losses, under Civ. Code, § 2404.

Appeal from Superior Court, Mendocino County; H. L. Preston, Judge.

Action by the San Joaquin Light & Power Corporation against John Costaloupes and others, doing business under the firm name and style of the Costaloupes Company. Judgment for plaintiff, and defendants appeal. Affirmed.

Frank W. Taft, of Willits, for appellants.
F. H. Pearson, of Fresno, for respondent.

PARKER, Justice pro tem. In this action plaintiff corporation sought to recover from defendants a certain sum of money alleged to be due under contracts for the furnishing of light and power by plaintiff, a public service corporation, to defendants. At the trial the action was dismissed as against all of the defendants, excepting the defendant John E.

Tsarnas. The case as tried by the court, sitting without a jury, and judgment was rendered in favor of plaintiff as prayed. A recital of the facts, upon which there is no conflict, will better illustrate the nature of the case and the contentions here made.

On May 13, 1921, a written agreement was entered into by and between plaintiff and Costaloupes Company, the terms of which may be summarized. The Costaloupes Company is called the consumer and the San Joaquin Light & Power Corporation is called the company. The company agrees to furnish, and the consumer agrees to take, use, and pay for, electrical energy from the company's system for the term of three years from June 28, 1921, to June 28, 1924, during the continuous period from January 1st to December 31st as it occurs in said period, for the operation of a 15 horse-power motor located on premises described as south end quarter of a certain section, provided, however, that the consumer shall guarantee $394 per annum, as per schedule of rates effective; provided that the consumer may, upon notice prior to the expiration of the term, discontinue the service, and unless such notice is given the contract shall continue from year to year, subject to cancellation by notice of 30 days prior to the expiration of each year. Any notice the company may give to consumer to be addressed to 720 Harrison street, San Francisco, and notice so addressed and deposited, with postage prepaid, shall be deemed sufficient notice. The contract to bind successors of the parties and the word "consumer" to include all purchasers of power by whom this agreement is executed and bind them jointly and severally. The contract was executed by one Henry B. Davidson, in behalf of Costaloupes Company, as manager thereof.

On June 11, 1921, another contract was entered into between the same parties, in writing, covering the same period of time. This contract permitted the purchase of electrical energy for the operation of lights located upon southeast quarter of the section referred to in the previous contract. This contract provided that the consumer shall guarantee $39 per annum. The contract contained all of the provisions of the earlier contract, and was likewise executed by Henry B. Davidson, as manager, on behalf of the consumer. It is a stipulated fact that, before the 28th day of June, 1921, the power corporation expended the sum of $1,299 in building and constructing an electrical and transmission line for the service of electrical energy to the premises of Costaloupes Company, and that said money was expended and said line built pursuant to the contracts hereinafter referred to, and further it is stipulated that the service of electrical energy by plaintiff was actually commenced upon the premises in June 28, 1921. It was further stipulated that the line had been maintained at all times up to June 28, 1924, and up to the date of trial, and that the power corporation had received no payment. It is also stipulated that the total amount guaranteed in the contracts equals the sum expended, namely, $1,299.

It was alleged in the complaint, not denied by defendant, and found by the court to be a fact, that on or about July 8, 1921, the factory, buildings, and machinery composing the manufacturing plant of defendants, for the operation of which plant electrical energy, power, and lights were to be provided, was destroyed by fire, and that defendants have not rebuilt, nor do they intend to rebuild, and that since May 13, 1921, defendants have failed, neglected, and refused to take delivery of or use electrical energy from plaintiff's system. It was also found that the plaintiff has fully performed its obligations under the contracts, and was at all times ready, able, and willing, to perform. The complaint was filed January 26, 1923, and the action brought to trial in December, 1926.

Appellant urges three reasons why the judgment of the lower court should be reversed. We arrange these in a different order than appellant presents them. Appellant contends: First, that the defendants were excused from performance by the destruction of the subject-matter; second, that the court erred in applying the measure of damages in that the contracts were for the sale of personal property, wherein delivery was not made and the title still remained in the vendor; third, that the court erred in finding that defendant John E. Tsarnas was a member of the firm of Costaloupes Company.

[1] On the first ground appellant urges that the contract was to deliver power and light to defendants for the purpose of electrifying the cheese factory building and plant owned and conducted by the latter. It may be here noted that, while the pleadings admit and the court finds that the contract was entered into for the furnishing of light and power for a manufacturing plant, yet the contract itself merely provides for the delivery of electrical energy to a certain described quarter section of land. The allegations and findings do not alter or in any way affect the contract. At the most it would simply determine the fact to be that, when the contract for power and lights was made, it was the intention of the consumer to use the energy in and about the premises used as a manufacturing plant. It is obvious that the subject-matter of the contract was the sale and delivery of electrical energy to the consumer, irrespective of its use. In many respects it parallels the situation where a manufacturer contracts to buy raw material, and subsequent to the contract the factory is destroyed. It would not be contended, in the absence of a specific provision covering, that the buyer would be discharged of his obligation under the contract.

Appellant cites many cases in support of his contention, but these cases simply repeat the familiar rule as set forth in California Jurisprudence, volume 6, at page 443, which is as follows: "Where from the nature of the agreement it is evident that the parties contracted on the basis of the continued existence of the person or thing to which it relates, the subsequent perishing of the person or thing will excuse performance. Thus where the contract relates to the use or possession in any dealing with specific things and performance necessarily depends on the existence of the particular thing, the condition is implied that the impossibility arising from the perishing or destruction of the thing, without default in the party, will excuse performance, because, from the nature of the contract, it is apparent that the parties contracted on the basis of the continued existence of the subject thereof."

We think the facts here do not warrant the application of the rule, nor does the contract. All that appears here is that by reason of the premises the defendants could not use any more power or light in these particular buildings, but if, at any time, they chose to rebuild or make other use or application of the light and power, they could have enforced their right of delivery of electrical energy. See Law v. San Francisco Gas Co., 168 Cal. 112, 142 P. 52, Ann. Cas. 1915D, 842; Field Co. v. Haven, 36 Cal. App. 669, 173 P. 108. The gist of the allegation in the complaint and the essential finding is that defendants failed and neglected to take delivery of or use electrical energy from plaintiff's system under the said contracts. The effect of the finding of the destruction of the premises and factory on the land described whereon delivery was to be made was merely to demonstrate the lack of any substantial or legal reason justifying such failure or to excuse performance. There is nothing in the contract to indicate that the parties contemplated that no amount should become due from consumer in the event that the manufacturing establishment ceased to exist; the contracts with plaintiff plainly imposed an obligation on the consumer to pay the amounts specified whether or not electrical energy was used. We find no merit in this, the appellants' first ground of appeal.

[2] The next point urged is that, whatever construction may be placed upon the contract, it must be held that the entire transaction was nothing more than an agreement of sale of personal property. In this view of the contract appellant urges that the measure of damages ensuing from a breach is set out in section 3311, Civil Code. Without quoting the section here, the appellant, relying on the provisions thereof, argues that the trial court should have inquired and found whether or not there had been a resale of the electrical energy contracted for, and that the difference between the net moneys obtained in case of a resale and the contract price would be the measure of damages, or, in case of no resale, then the damage as set forth in subdivision 2 of section 3311, Civil Code, would apply.

We do not think this point merits the detailed discussion accorded. Quoting from the brief of respondent, we would be interested to know how appellant herein could determine the amount of electrical energy which defendant refused to take, and which, therefore, under his contention, respondent should have sold to others—in other words, how the facts in this case could be determined according to the measure contended for upon which to compute the damages. It is a fact, agreed upon, that in pursuance of the contract the power corporation did expend in the construction of its line the exact amount of money guaranteed as a minimum for electrical energy which defendants would take during the period of the contract. When the corporation agreed to deliver light and power to the consumer, the latter guaranteed to the company the sum of $433 each year.

The case of Marin Water Co. v. Town of Sausalito, 168 Cal. at page 603, 143 P. 774, discusses the identical question here presented. In that case it was said "Respondent assigns as a reason why its demurrer was properly sustained, the failure of the complaint to set forth the damage suffered by appellant which, according to respondent's theory, should be measured by section 3311 of the Civil Code as the difference between the contract price and the value to the water company of the water which the town of Sausalito did not take. The contract with which we are here concerned, however, is not the usual agreement to accept and pay for personal property. It is, as we have shown, one of that class of agreements in which one of the parties promises to pay a minimum sum for a commodity at a fixed rate, such amount to become due whether enough of the commodity to equal such minimum price at the agreed rate is required or not. Such agreements have been upheld and the minimum rate has been sustained as the true measure of recovery, the promise to pay such sum being a part of the direct obligation of the contract and in no sense a covenant for liquidated damages in case of breach." The quoted case cites, in support of the holding, the following cases: Beck v. Indianapolis Light & Power Co., 36 Ind. App. 600, 76 N. E. 313; Klosterman v. United Electric, etc., Co., 101 Md. 29, 33, 60 A. 252.

In the case of Field Co. v. Haven, 36 Cal. App. 669, 173 P. 108, admittedly dictum, the court says (paraphrasing): Appellant contends "that the guarantee clause in the contract was void as providing for liquidated damages. As this point was neither raised in the court * * * for the first time upon the oral argument, we are not required to discuss or decide it. We may state, however, that in our opinion the clause * * * provides not for liquidated damages, but for a minimum compensation to defendant for the services to be rendered by him during the year for which he was employed." In Curtis on the Law of Electricity, § 116, it is said: "A valid contract may be entered into between an electric company and a consumer requiring the payment of a minimum charge. Under such a contract the customer is bound to pay such minimum though he consumes no current at all. The provision requiring the payment of the minimum charge is a part of the direct obligation of the contract and cannot be construed as an agreement for liquidated damages."

Appellant cites with much assurance the earlier case of Terrace Water Co. v. San Antonio Co., 1 Cal. App. 511, 82 P. 562. This case adopts the resuming of the Civil Code sections, thus: Anything that may be owned is called property (section 654) and there may be ownership of all inanimate things which are capable of appropriation or manual delivery (section 655). Every kind of property that is not real is personal (section 663). From these sections the court concluded that electrical energy was personal property. The action was one wherein the consumer was denied power agreed to be furnished and he was required to purchase power elsewhere and was allowed as damages the extra cost over and above the contract price in the original agreement. The court points out that this was the minimum of damage, inasmuch as the injured party did not permit special damage to his lands by reason of lack of water, but secured power for pumping elsewhere, thus mitigating his damage, as was within his power to do. This review of the case demonstrates its inapplicability to the case at bar. A careful reading of the Terrace Water Company Case will show that the court had no intention of establishing a doctrine such as contended for here but merely allowed the plaintiff therein the exact loss to plaintiff. Under the authorities previously cited we see no reason to disturb the judgment.

The third point raised by appellant goes to the liability of defendant John E. Tsarnas. Appellant, for this branch of the case, is willing to concede the correctness of the court's finding and judgment in all other features of the case. But, he claims, the liability thereunder rests in the other defendants, contending that he (Tsarnas) was not a partner or at all connected with the others, save as a general creditor. The question thus presented hinges upon the construction of a written contract before us. No point is made on ostensible partnership, nor is claim made that Tsarnas, by his acts or conduct, led plaintiff or third parties generally to believe that a partnership existed. It may be stated that both parties concede that the determination of whether or not a partnership existed must result from a construction of the contract itself and the recitals therein contained. The contract referred to is a contract entered into on April 1, 1921, being at a time previous to the executions of the contracts between plaintiff and Costaloupes Company. This contract may be summarized as follows:

The parties to the contract are John Costaloupes and Zetelia Costaloupes, described as doing business under the firm name of "Costaloupes Company," the parties of the first part, and John E. Tsarnas, party of the second part. The agreement recites that the Costaloupes are indebted to Tsarnas on a note and mortgage in the sum of $20,500 and other sums in an open account, the total of the latter sums being not known; recites further that the parties of the first part desire to secure $15,000 more, in addition to the present indebtedness, for the purpose of purchasing milk, supplies, and operating expenses, and that Tsarnas is willing to loan and advance the desired sum upon the terms thereafter set out in the contract. In consideration of the premises the parties agree as follows: The Costaloupes are to ship and consign to Tsarnas, and in his name, all of the cheese manufactured by them at their plant to Tsarnas' warehouse in San Francisco, being located at 720 Harrison street, San Francisco. Tsarnas is to sell the cheese at the market price, in as large quantities as consistent with market conditions, and is to properly keep and care for the cheese, without, however, being an insurer, and will make account as and when the cheese is sold. The Costaloupes will continuously manufacture cheese, unless it be agreed between the parties to the contract that market conditions do not justify further manufacture. The Costaloupes, on the 1st day of each month, will render an account to Tsarnas or his representative at San Francisco, or such other place as may be designated by him, showing all purchases made and debts incurred for the purchase of milk supplies, labor, etc., in the manufacture of the cheese. Tsarnas shall collect for all the cheese sold and deposit the money in the bank, together with the $15,000 herein agreed to be loaned, or as much thereof as shall be necessary to pay the operating expenses, and Tsarnas shall, on the 1st day of each month, render account of his sales and receipt of the expenses of storage, sale, etc. All of the expenses connected with the manufacture and the storage and sale shall be paid by check drawn on the funds deposited, which checks shall be signed by John Costaloupes, representing the parties of the first part, and by H. B. Davidson, representing Tsarnas. After the payment of all expenses then the Costaloupes family, three in number, shall receive a total wage of $5,000 per year and Davidson or other person selected as representative for Tsarnas as shall be paid $3,000 per year. After all of these expenses and wage allowances have been paid, the surplus shall be divided equally between the Costaloupes on one side and Tsarnas on the other. The agreement was to continue for one year. All bills were to be paid monthly and the surplus to be divided monthly. During the life of the contract the Costaloupes shall *not* be required to pay any interest on this money owing to Tsarnas, either on the note or mortgage or on the amounts advanced under the contract or upon the sum previously due under the open account. The contract is not to affect, in any manner, the note and mortgage, save that no interest shall be paid thereon, and no foreclosure shall be sought during the term of the contract unless Tsarnas should deem foreclosure necessary to protect his rights against the claim of a third person. Neither party to be liable for debts contracted for by the other. It is agreed further that all of the moneys advanced to the Costaloupes is advanced as a loan and not as a contribution to the business and the receipt of one-half of the net profits of said business is in lieu of payment of interest upon said indebtedness. It is expressly stated in the agreement that the parties thereto are not copartners. It may also be noted that the contract provided that, in case of its termination before the expiration of the year, then Tsarnas might sell whatever stock he had on hand and apply the funds on the unsecured debt and have the right to proceed with the foreclosure of his mortgage.

From this contract the issue as to the relationship between Tsarnas and the Costaloupes Company arises. There is no evidence of any acts or declaration on the part of Tsarnas, nor is there any question of an ostensible partnership created by such acts or conduct. There may be one exception to the statement and that is the fact of the representative of Tsarnas having executed, on behalf of Costaloupes Company, the contract for power and light out of which the controversy arises. Neither side makes comment on the fact, and in so far as it may go on the present issue of partnership it is passed.

[3, 4] It is the contention of appellant that the contract with Tsarnas establishes the fact of relationship of debtor and creditor and nothing further. It is likewise contended that the contract itself expressly negatives any idea of a partnership and expressly discloses the intent of the parties that the relationship should not be that of partners. We may concede that a relationship of debtor and creditor is shown and also that the contract expressly declares that the parties thereto are not partners. However, this does not establish the fact that the parties did not intend to create a partnership between themselves or as to a third person. The parties did intend to create exactly the relationship as shown by the contract, but did not intend that relationship to be called that of partners. Their intention in this respect is immaterial. Appellant and respondent here concede that if the contract by its terms establishes a partnership between the parties, the expressed intent that it should not be so classed would be of no avail. It is the intent to do these things which constitute a partnership that usually determines whether or not that relation exists between the parties. Chapman v. Hughes, 104 Cal. 302, 37 P. 1048, 38 P. 109.

[5] Let us look again to the contract as a whole. The parties prior to the agreement stood in the position of debtor and creditor. A portion of the debt was secured and another portion, amount not stated, stood unsecured or in open account. As the parties stood nothing is disclosed that prevented Tsarnas from foreclosing his mortgage or enforcing collection of the debt not secured. These things, however, he did not choose to do. Tsarnas agreed to finance the continuation of the cheese factory. It is evident from the contract itself that the transaction was quite distinct from a mere loan. Without again detailing the promise of the contract, it may be summed up as though Tsarnas and the Costaloupes met and Tsarnas thus addressed them: "I have a mortgage for some $20,000 on your cheese factory and plant, and you owe me other sums of money unsecured. Go on and operate your factory, and I will place $15,000 in the bank, if that much is needed. Send all of your cheese to me, and I will market it as conditions warrant, and put the moneys thus obtained in the bank, with whatever of the $15,000 it may require in addition thereto. If, after operating the plant, it appears to me it will not pay, we may cancel this agreement. Any time I think it best to protect myself, I can foreclose the mortgage, but no interest will accrue on it during the time the cheese factory is running. I will put my agent there to manage the business with you, and he shall receive $2,000 a year. All the bills shall be paid out of the moneys derived from the factory, and, if that is not sufficient, then I shall advance the balance up to $15,000. Each month we will have an accounting and we will divide the profits equally between ourselves. It may be that I will not have to put up any money at all. Whether I do or not the one-half of the profits will be considered as being received by me as interest. In other words, for my financing or agreeing to finance the business, if we make it succeed, I am to get half of the profits."

Having thus summarized the agreement, we conclude that Tsarnas was not obligating himself to advance anything beyond one month's operation, and that, if the business paid, he was not obligated in any sum, for the reason that, if the moneys advanced for labor and material exceeded the amount, the relationship might be terminated. While, on the other hand, if the moneys exceeded the advancement, then the advancement was first to be liquidated before any profit could result or the monthly division made. We characterize the relationship, as did the court below, as that of partners. The contract created an association of these persons for the purpose of carrying on the business of manufacturing cheese and dividing the profits of that business between them. It contemplated united action in manufacturing cheese and in promoting sales thereof and the joint expense to be incurred thereby. This was sufficient to constitute the relationship of partnership. Chapman v. Hughes, 104 Cal. 304, 37 P. 1048, 38 P. 109, supra.

[6, 7] A right to participate in profits affords urgent, often conclusive, evidence, that the trade in which the profits have been made was carried on in part for or in behalf of the person setting up such claim. It has also been held that the sharing of profits is prima facie evidence of the existence of a partnership. An agreement to divide the profits of a business implies an agreement for corresponding division of its losses, unless otherwise expressly stipulated. Civ. Code, § 2404; Welch v. Alcott, 185 Cal. 761, 198 P. 626. The courts will not countenance contrivances for giving persons the whole of the advantage of a partnership, without subjecting them to the liabilities, and an agreement which attempts to carry out a joint venture for the mutual profit of the adventurers and evade their responsibility for losses may be enforced and construed as creating a partnership. 20 Ruling Case Law, 833, and cases cited; 18 L. R. A. (N. S.) 1084. 20 Ruling Case Law, 828, with cases to support the text, declares the rule as follows: The distinction is drawn between lending money to the prospects of a business and contributing money and investing it as capital in the business. If the party investing the money is to be repaid out of the profits as profits and the amount to depend upon the business there is such a community as will create a partnership. The right of control or any voice in the control is considered an incident of proprietorship and the presence or absence may be of controlling weight. To frame a definition of any legal term, which shall be both positively and negatively accurate, is possible only to those who, having legislative authority, can adapt the law to their own definition. Lindley on Partnership (2d Am. Ed.) 1. Since, therefore, the definition of a legal term, such as partnership, would be a legislative function, we may accept the definition of our Code. Section 2395, Civil Code, defines a partnership as the association of two or more persons for the purpose of carrying on business together and dividing the profits between them. In Westcott v. Gilman, 170 Cal. 568, 150 P. 779, Ann. Cas. 1916E, 437, the court says: "In truth, the existence or nonexistence of a partnership in any case cannot be determined by * * * dissecting the whole relationship into broken parts and members, and studying each disjointed fragment as though it were the complete whole."

Further, in passing upon the question of partnership in the same case, we find this significant language: "It is plain from the very terms of the agreement between these defendants that it measures up to the definition of a partnership as declared by section 2395 of the Civil Code. It was an association of two persons to carry on a definite business and to divide the profits and losses of that business." In Wise v. Radis, 74 Cal. App. 772, 242 P. 93, it is said, in speaking of a situation there presented: "Their joint venture was an association of two persons to carry on a definite joint enterprise and to divide the profits and losses. This, in general, constitutes a partnership." Almost the exact language appears in Becker v. Turpin, 61 Cal. App. 20, 214 P. 255.

Applying these authorities to the case at bar, we find that the letter and spirit of the contract combined to manifest that its purpose was to carry on the business, rather than enforce a past indebtedness. The dominant characteristics of the contract was to carry on, and every provision of the contract was to this purpose. That it was to be carried on jointly is likewise clear. In the business venture involved there were two branches, as is necessary in all like undertakings, namely, manufacture and sale. In each of these branches the association and control of Tsarnas was provided for. The selling end was exclusively under his control and discretion, and the manufacturing end was under the joint control of the Costaloupes and the representation of Tsarnas which representative was to be paid a salary greater than the proportionate salary of either of the others. The scope of the control and interest of Tsarnas can better be understood from the fact that the agreement between the Power Company and the Costaloupes Company was executed on behalf of the consumer by the said representative, acting in the capacity of manager. If the transaction were, as claimed, merely a naked loan, why do we not find some provision in the contract concerning the repayment thereof, or the rate of interest chargeable thereon?

Whatever may have been the relationship of the parties before the contract was entered into was immaterial. That there may have been a mortgage in favor of Tsarnas can be disregarded, because none of his rights as mortgagee were affected, unless perhaps the meaningless provision that he would forbear foreclosure only as long as he felt safe to do so. The anticipation of third party claims compelling or making expedient a foreclosure indicated the intention of carrying on the business as a thing separate from previous indebtedness or previous relations. Out of the profits there was to be no lessening of any debt or of any pre-existing debt. As far as the contract went, the profits derived from the venture by Tsarnas were to be exactly as stated, namely, profits. The statement that these profits were to stand in lieu of interest would raise a question, namely, interest in what sum. The only answer is found in the contract provision that all the moneys advanced is as a loan, and the receipt of one-half of the net profits is in lieu of payment of interest upon said indebtedness. As a matter of fact, if there were profits, then there would be no indebtedness by reason of advances, as hereinbefore pointed out.

Further, it might be noted that, under the very plain provision of the contract, the Costaloupes were absolved from payment of any interest either on the mortgage note, or in the previous advances, or in advances made during the life contract. Therefore, if there was a specific waiver of interest as a part consideration of the agreement, then the general provision, in a separate paragraph of the contract, that profits received should be in lieu of interest, becomes purposeless, other than as a scheme in attempted evasion of partnership liability.

The judgment is affirmed.

We concur: KNIGHT, Acting P. J.; CASHIN, J.

---

96 Cal. App. 230

ALLERTON v. KING et al. (Civ. 3652.)

District Court of Appeal, Third District, California. Jan. 9, 1929.

1. Attachment 🔑351—Measure of damages in chattel mortgagee's action on attachment bond was property's value (Civ. Code, §§ 2969, 3338).

Measure of damages in action on indemnity bond, indemnifying chattel mortgagee and constable against loss from levying writ of attachment on steam shovel, subject-matter of the chattel mortgage, as provided by Civ. Code, § 2969, under section 3338, was the value of the property converted.

2. Attachment 🔑349—Complaint in chattel mortgagee's action on attachment bond, alleging amount due on mortgage, was sufficient to tender issue of property's value.

Complaint in mortgagee's action on bond indemnifying her against loss because of attachment of the mortgaged property by the defendant, alleging amount due her on mortgage, was sufficient to tender issue of the value of the property converted.

3. Pleading 🔑362(1)—Striking out portions of answer which were at most only uncertain held error, since motion to strike out cannot serve purpose of special demurrer, the proper remedy (Code Civ. Proc. § 430).

Striking out portions of answer for reason that they were irrelevant and irresponsive to the complaint, which were at most only uncertain, *held* error, since, in view of Code Civ. Proc. § 430, providing that remedy is by demurrer on ground that complaint is ambiguous, unintelligible, or uncertain, motion to strike out cannot be made to serve the purpose of a special demurrer.

4. Pleading 🔑354(1)—Pleading susceptible of amendment by statement of facts known to exist constituting cause of action should not be struck out except in extreme cases.

To strike out pleading which is susceptible of being amended by statement of facts known to exist and which constitute cause of action is harsh proceeding, and should only be resorted to in extreme cases.

5. Pleading 🔑365(1)—Motion to strike out statements in answer so broad as to include relevant matter should have been denied in its entirety.

Where motion to strike out statements in answer was so broad as to include relevant matter, the motion should have been denied in its entirety, as the court should never strike out matter which will leave the complaint defective and thus lead to dismissal of action.

6. Pleading 🔑192(2)—General demurrer to answer stating value of property as defense to action, though inaccurate, ambiguous or appearing by necessary implication, should not be sustained.

General demurrer to answer in action on bond indemnifying plaintiff as mortgagee of personal property from loss by reason of defendant's attachment of property, where answer contained statements of value of the property, though they were inaccurate, ambiguous, or appearing by necessary implication, should not be sustained.

Appeal from Superior Court, Los Angeles County; F. C. Valentine, Judge.

Action by Fannie Allerton against John F. King and others. Judgment for plaintiff, and defendant named appeals. Reversed, with directions.

R. W. Richardson, of Los Angeles, for appellant.

Irvin C. Taplin and Ivan Miller, both of Los Angeles, for respondent.

Lawler & Degnan, of Los Angeles, for defendants.

SHIELDS, Justice pro tem. [1] This is an action on a bond of indemnity given under the following circumstances: The defendant, John F. King, was employed as a fireman and laborer in the operation of a steam shovel, owned and operated by the brothers H. D. Allerton and D. F. Allerton. The Allertons failed to pay King for his labor, and on or about July 8, 1925, King began an action against them in the justice's court in the county of Los Angeles, for the sum of $296. In this action he procured a writ of attachment which was duly levied upon the steam shovel owned by the defendants therein. The writ was levied by Walter Hanby, the constable of the township in which the action was pending. About the 15th of July, 1925, Fannie Allerton, the plaintiff in the case now before us, presented her verified claim to the constable, Hanby, showing that she was the holder of a promissory note for $6,500, secured by a chattel mortgage on the steam shovel, and demanding that the constable deliver up the property to her, or that her claim against the property be satisfied. About August 13, 1925, upon the demand of the constable, under section 2969, Civil Code, the defendant in this action, the plaintiff there, gave the bond therein provided for, with the defendants W. P. Cunningham and Fannie R. Cunningham as sureties, conditioned as in such cases. The brothers Allerton defaulted in the action in the justice's court, and judgment was rendered therein in favor of King. The steam shovel was thereafter sold under execution on this judgment; the price realized for it being $550. Thereafter Fannie Allerton began an action against the brothers Allerton to foreclose her chattel mortgage. The defendant herein, John F. King, intervened in that action. In that action, Fannie Allerton prevailed and was given a judgment for $7,258.20, the judgment reciting that the Allerton brothers and the intervener King, and all persons claiming under them, be forever barred from any interest in the shovel property. Execution issued upon this judgment, which later was, by the sheriff, returned unsatisfied. This action was thereupon brought by Fannie Allerton upon the indemnity bond above mentioned against King, the principal therein, the Cunninghams, sureties thereon, and against the constable, Hanby. In this action she asked for an attorney fee of $2,500. For some reason which is not disclosed the Cunninghams and Hanby do not further appear in the record. Defendant King answered the complaint. Plaintiff thereupon filed a motion to strike out considerable portions of this answer, and at the same time filed a general demurrer thereto. The motion to strike was granted in its entirety. To the answer as it then stood the general demurrer was sustained. Defendant failed to amend his answer, and his default was entered, and later judgment was rendered against him for $10,058.44, and $36.25 costs. It is from this judgment, which is the somewhat startling result of defendant King's adventure in litigation, that this appeal is taken. He resorted to a justice's court to collect a small labor claim, admittedly due, and emerges with this heavy judgment against him. We think that the judgment was mistakenly arrived at.

In this action on defendant's bond by Fannie Allerton, her measure of damages was the value of the property converted. Respondent very plausibly contends otherwise, but the law in California seems settled to the contrary. In Irwin v. McDowell, 91 Cal. 119, 27 P. 601, the court thoroughly considers this matter. After reciting the provisions of section 3338, Civil Code, to the effect that "one having a mere lien on personal property, cannot recover greater damages for its conversion, from one having a right thereto superior to his, after his lien is discharged, than the amount secured by the lien," proceed to say: "What is the amount *secured* by the lien? The answer must be, the full amount of the mortgage debt, if the property is worth enough to pay it; and if not, then such sum or amount only as it is worth. It would seem absurd to say, if the mortgage debt was a thousand dollars and the mortgaged property was worth only a hundred dollars, that the full amount of the debt was secured. As the court found that the total value of the property attached did not exceed the sum of $650, it follows, in our opinion, that the plaintiff was not entitled to recover from the defendant the full amount of the debt." See, also, Troxler v. Buckner, 126 Cal. 288, 58 P. 691.

[2] The very terms of the section under which the bond herein sued upon was given (section 2969, Civil Code) clearly implies the law to be so. It gives the attaching officer discretion to require the bond to be given in twice the amount of the mortgage debt or double the value of the mortgaged property. Plaintiff, Allerton, in this action, alleged in her complaint the amount due her upon her chattel mortgage, and this was enough to tender the issue of the value of the property converted. Troxler v. Buckner, 126 Cal. 288, 58 P. 691. "If the property in fact was of less value it was matter of defense." Id. This defense the defendant King clearly endeavored to make. His answer was involved, and filled with recitals, legal conclusions, and other irrelevant matter. He endeavored to relitigate the validity of the chattel mortgage of the plaintiff. Most of this matter was properly stricken out. Defendant strangely failed to make a direct and positive allegation, unconnected with irrelevant matter, of the value of the steam shovel when taken. But his contention that it was of no greater value than $600 appears in many parts of his answer. At the conclusion of paragraph 2 of his answer he says: "And the value of same did not exceed the sum of six hundred dollars ($600)." Paragraph 3 recites that the property was sold for $550, "which was the reasonable, fair value of said property." Paragraph 4 makes a further indirect contention of the smaller value of the property. Paragraph 7 does likewise. Paragraph 10 refers to the mortgage "on property of the value of not to exceed the sum of six hundred dollars ($600)." Paragraph 11, after irrelevantly reciting that the action was for conversion, concluded: "The damage in any event cannot exceed the value of said property, to wit, a sum not in excess of six hundred dollars."

[3, 4] With the exception of the unimportant statement made in paragraph 4 of defendant's answer, all of the matters above re-

ferred to were stricken out. We think that this was clearly erroneous. A motion to strike out cannot be made to serve the purpose of a special demurrer. "A motion to strike out is not the proper method of attacking a pleading which is merely insufficient to state a cause of action, or defense, or which is defective in form, where the objection may be reached upon demurrer." 21 California Jurisprudence, 242. The concluding words of paragraph 2 of defendants' answer, referring to the property, that "the real value of same did not exceed the sum of six hundred dollars ($600)" were not irrelevant, nor irresponsive to the complaint. Yet that is the ground upon which they were requested to be stricken out. Read in connection with the irregular and irrelevant matter which preceded them, they were at most uncertain. To strike out an allegation on that ground "is not proper practice in this State. The only proper remedy is by demurrer on the ground that the complaint is ambiguous, unintelligible, or uncertain under section 430 of the Code of Civil Procedure." Mattson v. Mattson, 181 Cal. 44, 183 P. 443. Defendant's repeated references to the property and to its value made it clear that a contention that it was not worth to exceed $600 was one of the defenses upon which he wished to rely. "To strike out a pleading, which is susceptible of being amended by a statement of facts known to exist, and which constitutes a cause of action or defense to an action, is a harsh proceeding, and should only be resorted to in extreme cases." Burns v. Scooffy, 98 Cal. 271, 33 P. 86. The proper practice on such motions is well stated in Pacific Factor Co. v. Adler, 90 Cal. 110, at page 116, 27 P. 36, 37 (25 Am. St. Rep. 102), where the court says: "The affirmative defense of the answer is defectively pleaded, and should not have been allowed to stand if attacked by demurrer. * * * But it is quite apparent from the pleading, taken as a whole, that the defendant intended, by this defense, to claim that the contract embraced in the complaint formed part of this 'scheme or plan,' and was therefore void, as being against public policy. A defective pleading cannot be stricken out by reason of its defects upon the ground of surplusage."

[5, 6] The language above referred to at the end of paragraph 2, and the words in paragraph 11 in reference to the converted property, and its value was "to-wit, a sum not in excess of six hundred dollars ($600)," should not have been stricken out. These words appear in connection with other matter clearly irrelevant, but as the motion to strike out was so broad as to include relevant matter, the motion should have been denied in its entirety. The court should never strike out matter which will leave the complaint defective, and thus lead to a dismissal of the action. Stewart v. Newton, 63 Colo. 137, 165 P. 255. With these allegations in the answer, even in the inartificial form in which they appear, the general demurrer should not have been sustained. "A general demurrer—that is, a demurrer upon the ground that the complaint does not state facts sufficient to constitute a cause of action—does not reach defects made grounds of special demurrer, such as * * * unintelligibility, ambiguity or uncertainty. It does not reach mere defects in allegations, defects in matter of form—as that the essential facts appear only inferentially, or as conclusions of law, or by way of recital." 21 Cal. Jur. 108. In considering the sufficiency of a general demurrer, the "courts have always discriminated between insufficient facts and an insufficient statement of facts; and where the necessary facts are shown by the complaint to exist, although inaccurately or ambiguously stated, or appearing by necessary implication," the demurrer will be overruled. Amestoy v. Electric Rapid Transit Co., 95 Cal. 311, 314, 30 P. 550, 551; Cyr v. Cyr (Cal. Sup.) 272 P. 751. The attorney fee asked by plaintiff in her complaint was $2,500. What sum was allowed by the court is not separately stated in the judgment, but calculation indicates that it probably was the entire sum prayed for. Appellant, with much emphasis, protests that the allowance of such a sum was improper. The exact state of facts upon which this allowance was made does not appear. On its face the allowance seems grossly excessive, but as the cause must be retried, we do no more than to call the matter to the attention of the court which will so rehear the case.

The judgment is reversed, with directions to the trial court to deny the motion of plaintiff to strike out portions of the answer in so far as they relate to paragraph 2 and paragraph 11 of defendant's answer. The court is further directed to overrule plaintiff's demurrer to defendant's answer.

We concur: HART, Acting P. J.; PLUMMER, J.

96 Cal. App. 219

THORNLEY v. JONES et al. (Civ. No. 3651.)

District Court of Appeal, Third District, California. Jan. 9, 1929.

1. Fraud 🔑58(2)—In executrix's action to recover property alleged belonging to decedent's estate, evidence held to support findings that corporation and agent did not misrepresent stock decedent purchased.

In action by executrix to recover property alleged to belong to estate of her decedent and for an accounting thereof, evidence *held* fully sufficient to support findings that defendant mortgage company and its agent had not made any false or untrue representation to decedent inducing her to buy stock in such company.

2. Appeal and error 🔑994(3)—Credibility of defendant's testimony held exclusively for trial court.

Where one of defendants, sued by executrix to recover property alleged to belong to estate of her decedent and for accounting thereof, testified that there was no agreement, understanding, or concert of action between him and another in connection with the acquisition of property which decedent had conveyed to him, credibility of such testimony was exclusively for trial court.

3. Attorney and client 🔑143—Attorney may make enforceable contract with one about to become client for payment for services not subject to court's particular scrutiny.

An attorney may make an enforceable contract with one about to become his client for the payment of compensation for services to be rendered to the client, and such contract is not subject to particular scrutiny of the court.

4. Attorney and client 🔑143—Contract between attorney and client for former's compensation, entered into during relation, is not void, although presumptively invalid; attorney having burden of showing fairness.

Contract between an attorney and client for the former's compensation, entered into during the existence of the relation, is not void, although presumptively invalid, the burden of showing fairness resting on the attorney to prove the transaction between himself and client was fair and equitable, and that he took no advantage of client, and also that client was fully informed of all matters relative to transaction and was so placed as to be able to act understandingly and to deal with attorney at arm's length.

5. Attorney and client 🔑143—Client uninformed by attorney that compensation she tendered was greatly excessive, it cannot be held that client was not taken advantage of.

Where client of attorney was not informed by the attorney that compensation she was tendering was several times the amount his professional services were worth and several times the amount usually charged for similar services, it cannot be held that client was fully informed of all matters relative to transaction and was so placed to be able to act understandingly and to deal with the attorney at arm's length, and that client, who was over 80 years of age and of trusting and confiding disposition, in failing health, and with little business experience, was not taken advantage of by attorney.

6. Attorney and client 🔑143—Attorney's negative conduct in dealing with client paying him excessive fee held insufficient to overcome presumption of fraud and unfair dealing.

Attorney's proof of mere negative conduct in dealing with his client, who paid him several times the amount his professional services were worth, *held* not sufficient to overcome presumption of fraud and unfair dealing which is automatically raised by law as protection to client; it being necessary that attorney must go further and show that client was given information which, under similar circumstances, a disinterested legal adviser would have given.

7. Trial 🔑395(5)—Judge's remark that he did not know why client and daughter executrix did not know each other's business, even if a finding, held immaterial in suit to recover excessive fee decedent paid attorney.

In action by executrix to recover from defendants, one of which was decedent's attorney, money alleged to belong to decedent's estate and for an accounting thereof, remarks by judge in announcing decision that he did not know why executrix, who was decedent's daughter, and decedent did not live together happily and did not know each other's business and pleasures, but that they did not, even if it had been made as a finding, would be wholly immaterial as bearing upon reasonableness of the compensation given the attorney for his services.

8. Appeal and error 🔑1010(1)—Finding that two defendants sued to recover property alleged belonging to plaintiff's decedent had not conspired, supported by evidence, must be accepted as true.

Court's finding that there was no conspiracy between two of defendants in action by executrix to recover property alleged to belong to decedent and for an accounting thereof, having sufficient support in evidence, must be accepted as true on appeal.

Appeal from Superior Court, Los Angeles County; P. Walter Hanby, Judge.

Action by Carrie L. Thornley, as executrix of the will of Alfreda Smith, deceased, against Lewis S. Jones and others. Judgment for defendants, and plaintiff appeals. Affirmed in part and reversed in part.

Thomas J. Pitts, of Los Angeles, for appellant.

H. S. Clewett and Farrand & Slosson, all of Los Angeles, for respondents.

FINCH, P. J. The plaintiff, as executrix of the last will of Alfreda Smith, deceased, brought this action against the defendants to recover property alleged to belong to the estate of decedent and for an accounting thereof. The defendant Nelson was not served with summons and did not appear in the action. Judgment was entered in favor of the other defendants denying plaintiff any relief. She has appealed from the judgment.

In appellant's opening brief it is said: "Two important issues were litigated. 1. Did the defendants, or any of them, obtain any of the money or property of Alfreda Smith during her lifetime without consideration or through fraud or undue influence? 2. Did a conspiracy exist among the defendants, or any of them, to accomplish such purpose?"

[1, 2] The findings of the trial court are against the plaintiff on both of these issues. The evidence is fully sufficient to support the findings in favor of the defendants Kirby and California Mortgage Company. Jones testified that there was no agreement, understanding, or concert of action between him and Nelson in connection with the acquisition of the property in question. The credibility of this testimony was exclusively for the trial court. The only question left to be determined, the judgment not running against Nelson, is whether Jones obtained any of the property of Mrs. Smith without consideration or through fraud or undue influence.

The plaintiff is the daughter of Mrs. Smith, who was also known as Miss Smith. She came from Ohio to California in the year 1916 and thereafter resided in the plaintiff's home in Los Angeles until 1920, when she went to live with a family of the name of Bailey; none of the family being related to her. She left the Baileys in June, 1923, and for the next 18 months lived with other strangers in blood named Davis. She returned to plaintiff's home November 15, 1924, and remained there until her death January 9, 1925.

It may be gathered from the evidence that Mrs. Smith owned no property until the year 1915, when there was distributed to her, from the estate of a deceased brother, property of the value of about $20,000. In 1916 she furnished the money with which to buy a home for the plaintiff. She loaned $900 to the plaintiff and $800 to Nelson. While living with the Baileys, Mrs. Smith advanced $1,500 to them for the purchase of a lot in Los Angeles. They applied the money so advanced in payment on the purchase price of the lot, and April 20, 1923, she commenced an action against them to establish her interest in the property purchased, Jones acting as her attorney. The case was not brought to trial during Mrs. Smith's lifetime, but after her death it was successfully prosecuted by another attorney, who recovered judgment in favor of her estate. December 28, 1923, Mrs. Smith, through Nelson, who was an agent of Kirby, engaged at the time in selling capital stock of the California Mortgage Company, purchased 48 shares of the preferred stock of that corporation and 12 shares of its common stock, in payment for which she delivered to the corporation $1,951.23 in cash, a certificate of deposit for $600, and a promissory note for $2,500, secured by a mortgage on real estate, both executed by Fred Hessler, March 13, 1923. The trial court found that "said stock was worth at the time she received it the price she paid for it." Certificates for all of the stock were issued to and in the name of Nelson. Three days later he surrendered the stock and caused two certificates for 24 shares each of preferred stock and one certificate for 12 shares common stock to be issued to Mrs. Smith. January 11, 1924, Mrs. Smith assigned half of the preferred stock and half of the common stock to Jones and the remainder thereof to Nelson. New certificates were thereupon issued to each of them for 24 shares of preferred stock and 6 shares of common stock. Both Jones and Nelson left the respective certificates so issued to them in custody of the corporation, with instructions to pay all accruing dividends on the stock to Mrs. Smith during her lifetime. Within a few days after her death they transferred the stock to persons who are not parties to this action. The court found:

"Alfreda Smith * * * during the year 1923 was of the age of about 80 years; she was of a trusting and confiding disposition and for several years prior to her death was gradually but not noticeably in failing health due to her advanced age, and her vision and hearing were impaired during the several years immediately prior to her death; she had some knowledge and experience in business transactions but such knowledge and experience were very limited, and due to her failing health and impaired senses and her disposition she was, during the years 1923 and 1924, likely to be influenced or deceived or imposed upon by designing persons.

"From and about the year 1920 to a time shortly prior to the death of said decedent, defendant Jones acted as her attorney. * * * On or about January 11, 1924, the said Alfreda Smith voluntarily transferred and assigned to the said defendant Jones 24 shares of said preferred and 6 shares of said common capital stock, and a like amount to the said defendant Albert O. Nelson.

"The defendants Jones, Kirby and the California Mortgage Company did not nor did any of them ever make any false or untrue representations to the said Alfreda Smith."

The court did not find whether the transaction between Jones and his client, by which she gave him property of the value of $2,500 in payment for his professional services, was fair and equitable, or whether she was informed of all matters relative to the transaction so as to enable her to act understandingly. Jones knew of her inexperience in business transactions, because in the complaint drafted by him in her action against the Baileys, after the allegation that she had furnished the sum of $1,500 which was used by the defendants in the purchase of the lot hereinbefore mentioned, with the understanding that she was to have a corresponding interest in the lot, it is alleged: "That this plaintiff is over eighty years of age, and * * * at all times placed great confidence and trust in the defendants, and relied solely upon them to look after her interests, she having no knowledge of business transactions or making of deeds, mortgages or other title papers, and believed that the same was all properly attended to and taken care of for her by the defendants. That * * * the defendants made and delivered to this plaintiff a promissory note in the principal sum of $1,800, which they stated to this plaintiff secured and represented her interest and ownership in said real property, and this plaintiff believed that the same gave her an interest in the title to said property as a part owner thereof."

Relative to his services for Mrs. Smith, commencing in September, 1920, Jones, as a witness in his own behalf, testified as follows:

"I was called out there to her residence in Hollywood to prepare a will for her. * * * She was ill at the time and perhaps it was two or three weeks after that before I saw her, and she came down to my office. * * * I saw her at least twice a week during my acquaintance with her. * * * She usually came around in the morning; she was usually at the office when I arrived. * * * She would spend from half to three-quarters of an hour, sometimes perhaps an hour. * * * Outside of discussing her eastern affairs, from time to time, most of it concerned her relations and transactions with Mrs. Thornley. * * * She told me that she had bought that property, bought the Thornley home, I believe she stated that she had paid off the mortgage on it, * * * I think four or five thousand dollars. * * * And she said that she had let them have money from time to time, she had bought, paid for, I believe, a camera for Mr. Thornley. He was either a photographer or motion picture cameraman. * * * And likewise she had paid off some furniture that was in the house and sort of complaining about the amount of money she had paid and now was going to be deprived of a home. * * * I had a note signed by Mrs. Thornley for $900 that I had in my possession for quite sometime. And Miss Smith had requested several times that I bring suit on the note and I told her that I didn't see that there was very much use of bringing suit as long as what she had told me was true, that they did not have anything except this place they lived in. * * * Several times throughout her transactions she had told me that she had mortgages and notes in the east which were in the possession of her attorney, Mr. Barton Griffith. * * * And she discussed several times about selling those mortgages and investing the money here. * * * But nothing was ever done about it. I didn't tell her to do it or tell her not to do it. I let her use her own judgment on that, until she requested me to send for these securities. * * * The only money that she ever paid me was $10 that she paid me for drawing this first will. * * * I said to her one day, * * * perhaps a couple of months after I had met her, 'What about compensation or paying me? * * * It is rather difficult to make a definite charge. * * * You come in here and you are here a half an hour or three-quarters of an hour. * * * You come back time and again. * * * What do you think about it?' She said, 'Well, you know that I only have about $70 or $75 a month coming from my investments. * * * Some day it will be different, and * * * you will never lose anything by taking care of my business. * * * I will compensate you when my affairs are put in such a condition that I can. I will dispose of some of that property or make a change in it, then I will compensate you for all you have done; and try and remember the best you can what you do for me, as I know I come down here a lot of times when really there is no reason, but * * * I feel much better when I come down and discuss these different matters with you.' * * * I didn't make any entry or any charge for the time that I put in for her, because that would be a regular occurrence that * * * I could always bet that I would see Mrs. Smith once or twice a week. * * * A great many times * * * she would volunteer the information. * * * It got to be quite a common occurrence; she said, 'You will never lose anything by taking care of my business.' * * *

"Q. When was the first time you ever knew Miss Smith owned any stock in the California Mortgage Company? A. When she came into my office on January 11, 1924, and brought the stock certificate. * * *

"Q. Prior to that time had you ever heard of the Hessler mortgage? A. I had never heard of it. The first I heard of that was when this suit was filed.

"Q. Who was present when Miss Smith brought those certificates of stock into your office? A. Just myself, Miss Smith and Mr. Rifkind came in. * * * She came in on the usual morning trip. * * * She said, 'Well, Mr. Jones, I told you a great many times that you would not lose anything by taking care of my business for me. * * * I have some stock in the California Mortgage Company, and I am going to have it divided between you and Mr. Nelson. * * * You have worked these number of years for me and I have not paid you anything for your services, and I am getting old, I won't have use for it much longer, and Mr. Nelson has been very kind to me, and I am going to divide it between you.' Well, I was a little surprised at Nelson getting any, I didn't quite understand it, but I was not the judge of it * * * I said, 'According to what you have told me you only have about $70 or $75 a month income. * * * I will be willing, and I want to do this, that as long as you live that you will draw the interest or dividends * * * of this stock.' * * * So I filled mine in. * * * I called Mr. Rifkind in. * * * He said, 'You are signing this, Miss Smith, transferring this stock to Mr. Jones, are you, and Mr. Nelson?' She said said, 'Yes.' So he signed it as a witness and I gave the stock back to her and she said she would take it over to the Mortgage Company. * * * I have a rule that if anyone comes in for a half an hour to an hour, we will say, just a consultation, I make a charge of $5. * * * The wills were very brief. I will say they were worth not to exceed $25 apiece. As a matter of fact, I only charged $10 on the first one.

"Q. What do you consider was the reasonable value of your services that you rendered in the Bailey case? * * * A. I would say at least $150. * * * I collected a hundred dollars for Miss Smith from Mr. Dietrich. * * *

"Q. She did not really counsel or advise with you in regard to the loans she was making, did she? A. It is apparent that she did not. * * *

"Q. What was all of this talk twice a week, half an hour, in regard to this old lady about? A. Well, about half of it was concerning Mrs. Thornley. * * * No, not half of it, maybe. Mrs. Thornley half, and I think even about her matters in the east, and she has related to me many, many times about the farm that was sold back there, and about it being subdivided, a mortgage that she held, and one of these mortgages, she said that they were subdividing the farm, and if she had held onto it, it would have been worth a lot more money, something to that effect, and she would discuss those things from time to time; it wasn't so much business on every occasion but the old lady would come in and she would want to talk to me, want to sit down and discuss this and that and the other, and I gave her the time.

"Q. Really it was just more of a social call than anything else? A. Sometimes, from my viewpoint, I would say it was, but I didn't have the time to spend as a rule, yet she seemed to want to take my time, and as long as she had stated that I would never lose anything by taking care of her affairs and giving my time, why, I thought it was my duty to give it to her."

Mrs. Smith was the owner of securities, consisting of promissory notes and certificates of deposit in building and loan associations, of the value of about $6,000, which were in the possession of her attorney, Barton Griffith, of Columbus, Ohio. August 29, 1924, she signed a letter prepared by Jones, requesting Griffith to send these securities to her in care of Jones. Griffith complied with the request, and upon receipt of the securities, Mrs. Smith left them in the custody of Jones. She had an attack of illness in November, 1924, and on the 15th of that month the plaintiff took her to the plaintiff's home. December 4, 1924, Mrs. Smith employed Arthur L. Goodrick, one of the attorneys for the plaintiff in this action, and gave him her general power of attorney. Goodrick made demand upon Jones for Mrs. Smith's securities, whereupon Jones and Nelson called upon her, and she personally directed Jones to deliver the securities to Goodrick. Instead of complying with such direction, Jones, as attorney for Nelson, filed a petition for the appointment of a guardian for Mrs. Smith, alleging that "up until approximately six weeks prior to the filing of this petition, the said Alfreda Smith has been in good health and has been capable of and did attend to her business affairs; that on or about six weeks prior hereto, the said Alfreda Smith suffered a severe attack of illness accompanied by a stroke of paralysis, and that since said illness the said Alfreda Smith * * * is incapable and incapacitated from attending to or caring for her property." In the petition the Title Insurance & Trust Company was suggested as guardian. Goodrick appeared at the hearing, as attorney for Mrs. Smith, and, by stipulation, the Citizens' Trust & Savings Bank was appointed her guardian. Jones delivered the securities in his possession which he had received from Griffith to the guardian.

August 23, 1924, Mrs. Smith loaned Nelson the sum of $800, hereinbefore mentioned. Since the action, as against him, has not been tried, it is unnecessary to state the facts relating to his conduct with particularity.

The foregoing lengthy statement of facts is set forth for the purpose of accurately presenting the issue to be decided. It appears from the testimony of defendant Jones that Mrs. Smith gave him capital stock of the California Mortgage Company of the value of about $2,500 in payment for his services as her attorney, no agreement as to the amount of his compensation having theretofore been made.

[3, 4] "An attorney may make an enforceable contract with one about to become his client for the payment of compensation for services to be rendered, and such a contract is not subject to the particular scrutiny of the court." 6 C. J. 735; 3 Cal. Jur. 626; Cooley v. Miller & Lux, 156 Cal. 510, 524, 105 P. 981. "A contract between an attorney and client for the former's compensation, entered into during the existence of the relation, is not void, although presumptively invalid, the burden of showing fairness resting on the attorney." 6 C. J. 735; Reynolds v. Sorosis Fruit Co., 133 Cal. 625, 630, 66 P. 21. "All dealings between

an attorney and his client for the benefit of the former are not only closely scrutinized, but are presumptively invalid on the ground of constructive fraud and such presumption can be overcome only by the clearest and most satisfactory evidence. Not only must the attorney offer clear and satisfactory evidence that the transaction between himself and his client was fair and equitable and no advantage was taken by him, but he must also offer proof that the client was fully informed of all matters relative to the transaction and was so placed as to be able to act understandingly and to deal with the attorney at arm's length." Estate of Witt, 198 Cal. 407, 419, 245 P. 197, 202; Magee v. Brenneman, 188 Cal. 562, 567, 206 P. 37.

There are cases, of course, where the knowledge and experience of the client are such as to overcome the presumption referred to; but the facts of this case are such as to require the strict application of the foregoing rule. Mrs. Smith was over 80 years of age and, as the court found, "of a trusting and confiding disposition, * * * in failing health due to her advanced age; * * * her vision and hearing were impaired"; her business experience was "very limited"; she was "likely to be influenced or deceived or imposed upon by designing persons." She was induced to believe that the Bailey promissory note gave her an interest in real estate purchased by them. When she loaned Nelson $800, August 23, 1924, and took his promissory note therefor, he delivered to her a deed from Elsie Meridith to himself for certain lots and induced her to believe that the instrument was a mortgage securing the note.

[5, 6] Jones' testimony shows that the value of the stock received from Mrs. Smith was out of all proportion to the professional services rendered by him. In announcing his decision, the trial judge said: "I find from the evidence that this old lady for some reason or other went to this office two or three times a week for four years practically. Now, I don't know what she went there for. She had some little business interest—not so much. But here is an old lady, 82 years old, that wanted to talk to somebody. She could not talk to her own daughter. She found Mr. Jones here a man that she could talk to at least, and maybe get some advice and some consolation and satisfaction. And I don't know but what even for that service he is entitled to something." Jones testified that the reasonable value of his services in the Bailey suit was $150. He drew three short wills, for which he said his services were worth not to exceed $25 each, and for the first one he charged and was paid $10. He collected $100 for Mrs. Smith. He advised her of the futility of suing Mrs. Thornley on her promissory note. Several months after the stock was assigned to him, he caused Mrs. Smith's securities to be transferred from Griffith's custody to his own and, for a few months thereafter, he held possession of them. He states that about half of Mrs. Smith's consultations with him were in relation to Mrs. Thornley, but he does not say that there was any intention or thought of attempting to recover anything from her, except on the $900 note. She loaned $2,500 to Hessler, purchased stock for over $5,000, and loaned Nelson $800, apparently constituting all of her principal business transactions during the time that Jones was her attorney, without consulting him. The services for which he claims he was compensated by the transfer of the stock are, in the main, too indefinite and intangible to justify any inference as to the value thereof, and the court made no finding as to the value of such services. It certainly would be out of harmony with professional ethics for an attorney, dealing with a client such as Mrs. Smith, to charge a professional fee for her social visits or for innumerable consultations to determine whether to bring suit on a $900 note against a person having no property subject to execution. It cannot be held that "the client was fully informed of all matters relative to the transaction and was so placed as to be able to act understandingly and to deal with the attorney at arm's length," when the attorney did not inform his client that the compensation she was tendering him was several times the amount his professional services were worth and several times the amount usually charged for similar services. He must have known that Mrs. Smith was in her second childhood, but he did not suggest to her the improvidence of parting with property of the value of $5,000, leaving her with no other property in excess of $6,000 in value, except the uncertain amount she might recover from the Baileys. Jones testified that he never asked Mrs. Smith "to turn over any property" to him and never made any suggestion to her that she do so, and the court found that he never made "any false or untrue representations to the said Alfreda Smith." But, in a case such as this, proof of mere negative conduct on the part of an attorney dealing with his client is not sufficient "to overcome the presumption of fraud and unfair dealing which is automatically raised by the law as a protection to a client." Estate of Witt, supra. The attorney must go further and show that his client was given the information which, under similar circumstances, a disinterested legal adviser would have given.

[7] In announcing his decision the trial judge said: "I don't know why this mother and daughter did not live together happily and did not know each other's business and each other's pleasures, but they did not." This statement, however, even if it had been made as a finding, would be wholly immaterial as bearing upon the reasonableness of the compensation given Jones for his services.

[8] The trial judge also said: "I am convinced from the testimony here that this man Nelson had an unnatural and unusual influence over this old lady for some reason. * * * In my opinion, she was influenced by Nelson." This was not said, however, in relation to the transfer of the stock to Jones, and the court's finding that there was no conspiracy between Jones and Nelson has sufficient support in the evidence, and therefore must be accepted as true.

The judgment in favor of the defendants Kirby and California Mortgage Company is affirmed, and the judgment against the plaintiff in favor of the defendant Jones is reversed.

We concur: PLUMMER, J.; SHIELDS, Justice pro tem.

206 Cal. 254

CUTTING v. BRYAN et al. (Sac. 4074.)★

Supreme Court of California. Jan. 24, 1929.

Rehearing Denied Feb. 21, 1929.

1. Action 🔑6—Appeal and error 🔑949—Dismissal of wife's petition for declaratory relief as to community property held within court's discretion, and not reviewable, where abuse of discretion was not shown (Code Civ. Proc. §§ 1060, 1061).

Trial court's dismissal of wife's action against husband for declaratory relief relative to community property, under Code Civ. Proc. §§ 1060, 1061, *held* within court's discretionary power under statute, and not subject to review, where abuse of discretion was not shown.

2. Courts 🔑475(1)—Court which first undertakes to determine litigation has jurisdiction to exclusion of other tribunals to which parties or their privies apply.

Court which first takes subject-matter of litigation into its control, for the purpose of administering rights and remedies with relation to specific property, obtains jurisdiction to the exclusion of other tribunals, whose powers are sought to be invoked by parties to the original action or their privies.

3. Abatement and revival 🔑12—Pendency in federal court of suit against husband to establish trust and quiet title held to preclude wife's maintenance of suit to quiet title to her community interest.

Pendency in United States District Court of suit against husband to determine that his title to property was held in trust, and to quiet title, *held* to preclude wife from maintaining action in state court for purpose of having her title quieted as to her interest in community property, since husband represented both his own and his wife's interest in such property in the original suit, and wife was in privity with him, and was therefore barred from procuring another tribunal to exercise its jurisdiction over the same subject-matter.

4. Judgment 🔑693—Husband represents wife's community interest in real property in suit against him involving title.

In suit against husband involving title to real property, husband represents both his own and his wife's community interest, and wife is in privity with her husband as to such interest.

In Bank.

Appeal from Superior Court, Siskiyou County; Walter E. Herzinger, Judge.

★Rehearing denied.

Action by Minetta G. Cutting against Mahlon R. Bryan and others. From a judgment of dismissal, plaintiff appeals. Affirmed.

Dunne, Dunne & Cook, of San Francisco, and Allen & McNamara, of Yreka, for appellant.

Redman & Alexander, of San Francisco, Horace V. Ley, of Yreka, and Bert Schlesinger, Walter Loewy, A. B. Weiler, and John L. McNab, all of San Francisco, for respondents.

RICHARDS, J. The plaintiff, on or about January 6, 1927, commenced this action in the superior court in and for the county of Siskiyou, alleging herself to be the wife of one Henry C. Cutting, and alleging that the property, consisting of mining claims, to which the action related, was and for some time prior to said date had been the community property of herself and her said husband. Upon such averments she sought declaratory relief, to the extent permitted under section 1060 et seq. of the Code of Civil Procedure, decreeing the extent of her community interest in said property. She further sought to have the title to said property quieted against a number of defendants, alleged to be asserting adverse claims thereto. Shortly after the commencement of the action, Mahlon R. Bryan, one of said defendants, presented and filed in said court a motion to dismiss the action, supported by the affidavit of one Lloyd L. Root, wherein it was set forth that said Root was the duly appointed, qualified, and acting receiver in an action which had been commenced several months prior to the institution of the present action in the United States District Court for the Northern District of California, wherein Mahlon R. Bryan was plaintiff, and Henry C. Cutting and a number of other persons and corporations were defendants, and wherein it was sought to have it adjudicated that whatever title said Henry C. Cutting, or any of his codefendants, had in the property in question was held in trust, and not otherwise, for the use and benefit of the plaintiff in said action, and that the title to said property should be conveyed to said plaintiff by said trustee, and quieted as against the said Henry C. Cutting and each and all of his codefendants.

The affiant further asserted that the said United States District Court had thus acquired and taken sole jurisdiction over said property for the purpose of determining and quieting the title thereto, and had proceeded to exercise said jurisdiction to the extent of appointing the affiant as the receiver of said property, and of making and entering an interlocutory decree in said action after a trial thereof had therein, determining the issues presented therein, which action and the receivership therein was still pending in said court, and that said property and the whole thereof was in the hands of said receiver, and was in the custody of and in the course of administration by said court, pursuant to its said decree, and at the time of the institution of the present action, and of the motion of said Bryan to dismiss the same. Upon the hearing of said motion, the foregoing facts being uncontested, the trial court made and entered its judgment and order dismissing the present action. It is from such judgment and order that this appeal has been taken.

[1] In so far as the plaintiff sought declaratory relief by the institution of this action against her husband, it would seem that the judgment and order of the trial court dismissing the same must be held to have been a finality, from which the plaintiff could obtain no relief upon this appeal, in view of the provisions of section 1061, Code of Civil Procedure, which provides that "the court may refuse to exercise the power granted by this chapter in any case where its declaration or determination is not necessary or proper at the time under all the circumstances." The order of the trial court in refusing to entertain this action, in so far as the declaratory relief sought therein is concerned, must therefore be held to have been made under the discretionary power invested in it by the foregoing provision, and hence must be held to be not reviewable upon this appeal, except for an abuse of discretion, which is not shown.

[2-4] In so far as this action has been instituted by the plaintiff for the purpose of quieting her title as against the alleged adverse claims of the defendants, it must be held, in conformity with the general rule of comity established by a long line of authority, that the court which first takes the subject-matter of a litigation into its control, for the purpose of administering the rights and remedies with relation to specific property, obtains thereby jurisdiction so to do, to the exclusion of the exercise of a like jurisdiction by other tribunals, the powers of which are sought to be invoked by parties or their privies to the original action. In re Cohen, 198 Cal. 221, 226, 244 P. 359, and cases cited; Covell v. Heyman, 111 U. S. 176, 4 S. Ct. 355, 28 L. Ed. 390; Farmers Loan & Trust Co. v. Lake Street El. R. Co., 177 U. S. 51, 20 S. Ct. 564, 44 L. Ed. 667; Kline v. Burke Construction Co., 260 U. S. 226, 43 S. Ct. 79, 67 L. Ed. 226, 24 A. L. R. 1077, and many other cases. The fact that the plaintiff was not expressly made a party to the action which had theretofore been commenced and was being prosecuted in the federal court does not, in our opinion, militate against the application of the foregoing principle, for the reasons set forth in certain of the cases above cited, and for the additional reason that the husband of the plaintiff was the principal party defendant in said action, and as such was representing the community interest of himself and also of his wife in said property, and that as to such interest the plaintiff herein

was in privity with her husband, and was represented in said action by him as fully as though she had been expressly made a party thereto. McKay on Community Property (2d Ed.) § 1085; 13 Cal. Juris. p. 882; Estate of Clark, 190 Cal. 354, 212 P. 622; Lichty v. Lewis (C. C.) 63 F. 535; Id. (C. C. A.) 77 F. 111.

It follows from the foregoing that the judgment and order of the trial court dismissing this action, for the reasons stated therein, must be and the same is hereby affirmed.

We concur: WASTE, C. J.; SHENK, J.; SEAWELL, J.; LANGDON, J.; CURTIS, J.

PRESTON, J. I concur. I do so, however, with this explanation. As I read the opinion of Mr. Justice RICHARDS, he in effect holds that, whatever may be the rights of husband and wife inter se in and to the community real property, she was represented by him in the action in the federal court against the husband, which was made the basis for the dismissal of the action now under review. It is only upon this theory that the federal court acquired jurisdiction of the subject-matter of the action, for, if her interest is not represented by him, then the subject-matter of the two actions cannot be said to be the same. Under this view the effect of the recent amendments (Stats. 1923, p. 29), giving the wife testamentary power over half of the community property, is not necessarily involved.

It is true that the Washington courts have declared the wife a necessary party in any action respecting the community real property, and that a judgment against the husband alone is void. But in view of the nature of the community estate, and the difficulty in fitting it into our system of jurisprudence; in view of the fact that exclusive management and control, with the general power of disposition, is vested in the husband; in view of the fact that the wife may not by her own acts alone charge or bind the community estate; in view of the fact that her separate estate is free from the community obligations—and for other reasons that need not be enlarged upon, I am content to approve the rule that in all ordinary situations the wife is represented by the husband in suits by or against him involving the community real estate, and this, too, notwithstanding the provisions of section 172a of the Civil Code, requiring her signature to a transfer of such property, and notwithstanding the further fact that a judgment in such an action may have the practical effect of a conveyance. Such a holding, too, removes all reason for hesitation in declaring the right of the wife in the community property acquired since the effective date of the said amendments of 1923 to be a vested one, as is intimated in the recent case of Phillips v. Phillips (Cal. Sup.) 263 P. 1017.

---

206 Cal. 315

CITY OF OAKLAND et al. v. WILLIAMS, City Auditor. (S. F. 13079.) ★

Supreme Court of California. Jan. 30, 1929.

Rehearing Denied Feb. 28, 1929.

1. Landlord and tenant 🔑37—It is presumed parties will interpret lease in light of circumstances of execution and purposes.

It is presumed that parties to lease will interpret it in light of circumstances in which it is executed and purposes which lessor and lessee covenanted to promote.

2. Municipal corporations 🔑63(1)—Determination as to construction of building on lands given city for harbor will not be disturbed except for abuse of discretion (St. 1911, p. 1258; Oakland City Charter, as amended; Civ. Code, § 718, as amended by St. 1927, p. 1173).

Judgment of port commissioners of city of Oakland as to necessity for construction of warehouse in vacant tide and submerged lands granted to city under St. 1911, p. 1258, and Oakland City Charter, as amended (St. 1927, p. 1978), and Civ. Code, § 718, as amended by St. 1927, p. 1173, will not be disturbed unless it appears that the plans adopted are so inadequate as to inevitably result in waste of public funds, and thus involve abuse of discretion.

3. Municipal corporations 🔑719(5)—Contract for construction and lease of warehouse in submerged lands granted city for harbor, where it required lessee to guarantee minimum tonnage, held not void as promoting private purpose (St. 1911, p. 1258; Const. art. 1, § 14; Oakland City Charter, as amended; Civ. Code, § 718, as amended by St. 1927, p. 1173).

Contract of city to construct warehouse on vacant tide and submerged lands, granted by state for harbor purposes under St. 1911, p. 1258, and lease of warehouse so constructed to private corporation engaged in packing, processing, and shipping dried fruits, *held* not void as attempt to authorize use of public funds for private purposes in violation of Const. art. 1, § 14, where lease, executed pursuant to bond issues and Oakland City Charter, as amended (St. 1927, p. 1978), and Civ. Code, § 718, as amended by St. 1927, p. 1173, though it permitted using warehouse for industrial purposes of lessee, required lessee to route its goods for shipment by adjacent wharf terminal and to guarantee amount of tonnage to be shipped through such terminal.

4. Municipal corporations 🔑873—Municipal expenditure for warehouse leased to private corporation held not illegal loan of credit, where lessee guaranteed minimum tonnage through harbor (St. 1911, p. 1258; Oakland City Charter, as amended; Civ. Code, § 718, as amended by St. 1927, p. 1173; Const. art. 4, § 31).

Expenditure of public moneys for construction of warehouse on vacant tide and submerged

---

🔑For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

★Rehearing denied.

lands, granted by state to city for harbor purposes under St. 1911, p. 1258, and Oakland City Charter, as amended (St. 1927, p. 1978), and Civ. Code, § 718, as amended by St. 1927, p. 1173, *held* not illegal as lending credit of state to private corporation in private business enterprise, in violation of Const. art. 4, § 31, or as taxation for private purposes, though city contracted to lease warehouse to private concern for use in packing, processing, and shipping dried fruit; lease further providing that lessee should guarantee a minimum tonnage through harbor terminal.

5. Municipal corporations ⚷719(4)—City's lease of warehouse for extending harbor held not objectionable because running to single lessee for use in packing fruit (St. 1911, p. 1258; St. 1927, p. 1978; Civ. Code, § 718, as amended by St. 1927, p. 1173).

Lease of warehouse on city's vacant tide and submerged lands to private corporation for purpose of increasing use of city's harbor facilities under St. 1911, p. 1258, St. 1927, p. 1978, and Civ Code, § 718, as amended by St. 1927, p. 1173, *held* not void on account of lessee's use of warehouse for packing, processing, and shipping dried fruit, or on ground that publicly owned warehouse was leased solely to one party.

In Bank.

Application by the City of Oakland, the Board of Port Commissioners of the City of Oakland, and the individual members of the Board, for a writ of mandate to be directed to Harry G. Williams, as Auditor of the City of Oakland. Writ granted.

Markell C. Baer and Fitzgerald, Abbott & Beardsley, all of Oakland (Orrick, Palmer & Dahlquist, of San Francisco, of counsel), for petitioners.

Thelen & Marrin, of San Francisco, for intervener Hammer.

Perry Evans, of San Francisco, amicus curiæ, in support of petitioners.

Preston Higgins, City Atty., and Alfin N. Nelson, Chief Deputy City Atty., both of Oakland, for respondent.

SEAWELL, J. Petition for a writ of mandamus to compel Harry G. Williams, as the auditor of the city of Oakland, county of Alameda, to certify that there remained unexpended and unapplied a balance of an appropriated fund applicable to pay the estimated expense of a certain contract, according to the Freeholders' Charter of the City of Oakland, § 131, awarded by the board of port commissioners of the city of Oakland to the J. G. Wilson Corporation for furnishing rolling steel door supplies proposed to be used in the construction of a warehouse which said board of port commissioners had contracted to construct and lease to Rosenberg Bros. & Co., a private corporation extensively engaged in packing, processing, and shipping dried fruits and related products in large shipments to domestic and foreign ports. Said warehouse, according to plans, will cost approximately $400,000 and occupy about seven acres of the hundreds of acres of vacant tide and submerged lands, filled and unfilled, lying between the uplands of said city of Oakland and the low-water marks of the San Francisco Bay and the Estuary San Antonio, which lands were granted by the state to said city by an act approved May 1, 1911 (Stats. 1911, p. 1258), in trust for the uses and purposes therein named. Said warehouse is to be constructed at the Fourteenth street wharf terminal, parallel to an existing transit shed of equal length, and separated from said shed by public spur railroad tracks.

The authority of the board of port commissioners to enter into the lease and contract with said Rosenberg Bros. & Co. was challenged by two suits instituted in the superior court of the county of Alameda, wherein an injunction was sought in each action against said board and certain officials of said city, commanding them to desist and refrain from doing any act under or incurring any liability or obligations against said city by reason of said lease and contract, which threatened acts were claimed to be in excess of the power of said board on the ground that said contract attempted to obligate said city to expend $400,000 of its funds for a private purpose. The auditor, as a measure of protection to himself and bondsmen, declined to indorse his certificate upon said lease and contract. By reason of the public importance of the matter, the suits commenced in the county of Alameda were held in abeyance, and this proceeding was instituted for the purpose of expediting the determination of the questions raised in said actions.

The main point pressed by intervener, William F. Hammer, who was the plaintiff in the actions instituted in the superior court of the county of Alameda, is that said lease attempts to authorize the use of public funds for a private purpose, in violation of article 1, § 14, State Constitution.

The importance of the development of the natural harbor and seaport advantages which the city of Oakland, situate on the easterly side of the San Francisco Bay, with direct and spacious connection with the Pacific Ocean, offers to the immense agricultural and commercial districts of Northern and Central California, is not questioned. It is admitted that said city and port is the terminus of three transcontinental railroads and one intrastate railroad. In addition to these transportation lines, an immense volume of agricultural, orchard, dairy, and general farm and ranch products of the state, and factory products from without, is also carried into said city by many public transportation companies and by private conveyances, destined

---

⚷For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

for foreign shipment, but, because of the lack of reasonable harbor development and improvements, vessels of reasonable tonnage were unable to enter said harbor. It is alleged, and not denied, that the declared policy on the part of the city of Oakland, which had been the subject of long public discussion, to adopt a comprehensive and concrete program of development has attracted and is still attracting manufacturers in all industrial lines to establish large factories and plants in said city and territory adjacent thereto, because of its favorable situs for the transportation of commerce to domestic and foreign ports and countries by both land and sea. Responding to this growing demand, the city of Oakland submitted the proposition of issuing bonds in the amount of $9,960,000, to be known as the Oakland Harbor improvement bonds, to the electors of said city, which issue was duly approved May 18, 1926. Said bond issue was for the following purposes:

"The acquisition, construction and completion by the City of Oakland of a certain municipal improvement on or near the Estuary of San Antonio and on or near the western waterfront of said city, consisting of systems of wharves, docks, piers, slips, bulkheads, quays and terminal facilities, including channels, water ways, turning basins, courses and docking spaces, roadways, trackage and approaches, transit sheds, warehouses, cold storage facilities, mechanical handling appliances, construction and maintenance equipment, fire boat and house therefor, the extension of the high pressure fire system of said city to said improvement, and such works, structures and property as may be necessary or convenient for the accommodation of shipping by rail or water, and also lands, rights of way, and other easements, property and property rights, necessary or appurtenant to said municipal improvement."

In furtherance of said comprehensive scheme of harbor development and improvement, and pursuant to the recommendation made by its consulting engineers, the city amended its freeholders' charter (chapter 7, Stats. and Amdts. 1927, p. 1978) by providing for the establishment of a "port department." Said charter amendment provides for the creation of a board of port commissioners, consisting of five members, vested with the exclusive control and charge of said harbor, as the successor of all the rights and powers formerly exercised by said city, and it is charged with the performance of all the duties formerly imposed upon said city, and is given such legislative and administrative powers as were deemed necessary to enable it "to promote and more definitely insure the comprehensive and adequate development of the Port of Oakland through continuity of control, management and operation." The tide and submerged lands granted by the state to said city include an inner and an outer harbor. The inner harbor consists of a deep, navigable channel, known as the Estuary of San Antonio, which penetrates inland a distance of about six miles. The channel of this estuary is too narrow to permit the convenient turning and docking of ocean-going vessels. The outer harbor consists of basins, channels, and other waters of San Francisco Bay. The board of port commissioners, in the exercise of the powers conferred upon it by said charter amendment and also by the "Oakland Harbor Improvement Bonds" proposition, completed, in October, 1927, at a cost in excess of $500,000, the construction of a large concrete wharf and transit shed, with necessary approaches and other facilities, situate in the outer harbor near the terminus of Fourteenth street, known as the Fourteenth street wharf and terminal, which is designed for and is to be operated as a general cargo terminal. In April, 1928, a large pier, known as the Grove street pier, was completed at a cost of $920,000. Lands known as the Brooklyn Basin area, upon which said board proposes to erect a wharf and transit shed at a cost of $600,000, were acquired at a cost of $265,000. Said board of commissioners has taken over the control and management, and now operates directly or by lease, a number of terminal piers, wharfs and harbor facilities for the accommodation of shipping by rail and water. Appropriations in excess of $5,000,000 have been made by the federal government from time to time and have been expended in improving the waterways of said port, and this sum has been greatly supplemented by the city of Oakland and private interests for the dredging, deepening, and widening of the inner and outer harbors and the reclaiming of adjacent waste tide lands.

The warehouse, now in course of completion pursuant to and under the lease contract made by said board with Rosenberg Bros. & Co., is built upon reclaimed tide and submerged lands which constitute a portion of the western water front of said city, at the rear of and adjacent to said Fourteenth street wharf terminal, and parallel to an existing transit shed, and separated therefrom by a public street and spur railroad tracks, and thus, it is alleged, forms an adjunct to said Fourteenth street wharf terminal. The building is to be of the warehouse and storage type, constructed of standard concrete, and is similar in style, structure, and height to said transit shed.

The act of 1911 granting said tide and submerged lands, whether filled or unfilled, to the city of Oakland, provides:

"(a) That said lands shall be used by said city and its successors, only for the establishment, improvement and conduct of a harbor, and for the construction, maintenance and operation thereon of wharfs, docks, piers, slips, quays and other utilities, structures and appliances necessary or convenient for the *promotion* and *accommodation* of commerce and navigation, and said city, or its successors shall not, at any time, grant, convey, give or alien said lands, or any part thereof, to any individual, firm or corporation for any purposes, whatever; provided, that said city, or its successors, may grant franchises thereon for limited periods, for wharves and other public uses and purposes, and *may lease* said lands or any part thereof, for limited periods, for purposes consistent with the trusts upon which said lands are held by the state of California, and with the requirements of commerce or navigation at said harbor." (Italics supplied.)

Section 718, Civil Code (amended by St. 1927, p. 1173), provides that the tide and submerged lands granted to any city by the state may be leased for a period not exceeding fifty years, unless a greater term is fixed by the state's grant of the said lands. Said section further provides:

"* * * tidelands and submerged lands owned or controlled by any city, together with the wharves, docks, piers and other structures or improvements thereon, and so much of the uplands abutting thereon as may in the judgment of the city council, or other governing body of the city be necessary for the proper development and use of its water front and harbor facilities, may be leased for a period not exceeding fifty years. Said tidelands, submerged lands and uplands may be leased only for *industrial* uses, the purpose of improvement and development of the harbor of said city, and the construction and maintenance of wharves, docks, piers or bulkhead piers or for other public uses and purposes consistent with the requirements of commerce or navigation at said harbor." (Italics supplied.)

The act whereby said tide and submerged lands, both filled and unfilled, were granted by the state of California to said city of Oakland, the resolution or ordinance adopted upon the submission of the proposition to incur a bonded indebtedness in the sum of $9,960,000, and the amendment of the freeholders' charter of said city, constitute the several steps taken by said city of Oakland over a period of several years in the consummation of a long-considered and comprehensive plan for harbor and industrial development and improvement of its waterfront area. The powers conferred upon the board of port commissioners by the amended charter (Stats. and Amdts. 1927, p. 1978) are many, and the duty enjoined upon it to support and foster all *aids* to promote the commercial welfare of said port is repeated in a number of sections of said charter, a portion of which we quote:

"To make provision for the needs of commerce, shipping, and navigation of the port, to promote, develop, construct, reconstruct, alter, repair, maintain, equip and operate all waterfront properties including piers, wharves, sea walls, docks, basins, channels, slips, landings, warehouses, floating and other plants or works, dredge, and reclaim land, construct, equip and operate terminal trackage with sidings and turnouts and railroad connections between docks, piers and other port structures, and connect the same with main line tracks, and to establish, equip and operate all other facilities or aids incident to the development, protection and operation of the port, as may be deemed proper and desirable in its judgment, and it may modify its plans from time to time as the requirements of commerce, shipping and navigation may demand, and as part of such development and operation to provide for tugs, dredges, fireboats, barges, cold storage plants, and all other publicly owned facilities or appliances incident to the operation of the port, of such number and character, and in such places as the board may deem feasible and proper.

"To take charge of, control, and supervise the Port of Oakland, including all the waterfront properties, and lands adjacent thereto, or under water, structures thereon, and approaches thereto, storage facilities, and other utilities, and all rights and interests belonging thereto, which are now or may hereafter be owned or possessed by the city of Oakland, including all salt or marsh or tide lands and structures thereon granted to the city of Oakland in trust by the state of California for the promotion and accommodation of commerce and navigation."

It is not claimed by intervener that there was not then or that there was not at any time subsequent remaining sufficient unexpended and unapplied funds of said bond issue to pay the estimated expense of said lease contract or that the proceedings adopted by said city are in any way faulty, but it is claimed that the expenditure of public moneys for the construction of said warehouse for the uses to be made of it by the lessee amounts to lending the credit of the state, which is inhibited by article 4, § 31, State Constitution, in aid of said lessee in its private business enterprise, and, further, that it amounts to taxation for private purposes, which is a violation of the federal Constitution as well as of the State Constitution.

Public notice of intention to lease to the highest bidder, for a term of ten years, the filled parcel of tide lands, which is the subject of this proceeding, comprising approximately seven acres, together with a warehouse to be erected thereon by said board at the cost of approximately $400,000, and calling for bids thereunder, was duly published and circulated. The notice sets out the form of lease adopted by said board, which is very full as to its purpose and the mutual obligations of lessor and lessee. It provides, among many other things, that said warehouse shall be used for the purpose of receiving, storing, warehousing, preparing, and otherwise handling goods and for shipping the same and for other industrial uses which will promote commerce and shipping, but for no other purpose without the written consent of the lessor. The lessee is limited in the conduct of his business by the purposes above mentioned. The lessee shall be required to route for shipment by water from said Fourteenth street wharf terminal, adjacent to said premises, all goods which shall be owned or the shipment of which shall be controlled by the lessee, and which shall be shipped by water in the conduct of said business, whether produced or packed at said warehouse or elsewhere, and which can be conveniently shipped from said terminal and not in excess of the cost to the lessee or consignee at which such goods may be shipped from any other established cargo pier, dock, or terminal in general use in San Francisco or in Alameda county, to destination, including the cost of freight to, and the tolls and other regularly established charges incident to the handling of goods through, and the shipment of said goods from, such other established cargo pier, dock, or terminal. The lessor is required to maintain and operate said Fourteenth street wharf terminal in an efficient manner and as a public terminal for the accommodation of shipping by rail and water, including the handling of general cargo freight subject to what appear to be reasonable conditions. The lessee shall guarantee that the amount of goods which shall be routed and shipped by it annually during each of the first four years of said lease, over and through said terminal, shall not be less than 50,000 tons, and, in the event that said tonnage shall be less than 50,000 tons, the lessee shall pay to the lessor an amount equal to 30 cents for each ton of such deficiency as full compensation for nonperformance of its agreement; provided, that the lessor shall be relieved from full compliance with the terms of said lease in the ratio that the existence of conditions which expressly excuse performance has cut down the tonnage. The lessee shall agree that during the term of said lease it will exert its best efforts to cause all vessels necessary or convenient for the shipment of its goods to call at said terminal for the purpose of receiving shipments of goods which said lessee agrees to ship; also to pay all taxes, assessments, or charges which may be levied by the state, county, or city or any other tax or assessment levying body upon any interest or possessory right which the lessee may have in or to said land or improvements thereon and pay all taxes or assessments and charges levied upon goods, merchandise, fixtures, appliances, and equipment owned by said lessee. The board of port commissioners agrees to continue to cooperate with the United States government in carrying forward to completion an extensive plan of channel and harbor improvements adopted by the Congress of the United States and approved by the President April 28, 1928, making provision for extended harbor improvements in anticipation of the greatly increased volume of shipping originated by said Fourteenth street wharf terminal and the erection of said warehouse, which is to be further increased by other structures and improvements for the convenience of shipping generally in accordance with the program adopted by said board of port commissioners.

Upon the execution of the lease, the lessee is required to deposit $60,000 in gold coin as security for the faithful performance of its terms. We have set forth so much of said lease as tends to show that said warehouse was constructed and is to be used for a purpose in aid of and promotive of commerce and navigation.

The board, as a preliminary requisite, having found that it was necessary and convenient for the promotion and accommodation of shipping and commerce that said warehouse building be erected pursuant to the plan of harbor development adopted by it, and that it was consistent with the requirements of commerce and navigation that it be leased to a person or corporation shipping large cargoes of products and merchandise to foreign as well as domestic ports, accepted the bid of $34,598, annual rental, offered by Rosenberg Bros. & Co., a corporation, pursuant to said published notice of intention to lease said premises, and awarded the lease to said corporation. It is alleged, and not denied, that said Rosenberg Bros. & Co. is a responsible private corporation engaged in the business of packing, processing, and shipping dried fruits and related products, and that the general cargo and package goods annually shipped by said lessee equals in quantity and tonnage that of any other shipper on the Pacific Coast; that said Rosenberg Bros. & Co. owns or controls numerous large warehouses and packing plants located in the main on waters and transportation systems tributary to the western waterfront of said city of Oakland; that said corporation annually ships in excess of 50,000 tons of general cargo and package goods; that said corporation proposes to install in said warehouse shipping equipment, partitions, and other fixtures employed in the warehousing of dried fruits and related products in order that such products may be stored, processed, packed, and shipped directly from said Fourteenth street wharf terminal on ocean-going vessels to various ports of the world. In addition to said annual rental of $34,598, it is estimated that the earnings on the minimum guaranty of 50,000 tons per year will be in excess of $35,000. This added tonnage, it is claimed, will be sufficient to induce large steamship companies to make the port of Oakland a regular port of call, and this circumstance will in turn cause shippers to bring their products and merchandise to said port for shipment, thus increasing the revenue and tolls of the city of Oakland and aiding and assisting the general scheme and plan of establishing a permanent harbor that will rank in commercial importance with the leading harbors of the Pacific Coast.

[1] Intervener assails certain provisions of the lease, and seems to see in them a covert design on the part of the parties thereto to promote the private interests of Rosenberg Bros. & Co., rather than a purpose to aid the welfare of the harbor project. We have examined the provisions of the lease, and it appears upon its face to be a fair attempt to execute the trust imposed upon the board by the bond issue proposition and the charter amendment. The fact that certain provisions of the lease by which the parties make an effort to provide for a fair adjustment in case of failure to comply with certain covenants in the event that fortuitous circumstances should prevent a compliance therewith may also tend to create in the mind of the lessee a temptation to resort to equivocal conduct in an effort to gain an unfair advantage is not sufficient ground to support the conclusion that such a result was contemplated by the lessor or that the lessee would be influenced thereby. The lease appears to be reasonable, and no difficulties will be encountered if the parties thereto are disposed to interpret it in the light of the circumstances in which it was executed and the purposes which both the lessor and lessee covenanted to promote. It is to be presumed that they will so act.

[2] The questions of the necessity for the improvements and the adoption of the method by which they will be accomplished are matters resting in the judgment of the governing body, and courts will not interfere with the exercise of its judgment unless it appears that its proposed plans are not only not the best that might be adopted, but that they are so inadequate and impracticable as to inevitably result in a waste of public funds. In other words, the judgment of the board as to the necessity for the construction of the building and the methods employed for its construction will not be disturbed except in cases where the exercise of judgment or discretion is shown to have been unquestionably abused.

[3, 4] Intervener contends that the clause of the lease which grants to the lessee said building "for the purpose of receiving, storing, warehousing, preparing and otherwise handling goods and for shipping the same and for other industrial uses which will promote commerce and shipping" gives to the lessee the right to use said building for unlimited purposes which may not at all correlate with the carrying out of the trust with which said board is charged by the express provisions of the charter of said city of Oakland. We do not think that the literal language of the lease is reasonably susceptible of such a construction. Certainly the lease cannot be so construed when read as a whole and in connection with the grant to the city, the charter, and the ordinance of the city in submitting the bond proposition to a vote of the people. The erection of said building and the letting of the same for the purposes set forth in said lease must have some relation to and connection with, or be promotive of the accomplishment of the main purpose, to wit, the development, improvement, and upbuilding of a harbor with all the wharves, piers, warehouses, and other facilities and conveniences essential to its business success and growth in order to receive judicial approval. That said lease contract authorizes an improvement and conveniences consistent with the scheme of developing and improving said harbor we entertain no doubt.

Intervener places much emphasis upon the fact that the board had no control of the management of said private corporation and for that reason the present transaction falls within the rule announced in Egan v. San Francisco, 165 Cal. 576, 133 P. 294, Ann. Cas. 1915A, 754. Cases of this character are not in point. The board in the instant case does not propose to participate in or share in the profits arising from the operation of the business conducted by Rosenberg Bros. & Co., nor is its interest in said corporation's financial success in any degree different from the interest that a landlord may ordinarily feel in his tenant's success. The Rosenberg Bros. & Co. transaction constitutes but a single unit in a comprehensive plan adopted with the purpose of improving and developing a harbor in which deep water vessels may find anchorage, promotive of commerce and navigation, and not with the primary purpose of promoting the business success of said corporation, although such a result may be an incident of said purpose. The board is primarily interested in the development and commercial success of said harbor, and, as to it, it exercises exclusive control. Its relation with said corporation is that of landlord and tenant. Nor is there impressive persuasiveness in the claim that said warehouse building cannot, in the light of the situation presented, be lawfully leased for the exclusive use of said corporation on the theory that exclusiveness as to control would destroy its public character.

In the case of In re Mayor of New York, 135 N. Y. 253, 31 N. E. 1043, 31 Am. St. Rep. 825, involving a proceeding to condemn wharf and other properties as a part of a plan of putting under public ownership all wharves and piers in the city of New York, the question of exclusive use was disposed of in the following pertinent language:

"If the necessity for exclusive use exist, such necessity ought to be recognized by the city and the attempt to supply such necessity is an attempt to fulfill a public duty. The fact of exclusive use by the lessee must be considered with reference to all the other property of a like nature possessed by the city and at which all necessary and proper facilities may be afforded for the remainder of the commerce of the port.

"* * * The circumstances surrounding the case must be viewed in all aspects. The act plainly contemplates through all its provisions the fact that there will always remain under the direct control and possession of the city sufficient piers and docks for the accommodation of all commerce which may seek our port and which has no special pier or dock leased to the owner of the vessel desiring dock facilities.

"Considering the large extent of the property of this description owned and to be owned by the city, together with the fact that there is no absolute direction to the city to lease the smallest portion thereof to anyone, we become at once convinced that the leasing which will be actually carried on under this mere permission will amount to no more than a special regulation of the manner in which a comparatively small portion of the whole property of this nature owned by the city shall be used for the legitimate ends of commerce.

"This mere permission to use property by leasing it to others, when the whole surrounding circumstances are examined, cannot be regarded as providing for its private use.

"When used by lessees under the facts already stated, the use is a public one. The use is public while the property is thus leased, because it fills an undisputed necessity existing in regard to these common carriers by water, who are themselves engaged in fulfilling their obligations to the general public; obligations which could not otherwise be properly or effectually performed. And in filling the necessity for such accommodations, the city or the state is only performing its public duty."

Also directly in point is Marchant v. Mayor, etc., City of Baltimore, 146 Md. 513, 126 A. 884.

The object of the board in erecting said warehouse was not the promoting of the business of drying and processing fruits, but it was built with the view that it would develop said harbor and harbor commerce, which is clearly a public purpose.

[5] It cannot be successfully argued that the public had the right to occupy each and every portion of said expansive tide land area granted to said city. If this were so, a lessee would have no security of possession. Public property in the control of a private party may, nevertheless, serve a public purpose as an aid to, or a part of, a general plan. The contention of intervener that said warehouse cannot be leased for an exclusive use to said corporation can find support only upon the assumption that said warehouse and site constitute the whole and all there is of the project. Such is not the case. It is but a unit of a comprehensive plan. The board is commanded by said city charter "to make provision for the needs of commerce, shipping and navigation of the port, to promote, develop, construct, reconstruct * * * and operate all waterfront properties, including piers, wharves * * * warehouses * * * and operate all other facilities or *aids incident to the development* * * * *of the port as may be deemed proper and desirable in its judgment.*" (Italics supplied.) Said board is not attempting to lease or pass into the exclusive use of a private corporation all or any considerable part of the vast land acreage upon which other warehouses must be constructed as provided by charter as the commercial growth of the harbor shall require. The present warehouse, which intervener claims is not immediately needed, is but the beginning of an extensive plan of harbor improvement. Provision should be made in all cases for future growth.

Intervener further objects to the uses which are to be made of said warehouse, claiming that they are not strictly warehouse uses. We think this objection is not well taken. Said warehouse is for the accommodation of a vast fruit-growing section of the state, and offers as an outlet to said producers the highways of the sea. As a medium of commerce, it thus serves a public use. That said private corporation was awarded the lease does not make its possession any more exclusive than the possession that ordinarily passes with any other leasehold. A proper regard for the laws of health and sanitation require that a building or warehouse in which dried, processed, and related fruits are to be stored awaiting shipment during the summer season should be separate and apart from buildings in which hides, tallow, cured fish, and other articles of commerce of a noisome character are stored. The equipment necessary for ventilation and refrigeration and the conveniences essential for repacking and reprocessing and caring generally for such commodities may require an arrangement of the floor spaces which would constitute obstructions in the storage of general merchandise. Nor does the objection against leasing the whole of a publicly owned warehouse, rather than a portion thereof, appear to possess merit. It is admitted that Rosenberg Bros. & Co. are very extensive shippers of many varities of dried, cured, and processed fruits. It may be that one warehouse will not be sufficient in a short time to properly accommodate them as shippers. If their business, present or prospective, would warrant the board in its judgment to construct a warehouse to be used in the housing of merchandise pending transportation, we see no good reason why it should not do so. If others wish the same, or any accommodation whatsoever, doubtless provision will be made for them on equal terms with said corporation. It will be remembered that said warehouse is to be at all times conducted in a manner not inconsistent with the promotion of the commerce of said port and the board retains supervisory control over the uses to which said warehouse will be devoted. It will also be borne in mind that the building is the warehouse type, agreeing in construction with others now built or to be built, and the lessee is required upon expiration of its lease, if the lessor so requires, to remove from said building all partitions, equipment and other conveniences it may have placed therein, thus leaving the floor space of said warehouse open and ready for the storage of miscellaneous merchandise.

Intervener has cited a number of cases which hold that statutes attempting to authorize cities or counties to engage in the manufacture and sale of cement, or to issue bonds and donate them to a private manufacturing enterprise for the purpose of encouraging the establishment of factories or private industries within the taxing district in which said factories are proposed to be located, are void. Such cases as City and County of San Francisco v. Boyle, 195 Cal. 426, 233 P. 965, have no bearing upon the principle of law which must rule the decision in the instant case.

A number of cases are to be found in which the principle of law here involved was applied to situations quite analogous to the instant case, and the said several courts held that the power sought here to be exercised was a power properly conferred upon the governing body. The case of Veterans' Welfare Board v. Jordan, 189 Cal. 124, 208 P. 284, 22 A. L. R. 1515, answers many of the objections urged by intervener against the power of the board of port commissioners to enter into the lease which is here under attack. It cannot be doubted that said board is fully authorized to construct warehouses for purposes which intervener terms general uses by the public. It is the use which is to be made of said warehouse which furnishes the grounds of intervener's protest. In the Veterans' Welfare Board Case, supra, this court adopted as a part of its decision the language of the Supreme Court of the United States pronounced in Green et al. v. Frazier et al., 253 U. S. 233, 40 S. Ct. 499, 64 L. Ed. 878, in sustaining the validity of the Home Building Association of North Dakota, which, because of its appositiveness to the several questions raised in the instant case, is reproduced:

"What is a public purpose has given rise to no little judicial consideration. Courts, as a rule, have attempted no judicial definition of a 'public' as distinguished from a 'private' purpose, but have left each case to be determined by its own peculiar circumstances. Gray, Limitations of Taxing Power, § 176. 'Necessity alone is not the test by which the limits of state authority in this direction are to be defined, but a wise statesmanship must look beyond the expenditures which are absolutely needful to the continued existence of organized government, and embrace others which may tend to make that government subserve the general well-being of society, and advance the present and prospective happiness and prosperity of the people.' Cooley, Justice, in People v. Salem, 20 Mich. 452 [4 Am. Rep. 400]. Questions of policy are not submitted to judicial determination, and the courts have no general authority of supervision over the exercise of discretion which under our system is reposed in the people or other departments of government. Chicago, B. & Q. R. R. Co. v. McGuire, 219 U. S. 549, 569 [55 L. Ed. 328, 31 S. Ct. 259]; German Alliance Ins. Co. v. Lewis, 233 U. S. 389 [58 L. Ed. 1011, 34 S. Ct. 612, L. R. A. 1915C, 1189; see, also, Rose's U. S. Notes].

"With the wisdom of such legislation, and the soundness of the economic policy involved we are not concerned. Whether it will result in ultimate good or harm it is not within our province to inquire."

It appearing to this court that said lease and contract was lawfully entered into and is valid, subsisting contract between the parties thereto, and no sufficient legal cause having been shown why said auditor of the city of Oakland should not attach his certificate to said lease and contract, it is therefore the order of this court that a writ of mandate do issue commanding said auditor to attach his official certificate to said lease and contract in the manner and as provided by the charter and laws of said city of Oakland.

We concur: WASTE, C. J.; RICHARDS, J.; SHENK, J.; PRESTON, J.; LANGDON, J.; CURTIS, J.

206 Cal. 282

O'CONNELL v. LAMPE et ux. (L. A. 10134.)

Supreme Court of California. Jan. 28, 1929.

1. Landlord and tenant ⚷92(1)—Lessee's payment of rent was consideration for irrevocable right to purchase leased premises in accordance with option.

Payment by lessee of rent for full term of lease constituted sufficient consideration for lessee's irrevocable right to purchase the leased premises for specified price in accordance with option.

2. Specific performance ⚷57—Specific performance is proper remedy to require lessor to convey premises to lessee electing to exercise option to purchase.

Specific performance is proper remedy in case of lessor's refusal to convey premises to lessee electing to exercise option to purchase, if contract is certain in all its terms, fair and just in all its parts, and not a hard or unconscionable bargain.

3. Specific performance ⚷49(2)—Mere inadequacy of price is not, in absence of statute, ground for refusing remedy of specific performance.

In absence of statute on the subject, mere inadequacy of price or inequality in value between the subject-matter and the price is not a ground for refusing the remedy of specific performance.

4. Specific performance ⚷49(2)—Inadequacy of consideration sufficient to defeat right to specific performance relates to time of formation of contract (Civ. Code, § 3391, subd. 1).

Inadequacy of consideration, in order to defeat right to specific performance by virtue of Civ. Code, § 3391, subd. 1, must relate to the time of the formation of contract rather than date on which option to purchase was exercised.

In Bank.

Appeal from Superior Court, Los Angeles County; Edward T. Bishop, Judge.

Action by John A. O'Connell against Herman Lampe and wife. From a judgment for defendants and an order denying the entry of a different judgment, plaintiff appeals. Reversed.

John L. McGonigle and Tanner, Odell & Taft, all of Los Angeles, for appellant.

Dan M. Critchley, of Los Angeles, for respondents.

WASTE, C. J. This appeal of the plaintiff from a judgment and decree refusing to order and direct the specific performance of an agreement to convey real property, and from an order denying the entry of another and different judgment, was placed upon a special calendar of this court upon an order to the respondents to show cause why said judgment should not be reversed, or that such order be made as might be meet in the premises. At the time of the placing of the cause upon said calendar, and the entry of the order to show cause, it appeared that the appellant's brief had been filed herein, but that no brief had been filed on behalf of the respondents, although the time for the filing of such brief under the rules of this court had long since expired. The order to show cause was, therefore, submitted upon the calling of the special calendar on points and authorities presented by the appellant.

On December 5, 1921, the respondents, by written instrument, let and demised the property in question to the appellant for a period of five years, at a monthly rental of $70, with the right of a renewal or extension for a similar period on the same terms, if the lessee were not in default. The lease, by its further terms, gave the lessee an option to purchase the leased premises during the five-year period for the sum of $8,000, the option to take effect immediately from the date upon which the lessee took possession.

Upon the execution and delivery of the lease, the lessee entered into and was thereafter in sole possession of the premises, and at the time of commencement of the action was conducting a general grocery business thereon. He paid the monthly rental, faithfully performed all the terms and conditions of the lease, and made valuable improvements on the property. On April 8, 1926, and prior to the expiration of the lease, the lessee exercised his right of option by tendering to the lessors the agreed purchase price and demanding a conveyance of the premises. On the refusal of the lessors to accept the tender and to specifically perform, the lessee brought this action, alleging, among other matters, the adequacy of the agreed purchase price of the premises. By their answer respondents denied the allegation of the complaint touching the reasonableness and adequacy of the purchase price. The evidence tended to show that the property was worth approximately $8,000 in 1921 when the lease was executed. It was stipulated by the parties, however, that the property was reasonably worth $12,000 at the time appellant elected to purchase it. The trial court denied the relief prayed for in the complaint, finding that the "lease and option contract was in effect a continuing offer, which was not accepted by plaintiff until April 8, 1926, and that the offer or agreement to pay $8,000, was at that time no longer an adequate consideration." It also purported to find, as a mixed finding of fact and conclusion of law, that the payment of $70 a month by way of rental, pursuant to the terms of the lease, "was not in excess of the monthly rental value of the premises, and therefore did not furnish an adequate consideration for the option for the purchase of the property." Because of these findings the judgment denying specific performance must be reversed.

[1, 2] The right or option to purchase, given

the lessee by this lease, was not a mere offer without consideration. There was a valuable consideration moving from the lessee to the lessors. Contrary to the conclusion of the trial court, the payment by the lessee of the rent for the full term was the consideration for the lessee's irrevocable right to purchase the leased premises for the specified price, if he should elect to do so. Gordon v. Dufresne (Cal. Sup.) 271 P. 1066. Upon his doing so, what was before an option right became an executory contract for the sale and purchase of the property. Cates v. McNeil, 169 Cal. 697, 147 P. 944; Vassault v. Edwards, 43 Cal. 458, 464; Pomeroy's Specific Performance of Contracts (3d Ed.) § 169, p. 432. Such optional contracts are almost universally enforced, if fair and resting on adequate consideration, after the parties having the privilege of accepting them have exercised their rights in such a mode as to bind themselves by the contract. Even though unilateral before, on the exercise of the option such contracts become mutual. An option to buy land, perhaps more than any other form of contract, contemplates specific performance of its terms; and it is the right to have them specifically enforced that imparts to them their usefulness and value. (Note to section 169, Pomeroy's Specific Performance of Contracts, supra.) Specific performance is the proper remedy in such cases, if the contract is certain in all its terms, fair and just in all its parts, and not a hard or unconscionable bargain. Hall v. Center, 40 Cal. 63, 67.

[3, 4] In those jurisdictions in which there is no statute upon the subject the rule is, as stated by Professor Pomeroy, that mere inadequacy of price, that is, inequality in value between the subject-matter and the price, is not a ground for refusing the remedy of specific performance. Morrill v. Everson, 77 Cal. 114, 115, 19 P. 190; 2 Pomeroy's Equity Jurisprudence (4th Ed.) § 926. But section 3391, subd. 1 of the Civil Code provides that specific performance cannot be enforced against a party to a contract if he has not received an adequate consideration. "It is therefore put beyond the reach of successful argument that the laws of the state of California declare to its courts of equity that they shall deny the equitable relief of specific performance when they find an inadequacy of price standing alone." O'Hara v. Wattson, 172 Cal. 525, 535, 157 P. 608. While there seems to be a conflict among the authorities, the better rule appears to be that questions relating to the fairness and adequacy of the price must be referred to the inception of the agreement. Pomeroy's Specific Performance of Contracts, supra, §§ 177, 178 et seq. The accepted rule in this state is that the question of the inadequacy of the consideration relates to the time of the formation of the contract —that is, at the time the contract was made. Morrill v. Everson, supra, at page 116; Andersen v. Charles, 52 Cal. App. 290, 293, 198 P. 641; Keim v Lindley (N. J. Ch.) 30 A. 1063, 1086; 25 R. C. L. 210, par. 10. The trial court in this case departed from the rule and found an inadequacy of price, not at the time the lease was entered into and the option granted, but at the date on which the option to purchase was exercised. There is no finding of any unfairness or undue delay on the part of the lessee.

The judgment, and the order denying the motion of the plaintiff below for the entry of another and different judgment, are, and each is, reversed.

We concur: LANGDON, J.; PRESTON, J.; CURTIS, J.; SHENK, J.; SEAWELL, J.; RICHARDS, J.

---

206 Cal. 346

SNYDER v. SUPERIOR COURT IN AND FOR SAN DIEGO COUNTY et al.

(S. F. 13032.)

Supreme Court of California. Jan. 30, 1929.

1. Insane persons 🔑13—Order for appointment of guardian for incompetent, made on day petition was filed, held void for failure to give statutory notice, notwithstanding recital that notice was given (Code Civ. Proc. § 1763).

Order appointing guardian for incompetent person, shown by record to have been made on the same day the petition for appointment of guardian was filed, precluding possibility of five days' notice of hearing as required by Code Civ. Proc. § 1763, *held* void for want of jurisdiction, notwithstanding recital in order that notice of hearing had been given according to law.

2. Insane persons 🔑13—In proceedings to determine incompetency and appoint guardian, giving of statutory notice of hearing is jurisdictional (Code Civ. Proc. § 1763).

Giving of five days' notice of hearing on petition for appointment of guardian for incompetent person as required by Code Civ. Proc. § 1763, is jurisdictional, and without it court has no power to adjudicate question of incompetency or appoint guardian of estate of incompetent person.

3. Insane persons 🔑13—Appearance of person charged with incompetency and consent to appointment of guardian held not waiver of statutory notice of hearing; incompetent being incapable of waiving notice (Code Civ. Proc. §§ 1763, 1764).

Personal appearance of incompetent before the court in proceedings to determine incompetency and consent to appointment of guardian for her estate *held* not to amount to waiver of notice of hearing required by Code Civ. Proc. § 1763, so as to confer jurisdiction on court, since party charged with mental incapacity is incapable of waiving statutory notice or consenting to order under section 1764.

4. Insane persons 🔑39—Failure to give incompetent statutory notice rendered order for appointment of original guardian's successor void (Code Civ. Proc. § 1763).

Order appointing guardian of estate of incompetent to succeed former guardian, who resigned, *held* void for want of jurisdiction, where incompetent was not given five days' notice of hearing as required by Code Civ. Proc. § 1763.

5. Insane persons 🔑71 — Court held without authority to cancel commissioner's certificate of sale of incompetent's land on foreclosure, where purchasers were not made parties.

Court in suit by incompetent *held* without authority to cancel commissioner's certificate of sale, on mortgage foreclosure, of incompetent's property, on ground that mortgage under which sale was made was procured by fraud, where purchasers of certificate were not made parties.

6. Insane persons 🔑27—Supreme Court on certiorari by incompetent to review orders determining incompetency and appointing guardians held without jurisdiction to adjudicate validity of mortgage on incompetent's property.

Supreme Court in original certiorari proceedings by incompetent to review orders of court adjudicating incompetency and appointing guardians *held* without jurisdiction to determine validity of mortgage as against property of incompetent or to cancel commissioner's certificate of sale on foreclosure, even if all necessary parties were before court.

In Bank.

Original proceeding by Alzeda R. Snyder, an incompetent person, by H. William Hess, her guardian ad litem, for writ of certiorari, to be directed to the Superior Court in and for San Diego County, Department No. 4, and Hon. C. N. Andrews, Judge, to review certain orders decreeing petitioner incompetent and appointing guardians. Orders annulled.

H. William Hess, for appellant.

CURTIS, J. This is an original application to this court, brought by Alzeda R. Snyder, an incompetent person, by H. William Hess, her guardian ad litem, directed to the superior court of the county of San Diego, praying for an order requiring said superior court to certify to this court a full transcript of the records and proceedings in the matter of the guardianship of Alzeda R. Snyder, an incompetent person, and that upon a review of said proceedings this court annul two certain orders made therein; in one of said orders, dated March 8, 1926, the said Alzeda R. Snyder was declared an incompetent person, and Albert E. Miller was appointed guardian of her estate; and in and by the other of said orders, dated April 8, 1927, Lucy Harris Murphy was appointed guardian, the said Albert E. Miller having resigned as such guardian, and his resignation, after the settlement of his account as guardian, having been accepted by said superior court. Upon the filing of said application or petition, this court made its order directing said superior court to certify to this court all the proceedings of record in said court in the matter of said guardianship. Said order has been complied with and said proceedings are now before us, duly certified as required by law and the previous order of this court.

[1, 2] The ground upon which petitioner asks for the annulment of said orders is that the court never acquired jurisdiction of the person of said incompetent person or of her estate to make either of said orders, for the reason that no notice, as required by section 1763 of the Code of Civil Procedure, was ever given prior to the granting of either of said orders. We will first consider the order of March 8, 1926. It appears from the return of the respondents, as well as by the allegations of the petition, that on that day the said Albert E. Miller filed a petition in said superior court, containing the necessary averments for the appointment of a guardian of the estate of the said Alzeda R. Snyder as an incompetent person, and asked therein for the appointment of himself as such guardian. On the same day the court made an order fixing the time for hearing said petition for 2 p. m. of said day. Said order provided "that said incompetent person be produced before the court at the time fixed herein for the hearing of said petition and that no notice of said hearing be given." The order appointing the said Albert E. Miller guardian recited "That notice of this hearing has been given according to law and the order of the court; that the allegations of said petition are true; that said Alzeda R. Snyder appeared personally before the court and consented to the appointment of a guardian of her estate." It appears from the foregoing that no notice was given to the said Alzeda R. Snyder of the time and place of hearing the petition of Miller to have her declared an incompetent and himself appointed the guardian of her estate, but that said incompetent person did appear personally in court and consented to the appointment of a guardian of her estate. It is true that said order contained a recital "that notice of this hearing has been given according to law and the order of the court." The only order contained in the proceedings certified to us, bearing upon the notice given Mrs. Snyder, was that of March 8, 1926, which provided that "no notice of said hearing be given." The further fact is shown by the record that the order appointing the guardian was made on the same day the petition for such appointment was filed. It was therefore impossible to give the five days' notice of the hearing of said petition as required by section 1763 of the Code of Civil Procedure. In spite

of the above recital regarding notice contained in the order appointing the guardian, it must be held that from the whole record before us it conclusively appears that the notice required by the section of the Code just mentioned was not given. In the case of McGee v. Hayes, 127 Cal. 336, 59 P. 767, 78 Am. St. Rep. 57, the order therein considered which was an order appointing a guardian of the estate of an incompetent person, contained a recital that "he [the alleged incompetent] 'was duly notified of the time and place of the hearing of the petition heretofore filed herein.'" The court, however, found from the record that the only notice given or served was a copy of a certain order, which the court also found to be insufficient, and, in spite of the recital in the order regarding due notice given, held that the appointment of the guardian was void for failure to give the notice required by section 1763 of the Code of Civil Procedure. The giving of this notice is jurisdictional, and without it the court has no power to adjudicate the question of the incompetency of a person brought before it charged with being incompetent, or to appoint a guardian of the estate of such person. McGee v. Hayes, 127 Cal. 336, 59 P. 767, 78 Am. St. Rep. 57; Estate of Schulmeyer, 171 Cal. 340, 345, 153 P. 233; Estate of Espinosa, 179 Cal. 189, 175 P. 896; Grinbaum v. Superior Court, 192 Cal. 528, 221 P. 635.

[3] The next question is whether Mrs. Snyder's appearance in court at the time of the hearing and consenting to the appointment of a guardian of her estate amounted to a waiver of the required notice and gave to the court jurisdiction over the proceedings to have her declared incompetent and to appoint a guardian of her property. This same question was before this court in two different proceedings, and on each occasion it was held that a party charged with mental incompetency is incapable on the trial of the issue as to such incompetency of waiving the statutory requirement as to notice or of consenting to an adjudication of incompetency. McGee v. Hayes, 127 Cal. 336, 59 P. 767, 78 Am. St. Rep. 57; Guardianship of Sullivan, 143 Cal. 462, 77 P. 153. In the first of these cases the order appointing a guardian recited "that the said William L. McGee appeared in person at the hearing of said petition, on this day, and requested that said petition be granted." The court in passing upon the validity of the order appointing a guardian of his estate held said order to be void. In doing so it used the following language: "The presence of the incompetent could not supply the requirement of the statute that he should be served with notice of the hearing; he was incapable by reason of his incompetency to consent to the jurisdiction of the court or waive any of the steps necessary to confer jurisdiction upon the court, or to make any request that the petition be granted."

In Guardianship of Sullivan, supra, the court said, on page 466 of the opinion (77 P. 154): "The only question was as to whether or not there was such mental incompetency on the part of Mrs. Sullivan as to make it essential for the protection of herself and her property that a guardian should be appointed. The statute does not contemplate that any such adjudication should be made upon the agreement of the party alleged to be incompetent. If the party is in fact mentally incompetent, his request or consent that he be so adjudged is unavailing for any purpose. He is incapable of making any such request or giving such consent. McGee v. Hayes, 127 Cal. 336 [59 P. 767, 78 Am. St. Rep. 57]. If he be not in fact incompetent, his agreement that he is incompetent does not make him so, and the statute authorizes the appointment of a guardian on this ground only where, after full hearing and examination, it appears from the testimony that the person is in fact incapable of taking care of himself and managing his property. Code Civ. Proc. § 1764. The consent of the alleged incompetent was therefore unavailing for any purpose, except perhaps as evidence upon the question of incompetency." These authorities undoubtedly settle in this state the question of the power of a person accused of being incompetent to waive the notice prescribed by the statute, and to consent to an adjudication of incompetency. They expressly hold that such a person cannot waive the statutory notice nor consent to an order declaring him incompetent, and that an order made without giving the statutory notice is void, even when the alleged incompetent person appears in court in person and consents to the making of such order. The order of March 8, 1926, purporting to appoint Albert E. Miller guardian of the estate of said incompetent person was void.

[4] The same consequences must follow the order of April 8, 1927, appointing Lucy Harris Murphy the guardian of said estate to succeed Miller. The court not having acquired jurisdiction of said incompetent person or of her estate authorizing it to appoint Miller guardian of her estate, it would have no power to appoint a successor to Miller, except after proceedings had wherein all the requirements of the statute providing for the giving of notice to the alleged incompetent were complied with. The petition for the appointment of Mrs. Murphy was by the court, by an order made on April 4, 1927, set for hearing on April 8, 1927, and provided that a citation issue for the appearance of Mrs. Snyder and that it "be served personally upon said ward at least three days prior to said hearing." As before stated, the code section provides that notice of the hearing must be given at least five days before the hearing. The return to said citation shows that it was served upon Mrs. Snyder on April 4, 1927, which would not give the required five days' notice to her of said hearing. The court therefore never acquired jurisdiction to make the order ap-

pointing Mrs. Murphy guardian of Mrs. Snyder's estate. It follows, then, that each of said orders is void, and should be annulled.

[5, 6] In addition to the petition filed herein asking for the annulment of said orders, and subsequent to the filing of such petition, the petitioner by her guardian ad litem, H. William Hess has filed what she terms and designates as "Supplemental Data as to Relief Prayed For." In this instrument, among other things, the petitioner makes it to appear that after the appointment of Miller as guardian certain litigation instituted by him and affecting real property claimed to be owned by petitioner was compromised, and as a result of such compromise, the petitioner was awarded said real property subject to a prior mortgage; that Miller, as such guardian under order of court, sold the interest of petitioner in said real property for the sum of $9,500, to be paid $1,500 in cash and the balance evidenced by a promissory note for $8,000 secured by a second lien by means of a trust deed, upon said read property; that subsequently thereto the first mortgage was foreclosed, and the said real property was sold to William H. Sweetland and Adina May Sweetland under said judgment of foreclosure by H. J. Place, a commissioner appointed by the superior court of the county of San Diego, and that said Place had issued to said William H. Sweetland and Adina May Sweetland, his wife, a commissioner's certificate of sale of said real property, which certificate of sale has been recorded in the office of the county recorder of said county. It is further alleged in said supplemental pleading that said first mortgage was procured through trickery and device practiced upon Mrs. Snyder by persons who were the predecessors in interest of Sweetland and wife in the ownership of said first mortgage, and that the latter were at all times aware of the fraudulent origin of said first mortgage, and had notice that the same grew out of and resulted from certain transactions by and through which Mrs. Snyder was defrauded of property the value of which exceeded the amount of the promissory note secured by said first mortgage. Petitioner therefore asks for the cancellation of said commissioner's certificate of sale, and for other relief against him and the Sweetlands. None of these last-named persons are made parties to this proceeding, and the record does not show that notice of the pendency of these proceedings has been given to any of them, and no appearance has been made herein by any of said persons. Any order which we might make, therefore, in response to the prayer of this supplemental pleading or petition would be ineffectual for any purpose as against said parties for want of notice to them. But even if said parties were properly before this court upon notice duly and regularly served upon them, this court has no jurisdiction, either appellate or original, to entertain such a proceeding or to grant any relief thereunder. The validity of said mortgage as against the property of petitioner and the rights of the holders thereof and those of the purchasers of said real property at said foreclosure sale cannot be determined in this proceeding. The petitioner may have a good cause of action against said parties for the cancellation and annulment of said mortgage, but such action must be brought in the proper tribunal, and can only be finally determined after due notice is given to all parties interested therein.

For the reasons stated in this opinion it is ordered and decreed that those two certain orders of the superior court of the county of San Diego, in the matter of the estate and guardianship of Alzeda R. Snyder, an incompetent person, one of which is dated March 8, 1926, and purports to appoint Albert E. Miller guardian of said estate, and the other of said orders dated April 8, 1927, purporting to appoint Lucy Harris Murphy guardian of said estate, to succeed the said Albert E. Miller, are hereby annulled.

We concur: WASTE, C. J.; LANGDON, J.; PRESTON, J.; RICHARDS, J.; SHENK, J.; SEAWELL, J.

---

206 Cal. 363

SHADY v. MERCANTILE ARCADE REALTY CO. (L. A. 9509.)

Supreme Court of California. Jan. 30, 1929.

1. Landlord and tenant ⟜232—Lessor, reducing rental for preliminary period conditionally, could recover from delinquent lessee balance due under modified agreement, plus amount of reduction, plus rental for subsequent months.

Lessor, reducing rental $200 per month for first eight months of lease on condition that lessee would faithfully perform covenants of lease during period of reduced rental, *held* entitled to recover balance due under modified rental agreement to end of reduced rental period and time of lessee's abandonment, plus $200 a month for that period, and full rent for subsequent months, where lessee became delinquent in paying rentals during the reduced rental period, and failed to give ten days' notice of intention to cancel as required by contract, and asserted claim to deposit on ground that lease was fraudulent.

2. Appeal and error ⟜1117—On motion of appealing defendant for judgment on findings, court must increase plaintiff's recovery where findings so require (Code Civ. Proc. § 663).

Where defendant not only appealed from the judgment, but moved for judgment on the findings under Code Civ. Proc. § 663, reviewing court is obliged to modify judgment as the findings require, though modification is in plaintiff's favor.

Department 1.

Appeal from Superior Court, Los Angeles County; Walter Guerin, Judge.

Action by J. Shady against the Mercantile Arcade Realty Company. Judgment for plaintiff, and defendant appeals. Modified and affirmed.

Bertin A. Weyl and S Laz Lansburgh, both of Los Angeles, for appellant.

Burnett Wolfson and Louis L. Swarthe, both of Los Angeles, for respondent.

PRESTON, J. In this cause, paragraph I of the judgment is amended to read as follows: "That in the action entitled 'Mercantile Arcade Realty Company, a corporation, plaintiff, v. J. Shady, defendant,' numbered 160209, Mercantile Arcade Realty Company, a corporation, do have and recover of and from J. Shady the sum of four thousand six hundred eighteen and 44/100 (4,618.44) dollars, together with interest thereon at the rate of seven per cent. per annum from the date hereof until paid; together with costs and disbursements of said Mercantile Arcade Realty Company, a corporation, incurred in said action, amounting to the sum of $71.30."

Paragraph II of said judgment is modified to read as follows: "That in the action entitled 'Mercantile Arcade Realty Company, a corporation, plaintiff, v. J. Shady, defendant,' numbered 167550, the said Mercantile Arcade Realty Company, a corporation, have and recover from said J. Shady the sum of twenty-nine hundred four and 75/100 (2,904.75) dollars, together with interest thereon at the rate of seven per cent. per annum from the date hereof until paid."

As so modified, it is ordered that the said judgment be and the same is hereby affirmed, with costs to appellant. This judgment is so modified and affirmed for the following reasons:

First, it will be noted that the parties plaintiff and defendant have been transposed; the Mercantile Arcade Realty Company, a corporation, being known in the judgment as the plaintiff and J. Shady being known as the defendant. In this opinion said corporation will be called the company.

Said company leased, as of February 15, 1924, to defendant, shops 5 and 6 in the Arcade Building, Los Angeles, for a term of ten years, at a combined rental of $900 per month. In May, 1924, an amended agreement was executed by the parties, changing the spread of said rental but without changing the total amount thereof. The change provided for a rental of $700 per month instead of $900 per month between May 1 and December 31, 1924, with a rental of $1,000 per month for the succeeding sixteen months; then the old rate of $900 per month was to reattach. This concession, however was dependent upon the faithful performance of the covenants of the lease during the period of reduced rental. The right to cancel the leases was also given the defendant, provided he gave a written notice to that effect ten days prior to December 31, 1924, and provided also that he relinquished to the company the sum of $2,850, theretofore deposited with it as security for the faithful performance of the covenants of the lease on his part.

The findings show that in all these particulars Shady fell short of his covenants. He paid the October rental long after it was due. He paid only half of the November rental and none of the rental for December, abandoning the premises altogether on December 27, 1924. He failed to give the ten-day notice of his intention to withdraw from the contract. He failed to relinquish his claim to the $2,850 pledged as security as above stated. He adopted a contrary line of conduct altogether, by suing on December 22, 1924, to cancel said leases for fraud, and asked as well for the return to him of said sum of $2,850 so pledged.

The court found against him on all these issues and specifically established the integrity of the leases and decreed them to be binding and subsisting at all times herein. The company sued Shady in two actions—the first for the balance due on the rent for the months of November and December, 1924, at the rate of $700 per month, and January, 1925, at the rate of $1,000 per month, and for certain other undisputed items relating to charges for electricity, etc., aggregating $181.11, and for the sum of $200 per month with interest for the eight months beginning May 1, 1924, and ending December 31, 1924; the second action was for the original rate of $900 per month rental for the months of February, March, and April, 1925.

These two causes of action and the action by Shady for a cancellation of the leases were consolidated and tried together. The judgment denied all relief to Shady on his cause of action, but the company was given only partial relief, confined to the balance due under the modified rental agreement up to December 31, 1924, and attorneys' fees. Nothing was allowed it on the $200 per month reduced rental claim nor upon the claim for rental subsequent to December 31, 1924.

[1] From the above facts found by the court there is no escape from the conclusion that plaintiff company is entitled on the findings to judgment for the $200 per month because of the failure of Shady to live up to the conditions upon which the right to said reduction was to come into being, to wit, the prompt payment when due of the reduced rental. Shady, in fact, not only failed to pay, but repudiated the leases altogether. The company was also entitled to judgment for the rent from January to April, 1925, inclusive, for the same reason. Shady did not elect to cancel within the required time, nor

did he relinquish his claim to said $2,850, pledged as security for the faithful performance of the covenants on his part to be kept and performed. On the contrary, he sought to repudiate the leases and reclaim this sum. Having failed in these efforts, he must submit to the legal consequences.

[2] Appellant not only appealed from the judgment, but moved for judgment on the findings as provided under section 663 of the Code of Civil Procedure.

Under this state of the record there is nothing to do but to modify and affirm the judgment as above ordered.

We concur: SEAWELL, J.; CURTIS, J.

McCOLGAN v. BANK OF CALIFORNIA NAT. ASS'N et al. (S. F. 12087.)★

Supreme Court of California. Jan. 30, 1929.

Rehearing Granted Feb. 28, 1929.

1. **Principal and agent 🔑43(1)—Agency, unless coupled with interest, terminates on principal's death.**

Agency terminates on death of principal, unless agency is coupled with an interest.

2. **Principal and agent 🔑43(2)—"Power, coupled with an interest," involves beneficial interest in subject or power given as security.**

To create a "power coupled with an interest," which will survive death of principal, there must coexist with the power a beneficial interest in the subject which is enforceable in the name of the attorney in fact, or a power must be given as security for payment of money other than that arising as compensation through the exercise of the power, or as security for the performance of some act of value.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Power Coupled with an Interest.]

3. **Brokers 🔑9—Contract between landowner and land company for subdivision of land into lots and sale thereof at minimum price, dividing profits over stated amount, held not to give company interest, surviving death of principal.**

Contract by which landowner placed property in hands of land company to be subdivided into lots, and sold at not less than minimum price, with provisions for division of profits over stated amount, and for owner's limitation of amount of improvements which might become charged against the land, *held*, to create agency which terminated on death of property owner, and not to give company interest in land involving "power coupled with on interest," which survives principal's death.

4. **Brokers 🔑9—Power to subdivide land and sell lots, retaining portion of profits over certain amount, is not coupled with an interest.**

One authorized to lay off land into lots and sell the lots dividing the proceeds above a certain amount with the owner does not have a power, coupled with an interest, such as will survive the death of the owner of the land.

5. **Principal and agent 🔑43(2)—Agent must have interest derived from power or property in question to give him "power coupled with an interest."**

In order that a power may be a "power coupled with an interest," agent must have an interest derived from the power or from something else in the property in reference to which the power is given; mere payment in consideration of power being insufficient.

6. **Brokers 🔑9—Provision in contract authorizing agent to subdivide and sell lots that agreement was coupled with interest held ineffectual to give agent interest surviving owner's death.**

Contract by which landowner authorized land company to subdivide land into lots charging improvements to the land, and selling the lots at a minimum price, dividing proceeds over stated amount, did not give land company a power coupled with an interest in the land surviving owner's death by virtue of provision in contract that "this agreement is coupled with an interest, and is only revocable by the consent of the parties hereto."

7. **Trusts 🔑25(1)—Trust will not be impressed on realty to secure performance of personal contract, unless intent to do so is expressly stated.**

Trust will not be impressed on realty to insure the performance of a purely personal contract, in the absence of words expressly showing such an intent.

8. **Trusts 🔑1—Trust must require some act on part of trustee inuring to beneficiary.**

Trust must have a purpose, and require for its fulfillment some act on the part of the trustee inuring to the beneficiary.

9. **Trusts 🔑30½(1)—Contract authorizing land company to subdivide land into lots, and sell lots to prospective purchasers, held not to create trust upon land.**

Contract between landowner and land company by which the company was to subdivide land into lots, and transfer the property to purchasers which it should procure, *held*, not to create either express or resulting trust, since no act was required on part of land company as trustee inuring to any beneficiary.

10. **Brokers 🔑77—Land company, authorized to subdivide property into lots, and sell lots, charging owner's share of profits with moneys advanced, held not entitled to lien for advancements, where no profits were ever realized.**

Land company, which failed to realize any profits for landowner under contract whereby it undertook to subdivide lots and sell them, retaining sufficient to liquidate its claim for money advanced from landowner's share of profits, *held* not entitled to lien for moneys advanced,

---

★Superseded by opinion, 281 P. 381.

though contract gave express lien for moneys advanced for particular purpose of laying out streets.

11. Brokers ⚷77—Land company held not entitled to lien for expenses in carrying property under contract given lien for moneys advanced for subdividing tract and laying out streets.

Land company, authorized to subdivide land into lots, and sell the lots, retaining part of profits, and deducting from owner's share sufficient to liquidate claims for moneys advanced him, and given lien for expense of subdivision and laying out streets, *held* not entitled to lien for expenses in "carrying" the property, in view of rule that the expression of the one is the exclusion of the other, especially where no profits had been realized.

Preston, Curtis, and Langdon, JJ., dissenting.

In Bank.

Appeal from Superior Court, Santa Clara County; J. R. Welch, Judge.

Action by R. McColgan against the Bank of California National Association, the Co-operative Land Company, and others. From a judgment in favor of defendant last named, plaintiff appeals. Reversed.

For opinion of the District Court of Appeal, see 267 P. 151.

George D. Collins, Jr., of San Francisco, for appellant.

John L. McNab and Byron Coleman, both of San Francisco, for respondent.

PER CURIAM. This cause was transferred to this court for hearing and determination after decision by the District Court of Appeal of the First Appellate District, Division 1, for a more mature consideration of the question involved, and a more extended examination of the authorities than we were able to give in the limited time permitted for the consideration of the petition for the transfer. After such consideration and examination, we are satisfied with, and adopt as the opinion and conclusion of this court, the opinion and conclusion of the other court, as announced by Mr. Justice pro tem. Parker, and concurred in by Justices Tyler and Knight:

This is an appeal from a final judgment and decree to the extent that the judgment is against plaintiff and in favor of defendant Co-operative Land Company, a corporation. The action, as instituted, was against other defendants, but since then plaintiff has acquired all of the interest of the remaining defendants.

The action was one to quiet title. The court below found and decreed that plaintiff was not entitled to have his title quieted against Co-operative Land Company, and found necessarily that said Co-operative Land Company had and has an interest in the real estate in controversy valid and substantial, and by the decree confirmed.

The entire controversy hinges about the construction of certain contracts, and the one definite question to be answered relates to the nature of the power created by these contracts. Therefore, with some particularity of detail, we relate the facts as the record here discloses them.

At the outset, we do not deem it necessary to give any description of the property involved other than to state that it comprises certain tracts of land situated in the town of Mayfield, county of Santa Clara, Cal. The land involved is rather extensive, and a surveyed description of it long, and no useful purpose can be served by further particularization. The real estate was formerly owned in fee by one Percy Beamish, and both parties here derive their title through him. It is conceded that the title of Beamish was good and sufficient, and comprised the fee. On October 28, 1904, Beamish entered into a contract with the Co-operative Land & Trust Company (a corporation). Here it may be noted that this corporation subsequently changed its name to Co-operative Land Company, respondent here. To avoid further specification or confusion, whether referring to it before or after the change of name, this corporation will hereinafter be called the land company. This contract was substantially as follows: Beamish, in consideration of the covenants and agreements on the part of the land company, and in consideration of services and money advanced by said land company, by the terms of this agreement, agrees to place the following described property in the hands of the land company, with power to control the same as hereinafter stated: [Here follows description of the lands, being lands here involved.] Beamish further covenants and agrees that the control of said property shall remain and be exclusively in the hands of the land company until the lands are finally sold and disposed of, and all the terms and conditions of this agreement are fulfilled, settled, and adjudged, and all the affairs in connection therewith fully concluded. Out of the proceeds of the sale of said property, it is agreed and understood that Beamish shall receive not less than the sum of $300 per acre, and the tract contains approximately 20 acres. Beamish covenants and agrees to give, and does give, full power and authority to the land company to lay out streets and avenues on the property, and subdivide said property into lots and acres, or in any way, and to sell the same in any part or parts, piece or parcel, or in any manner, the land company sees fit, and Beamish ratifies and confirms all acts and deeds of the land company in regard to laying out of streets, subdivisions, and sales. Beamish further agrees to make a good and

---

⚷For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

sufficient deed to any part of said land to any party named by the land company.

Beamish agrees that the land company shall have full power and control of the selling price of the land, and that the land company may fix or change said price at will, provided, however, that the prices to be fixed for subdivisions by the land company shall not be fixed so as in the aggregate to produce a less sum than $9,000 for the entire tract, plus the amount to be expended in improvements as hereinafter stated by the land company. If at any time it shall be necessary to reduce the prices of subdivisions of said tract below the figure stated, it is understood and agreed that it may be done only after the written assent of Beamish shall have been given. Beamish covenants and agrees to give the land company 5 per cent. commission on the selling price of said land, also that one-half of the net profits on the sales of said land above the average price of $300 an acre shall belong to the land company, after deducting 5 per cent. commission on the gross selling price. Also that all interest on sales, mortgages, and notes above the average price of $300 per acre shall be considered as profits, and equally divided between the parties. No division of profits shall take place until Beamish shall have been paid $6,000, plus all taxes paid by him, and the land company shall have been reimbursed for money expended in making the improvements herein specified. Thereafter the profits shall be divided every 90 days.

All deeds shall be given by Beamish or his trustee for that purpose created, or their heirs, executors, administrators, or assigns. All trust deeds, mortgages, and notes shall be made to Beamish, and the same and all papers in connection therewith shall be deposited with, and kept by, First National Bank of Palo Alto in trust for all parties concerned; and for said purpose it is hereby agreed that said bank shall be the trustee of the parties hereto.

It is agreed that all expenses and costs of surveying said tract and the cost of laying out, grading, turnpiking, and graveling, and other improvement of streets, is to be paid for by the land company, and is to be considered and become a charge against the land, and added to the net selling price of $300 per acre; provided, however, that the land company shall begin the work of improving said tract within 30 days from the signing of the contract, and shall complete the same, and place said tract on the market for sale within 3 months thereafter. It is further agreed that the land company shall expend no greater sum in making said improvements than $500 without first obtaining the consent in writing of Beamish; it being the purpose of this clause to give Beamish the power to limit the amount which by improvement may become a charge against the land.

It is agreed that all taxes shall be paid by Beamish and be a charge on the land, and added to the net selling price of $300 per acre. The expense of advertising and selling the land shall be at the proper cost and charge of the land company. At any time Beamish may demand a statement of account and conditions from the trustee and the land company, and it shall be the duty of either or both to furnish such a statement when demanded.

It is further agreed that the terms of sale may be cash, or that purchaser of land may pay one-fourth in cash at time of sale, one-fourth in one year, and one-half in two years after the date of sale, with privilege of paying any amount at any time, any unpaid balance of the purchase price to be secured by mortgage on the property sold, with note bearing interest at 8 per cent. per annum; or sales may be made on contract for deed on the payment of one-tenth of the selling price in cash, and the balance in twenty-four monthly payments, with interest at 6 per cent. added pro rata to each monthly payment. Where a mortgage is given, the mortgagee to pay the taxes; where contract for deed is taken, the purchaser is to pay the taxes.

This agreement is coupled with an interest, and is only revocable by the consent of the parties hereto; but it is understood that for breach of covenant either party may rescind.

On February 28, 1905, a rider was executed by the parties to this agreement and affixed to the first contract. This rider provided that the land company shall have, and is thereby given, power to execute contracts for the sale of the land described, which said contracts shall be binding upon Percy Beamish. All contracts, however, are to be made subject to the terms of the first agreement, and this authority is to be considered and construed as a part of the original agreement.

On the 6th day of November, 1908, this contract with the rider was recorded in miscellaneous records of Santa Clara county.

Thereafter on June 10, 1907, Percy Beamish entered into another contract with the land company, which latter contract is substantially as follows:

Beamish, in consideration of the agreement thereafter contained, and for and in consideration of the contract of October 28, 1904, makes these additional covenants and agreements to be added to, and make a part of, the agreement of October 28, 1904, and this present agreement shall be made a part of, and construed with, the former agreement, and, whenever the agreements may conflict, this later agreement shall control.

Beamish agrees that the land company shall have full power and control of the selling price and terms of sale of the lands, and may make and fix or change said price at will, and this control of the selling price by the land company shall be absolute, and Beamish ratifies and confirms all that the land company may do in making agreements of sale of said land and fixing the price thereof.

It is further agreed that, after Beamish has been paid the full sum of $6,000 as provided in original contract, all money received thereafter for the sale of the land shall be divided equally between the parties. The land company waives the 5 per cent. commission as specified in the original contract. It is further agreed that all expenses of surveying and subdividing the land, and the cost of laying out, grading, turnpiking, and graveling, laying sidewalks, water pipes, and other improvements of streets, commissions of agents other than the land company, advertising and selling said tract, shall be paid equally share and share alike by the parties hereto. There is then a provision that an outstanding mortgage in the sum of $2,250 shall be paid by Beamish, together with the taxes for 1906 and 1907.

It is then agreed that the land company may retain from the one-half of net profits that may become due to Beamish a sufficient sum to pay the mortgage referred to or to make partial releases thereof, together with interest and taxes thereon. It is also provided that the land company shall retain from the Beamish profits sufficient sums to liquidate any claim for money that has been advanced to Beamish by the land company. All sales made by the land company heretofore are ratified and confirmed.

It is understood by this agreement that it is the intention that it shall be so considered and construed that all the expenses of any kind and nature attending the sale of the land shall be borne equally between the parties, and that thereafter the net profits shall be divided share and share alike, providing the share of the net profits belonging to Beamish shall be first charged as hereinbefore specified.

This contract was likewise recorded on November 10, 1908, in miscellaneous records of Santa Clara county, Cal.

On March 12, 1912, Percy Beamish conveyed the real property by deed of trust to R. McColgan and C. H. Williams, as trustees for D. A. McColgan as beneficiary, and as security for a loan to Percy Beamish. On March 22, 1915, the trustees under the trust deed conveyed the property by deed to D. A. McColgan. Thereafter, on or about September 19, 1924, plaintiff, R. McColgan, became the record owner of said property by reason of various mesne conveyances subsequent to said conveyance to D. A. McColgan by the trustees.

Prior to the commencement of this action, there had been fully paid to the land company all expenses and costs of surveying and subdividing the tract of land, and said Beamish also fully paid the land company all expenses and costs of laying out, grading, turnpiking, graveling, and other improvement of streets mentioned in the clause of the contract as being a charge on the land. The charge and lien given said land company by said contract were fully satisfied and discharged by said payments.

From time to time the land company advanced for other purposes, in accordance with the terms of the contracts, sums amounting to $3,252.62, and the accrued interest thereon up to October 1, 1924, equals $1,914.15. Also the land company advanced moneys for the use of Beamish in the sum of $1,916.43, and the interest thereon computed $1,650.29. No part of either of the sums advanced or the interest on either has been repaid.

Percy Beamish died on March 14, 1916.

The judgment and decree of the trial court adjudged as follows: That plaintiff is the successor in interest of Percy Beamish in and to the lands involved; that plaintiff is entitled to take nothing by the action, and is not entitled to have his title quieted as against the land company; that the land company is the owner of an interest in said real property in accordance with the terms and conditions of the contracts hereinbefore set forth; that the land company is entitled to a charge and lien against the property and the proceeds of any sales thereof as security for the repayment of $3,253.62 principal and $1,914.15 interest, and also is entitled to a lien and charge against the half interest in the property remaining in Percy Beamish and the proceeds of any sales in the sum of $1,916.43 principal and $1,650.29 interest; that the land company is entitled to carry into effect, and fully perform, and cause to be fully performed, the provisions of the contracts with Percy Beamish; that under the terms of the first agreement Percy Beamish, or his trustee for that purpose created, was to execute all deeds that might be necessary under the performance of the contract; that by the terms of the contract it was agreed that First National Bank of Palo Alto should be trustee of the parties.

The decree then provides that the land company is entitled to demand and receive and cause to be executed and delivered by plaintiff any and all deeds and conveyances which may be necessary to secure to purchasers from the land company a good and sufficient title, such deeds to have the same force and effect as if executed by Percy Beamish in his lifetime, and if, upon demand, plaintiff shall neglect or refuse to execute and deliver such deeds and conveyances, or in the event of the death or incapacity of plaintiff the land company is entitled upon application to the court to have appointed a trustee or administrator under the orders of the court to execute the necessary deeds, and in the event of the appointment of such trustee or commissioner, all the expenses in connection therewith shall be charged to plaintiff, his personal representative, successor or assigns. Any balance over and above all of these claims and charges and expenses, if any there be, to which Percy Beamish may have been entitled during his lifetime, shall be paid to plaintiff.

The record before us consists of the judgment roll and the engrossed bill of exceptions, which latter shows the fact herein stated to the effect that the amounts hereinbefore referred to have been paid; that is to say, the bill of exceptions discloses that the amounts listed as costs of surveying and subdividing the tract, and all expenses and costs of laying out, grading, turnpiking, graveling, and other improvement of streets, have been fully paid and discharged.

Appellant's reasons advanced on this appeal are stated thus: Either taken separately, or read together, the contracts are nothing more than agreements of agency by which plaintiff's predecessor, Beamish, as owner of the land, gave to the land company exclusive right to sell the land for a compensation, to be measured by the price realized; that, Beamish having died in 1916, the power of the agent land company at that instant ceased, and the agency came to an end.

Next appellant urges that in any case defendant land company is not entitled to a lien upon the land as decreed.

Without further analyzing the contention of appellant, as regards the first claim, the question presented is whether the agency created, or the power given, was or was not coupled with an interest.

[1] If the rights of the respondent land company were all embraced within a mere naked agency, it is settled that the agency ceased with the life of Beamish. If, however, we find what in legal parlance is denominated an agency or power coupled with an interest the conclusion is different.

This brings us, therefore, to an inquiry as to what an agency coupled with an interest means. In Mechem on Agency (2d Ed.) §§ 570–575, we find the subject well discussed. The author finds a general loose use of the word "interest," and cites illustrations. Those illustrations pertinent to this discussion may be given, viz., (1) an interest, not amounting to a property or estate in the thing itself, but still an interest in the existence of the power or authority to act with reference to it, not for the purpose of earning a commission by the exercise of the power, but because the agent has parted with value, or incurred liability, or assumed obligations, at the principal's request or with his consent, looking to the exercise of the power as the means of reimbursement, indemnity or protection; (2) an interest or estate in the thing itself, concerning which the power is to be exercised, arising from an assignment, pledge, or lien created by the principal, coupled with which is the power to deal with the thing itself in order to make the assignment, pledge, or lien effectual.

These two interests illustrated differ from each other in the fact that in the latter the agent has an estate or interest in the subject-matter of the power, while in the former his interest is rather in his right to exercise the power over the thing in order to make it available for the security or protection contemplated. Each of these illustrations might be called a power coupled with an interest, and each has been so called, though the interest in the respective cases is of a different nature. The leading case on the subject, and the one most quoted and relied upon, is the case of Hunt v. Rousmanier, 8 Wheat. 174, 5 L. Ed. 589. The opinion was written by Chief Justice Marshall, and the reasoning thereof stands unchallenged, and, in fact, both appellant and respondent here concede the controlling force of the decision. The opinion reads:

"We hold it to be clear, that the interest which can protect a power, after the death of a person who creates it, must be an interest in the thing itself. * * * The words themselves would seem to import this meaning. 'A power coupled with an interest,' is a power which accompanies, or is connected with, an interest. The power and the interest are united in the same person. But if we are to understand by the word 'interest,' an interest in that which is to be produced by the exercise of the power, then they are never united. The power, to produce the interest, must be exercised, and by its exercise, is extinguished. The power ceases, when the interest commences, and therefore, cannot in accurate law language, be said to be 'coupled' with it. * * * The interest or title in the thing being vested in the person who gives the power, remains in him, unless it be conveyed with the power, and can pass out of him only by a regular act in his own name."

[2] In a review of the authorities, it will be found that on almost every occasion when the question of a power, coupled with an interest, has arisen, the case of Hunt v. Rousmanier has been accepted as the leading authority. Without reviewing these cases, we may turn to the California authorities on the subject, which are in complete accord in accepting the rule of Hunt v. Rousmanier, supra; Barr v. Schroeder, 32 Cal. 609; Flanagan v. Brown, 70 Cal. 254, 11 P. 706; Cox v. Hughes, 10 Cal. App. 553, 102 P. 956; Boehm v. Spreckels, 183 Cal. 247, 191 P. 5; Todd v. Superior Court, 181 Cal. 414, 184 P. 684, 7 A. L. R. 938. From all of these authorities but one conclusion may be reached. However it may be phrased, the rule remains that to create a power coupled with an interest there must coexist with the power a beneficial interest in the subject thereof which is enforceable in the name of the attorney in fact and will survive the constituent; or the power must be given as security for the payment of a sum of money other than that which arises as compensation through the exercise of the power, or as security for the performance of some act of value. Todd v. Superior Court, supra.

[3] Testing the contracts here involved by

the rule, we conclude that the respondent acquired no interest in the subject-matter of the contracts, namely, the lands; and, having acquired no interest coupled with his power, the power was terminated upon the death of Beamish. This conclusion is compelled from the language of the contracts themselves. For instance, in the original contract, which remains in that respect unchanged, the land company was restricted in the amount to be expended without first obtaining the consent of Beamish; and it was expressly stated that the purpose of this clause was to give Beamish the power to limit the amount which by improvement *may become a charge against Beamish's land.* Likewise it was agreed that deeds were to be given by Beamish or *his* trustee for the purpose named. Further still, the agreement provides specifically "Beamish covenants and agrees that the control of the property shall be exclusively *in the hands of the land company* until finally sold, etc.; the phrase thus italicized being indicative of an agency; likewise the provision in the first contract for commissions.

The rider of February, 1905, in no way changes the relationship. The final agreement, rather than altering the legal relationship of principal and agent, tends to confirm its existence. A fair reading of the last contract indicates its purpose to be only to enlarge the powers of the agent, manifestly on the theory that, in the absence of those later provisions, no such powers were originally given. It will likewise be noted that in this last agreement, while the land company was to receive its compensation in a mode exclusive of commissions as such, nevertheless the contract expressly provides for commissions to agents *other than the land company.*

Scrutinizing carefully the provisions of all the contracts, it cannot be found where the land company has acquired, or was given by Beamish, the slightest vestige of interest in the lands themselves. By various methods of construction, natural and forced, it might be held that a relationship possibly greater than that of mere principal and agent resulted from the agreements. But no interest in the premises such as contemplated in the doctrine of a power coupled with an interest can be created in the land company.

In Walker's American Law of Real Estate Agency (2d Ed.) at page 23, § 16, we find the law again stated thus:

"An interest in the land itself, as distinguished from the proceeds of it, is the distinguishing feature of a power coupled with an interest."

[4] One authorized to lay off land into lots and sell, the proceeds above a certain amount to be divided with the owner, has not a power coupled with an interest. Le Moyne v. Quimby, 70 Ill. 399; Atlantic Coast Realty Co. v. Townsend, 124 Va. 490, 98 S. E. 684; Hall v. Gambrill (C. C. A.) 92 F. 32.

[5] In order that a power may be a power coupled with an interest, the agent must have an interest derived from the power or from something else in the property or thing in reference to which the power was given; that he paid a valuable consideration for the power will not be enough. Coney v. Sanders, 28 Ga. 511, 513.

In passing, it may be noted that in most of the decided cases the question is presented on facts similar to those in the case at bar. It should be borne in mind that the doctrine of agency, coupled with interest, is in itself an exception to the general rule that the power of the agent ceases upon the death of the principal. As an exception, it should not receive a construction that would destroy the rule. It would be economically unsafe to extend the rule to the end that a condition might result where the real estate of a nation should be held under agency or power given by deceased persons. To have property and property rights controlled and handled under the principalship of past generations is manifestly destructive of progress, and can result only in chaos and confusion.

In Hicks v. Post, 154 Cal. 22, 96 P. 878, we note this language applicable here:

"The case is simply one of an agency to sell land. * * * The agent, in the hope and belief that he will be able to sell the land at a profit, * * * agrees to and does make certain expenditures upon the land. If he is able to make the sales he will be reimbursed for these expenditures out of the proceeds of the sales. If he fails to make the sales he loses the expenditures which he has made. This is the element of chance which necessarily inheres in a contract of this character."

The agency in the instant case was first conferred in 1904, and the record indicates that it still remains unexecuted in full. There is nothing to indicate that any of the powers were executed, though we may assume that some lots have been sold and other things done. There is nothing inequitable in the doctrine of Hunt v. Rousmanier, supra, or in its application. One desirous of subdividing the property of another can purchase the same, and thus end all questions of agency or power. Or, if unable to do so, he may readily secure a sufficient interest to protect his investment against sudden revocation. Or, in lieu of either of these, he may still, with his eyes open, take the chances.

[6] In support of its claim that there was a power coupled with an interest, respondent contends that the language of the contract should govern. The contract, as noted, reads:

"This agreement is coupled with an interest and is only revocable by the consent of the parties hereto."

This may be influential in determining the revocability of the agreement by either party, and particularly by Beamish during his lifetime. It may be conceded that Beamish could not revoke the power conferred under the agreement. However, this would not have the effect of avoiding the rule that the power came to an end upon the death of Beamish. The statement in the contract that the agreement that the power is coupled with an interest means nothing. Evidently the one drawing up the agreement had some idea that to give the agreement the capacity of survival after Beamish's death the power must be so coupled. Yet the bare statement did not accomplish this result. The fact is not to be established by a mere characterization. The statement is a general, loose one. It may reasonably mean that the interest remained in Beamish, in the absence of anything to the contrary in the contract appearing. Surely there is nothing to indicate what the interest is; and, if we did accept the phrase in the contract as binding, we would still be left to surmise as to what actually passed to the land company other than the naked power.

[7-9] Respondent argues that, if it is determined that the agency or power was not coupled with an interest, and therefore ceased on the death of Beamish, nevertheless the facts show that an express trust was created in the lands, and that such trust should be enforced, and was equitably enforced by the terms of the decree herein. All of the cases hereinbefore cited negative this contention.

In the case of Miller v. Lerdo Land Co., 186 Cal. 1, 198 P. 778, a situation sufficiently similar to permit quotation arose. There the court says:

"Respondent's rights * * * are: That he shall receive one-third of the selling price of any and all of the said lands; that this one-third of the selling price shall be paid to respondent at the times and in the manner and according to the same terms as the remaining two-thirds are paid to appellant. * * * It is apparent * * * that the contract conferred upon respondent nothing more than a right to one-third of the proceeds when * * * sold. There is a distinction between an interest in the land itself and an interest in the money obtained from the sale of the land. * * * The contract relied upon by respondent * * * does not, by any possible construction, purport to pass a present interest in the lands to respondent nor to provide for the holding of the lands or any interest therein for the benefit of respondent, nor is there anything from which any such intention can fairly be inferred. There is, therefore, no express trust."

A trust will not be impressed upon the realty to insure performance of a purely personal contract in the absence of words expressly manifesting such intent. A trust, whether express or resulting, must have a purpose, and require for its fulfillment some act on the part of the trustee inuring to the beneficiary. Here there is no act required of Beamish other than to transfer the property to purchasers procured by the land company when and if procured. We hold this not to be a trust upon the land.

[10] Lastly, appellant attacks the judgment and decree which impresses a lien upon the property for certain sums of money. The contract provided for a lien as follows:

"It is further covenanted and agreed that all expenses and cost of surveying and subdividing said tract, and the cost of laying out, grading, turnpiking and graveling and other improvement of streets, is to be paid for by the land company, and is to be considered and become a charge against the land."

The engrossed and certified bill of exceptions before us states that plaintiff proved to the satisfaction of the trial court that all charges incurred for purposes in the clause recited have been fully paid and discharged before the commencement of the action. The lien impressed upon the property by the decree, pursuant to the findings, is for advancements and expenditures for other purposes. The contract specifically provides that the land company shall retain from the one-half of net profits due Beamish sums sufficient to liquidate any claim for money advanced to him. For the sum found to have been advanced, the court below decreed a lien against the lands in favor of the land company. The contract will not justify such a lien, and impressing it upon the lands as against the plaintiff is unsupported by any authority. Indeed, none is cited. This is purely a matter of accounting between Beamish and the land company, and, if no profits accrue, there is no fund out of which the land company may be reimbursed. It is obvious that the main purpose of the arrangement was to subdivide the lands and sell the same. This was the understanding of the land company, and, if the undertaking failed to the extent that there were no profits, the contract of Beamish to repay moneys only out of the profits did not then become a burden upon the lands.

[11] The remaining sum of money for the repayment of which a lien is impressed upon the lands is, as expressed in the findings, money advanced "to carry said property in accordance with the terms of the contracts." There is absolutely no provision in the contract to which these advancements refer. The nature of these advancements is not disclosed. The clause of the contract last set forth determines the kind and character of expense chargeable to the land. The ancient rule of construction "expressio unius," etc., applies. Whatever the term "carrying the property" may mean, no lien or charge arises against the land by virtue of moneys expended in that enterprise under the contract.

Respondent at the oral argument agreed that the main point in the appeal was the determination of whether or not the land company acquired any interest in the lands under the contract. No attempt has been made by respondent to justify the lien.

The judgment is reversed.

PRESTON, J. I dissent. The opinion as written is based upon a misconception of the legal effect of the contracts between Beamish and the land company. It is true that the original contract provided that the cost of laying out, grading, turnpiking, graveling, and other improvements was to be a charge against the land, and that the expense of advertising and selling the land should be at the proper cost and charge of the land company only, but this arrangement was changed by the supplemental contract to the effect that the above-enumerated items and the expense of advertising and selling said tract should be paid equally share and share alike by the parties to the contract; the only exception being that the Semino mortgage of $2,250 should be borne exclusively by Beamish. It was further provided in the later contract that the party of the second part was given exclusive management and control of said property and should retain from one-half of the net proceeds belonging to Beamish a sum or sums sufficient to liquidate the said Semino mortgage and "to liquidate any claim for money that has been advanced to the party of the first part by the party of the second part."

It is again specified in said contract: "It is understood by this agreement that it is the intention that it shall be so considered and construed that all the expenses of any kind and nature attending the sale of said tract of land herein described shall be borne equally between the parties hereto and that thereafter the net profits shall be divided share and share alike between the parties hereto, provided that the share of the net profits belonging to the party of the first part shall be first charged with the mortgage, taxes and interest, hereinabove mentioned, and also for any money advanced by the party of the second part."

Under the findings of the court, the amount found due the land company was composed of two sets of items; one for Beamish's part of the carrying charges, and the other for advances in money made to him by the land company. It will thus be seen that the land company had as against Beamish bona fide claims for money, claims which have an independent existence and which are in no sense claims that were to be due only upon the exercise of the power conferred by the agency. In other words, the only construction which can be placed upon the contract is that the net proceeds of any sales made by the land company were to be held by the land company as security for the item or items of the character hereinabove specified. That is, this is not a case where the agent was to earn a commission and to get other kinds of compensation only upon the exercise and completion of the power conferred by the agency. This is no such case, and the principle governing it is altogether different from that set forth in the authorities cited in the opinion. Indeed, the case of Todd v. Superior Court, 181 Cal. 406, 417, 184 P. 684, 688 (7 A. L. R. 938), the chief case relied upon in said opinion, recognizes the distinction here involved, by use of the following language: "It is well settled, therefore, that in order to constitute an irrevocable power of attorney there must coexist with the power a beneficial interest in the subject thereof which is enforceable in the name of the attorney in fact and will survive the constituent; or the power must be given as security for the payment of a sum of money other than that which arises as compensation through the exercise of the power; or as security for the performance of some act of value."

This case comes under the second clause of said paragraph, to wit, power that is given as security for the payment of a sum of money arising other than as compensation through the exercise of the power. This principle is also recognized in Norton v. Whitehead, 84 Cal. 264, 24 P. 154, 18 Am. St. Rep. 172, and it is the principle first set forth in Posten v. Rassette, 5 Cal. 469, and stated as follows in Marziou v. Pioche, 8 Cal. 522, 536: "Where an agent, for the collection of debts, or the sale of property, advances money to his principal before he collects the debt, or sells the property, it must be presumed, from the nature and character of the transactions, that the parties intend the agent shall have a lien for his advances, unless there is 'an *express* stipulation' to the contrary. It makes no difference whether the advances be made before or after the power is given, so they are approved by the principal. And when the principal, as in this case, *expressly* gives the power, for the very purpose of providing the *means* to return the advances made by the agent, there would seem to be no doubt as to the irrevocable character of the power. 5 Cal. 469, Posten v. Rassette."

Of course, in a case where the only interest of the agent is compensation to be gained from the proceeds of the sale of property the subject of the power, there is no agency coupled with an interest; but, as above pointed out, that is not the case before us. Happily Mr. Justice pro tem. Parker, in a case written since the writing of the opinion about to be adopted by this court, made the distinction for which I here contend. Lane Mortg. Co. v. Crenshaw (Cal. App.) 269 P. 672, 679, 680. In that case a mortgage company, having a 20-year lease upon a building, for sufficient consideration had been given an agency to control the said building and to lease the same, and was to receive a commission of 5 per cent. It was there held that inasmuch as the 20-year lease was a thing of value that might be jeopardized by the taking away of the agency to manage the building, the agency was one coupled with an interest. The subject is thoroughly considered, and from the opinion we quote the following: "We think that there is hardly a case that can be made to which these principles could have a more direct and fitting application than the case at bar. The Lane Company has a 20-year lease in the entire second floor of the 12-story building which is the subject of the power. That this is an interest there can be no question. (Union Trust Co. v. Reed, 213 Mass. 199, 99 N. E. 1093; Inyo Water Co. v. Jess, 161 Cal. 516, 119 P. 934; Walther v. Sierra Ry. Co., 141 Cal. 288, 74 P. 840; Payne v. Neuval, 155 Cal. 46, 49, 99 P. 476; Friedman v. Macy, 17 Cal. 226; Dahlberg v. Haeberle, 71 N. J. Law, 514, 59 A. 92; Brickill [Brickell] v. Atlas Assurance Co., 10 Cal. App. 17, 101 P. 16; 16 Am. & Eng. Ency. of Law [2d Ed.] 1102.) The interest does not arise only upon the execution of the power, as was the situation in Hunt v. Rousmanier, supra, or Todd v. Superior Court, supra. It is a live, active, valuable interest, coupled with the power to the extent that if the power did not exist the interest would be subject to destruction or forfeiture. The lease, as hereinbefore pointed out, would be totally valueless in the absence of compliance with the provisions of the original land lease. The powers granted the Lane Company in their total amount to no more than placing in the hands of the company directly the means of preserving its said interest. This manifestly constitutes such a power as Chief Justice Marshall refers to in Hunt v. Rousmanier, namely, a power forming part of the contract and security for the performance of an act deemed valuable. The power in the present case was expressly made irrevocable and expressly tied to the entire transaction in the creation of the leasehold interest. We would concede that if the Lane Company merely held an agency to collect rents and retain 5 per cent commission the agency would be revocable. But the mere fact that, incidental to the execution of the coupled power, an additional interest is created in the proceeds thus derived in no sense impairs the coupling of the power and interest theretofore existing."

Coburn v. Davis, 201 Iowa, 1253, 207 N. W. 586, 587, illustrates the class of case in which the opinion as written seems to place the one before us. In said case the agent agreed to sell lots belonging to his principal and was to receive as compensation only a commission earned from such sale. It was held, of course, that the agency was not coupled with an interest, but in disposing of this question the court intimates that it might be different if it were a case like the one before us, for it is said: "Appellant cannot be said to have acquired an interest in the subject-matter of the contract. He was to incur no expenses for which appellee was to reimburse him. He did not hold the contract as security for the payment of any sum to become due thereunder, and his sole and exclusive right and duty was to sell the lots and to account for the proceeds received therefor after deducting commissions."

There is also another theory upon which the judgment of the court below may well be sustained; that is, the theory that this transaction formed an equitable lien or mortgage in favor of the land company. A clear statement of this doctrine is found in the case of Nau v. Santa Ana Sugar Co., 79 Cal. App. 685, 691, 250 P. 705, 707, where, quoting from Pomeroy's Equity Jurisprudence, vol. 3 (3d Ed.) § 1235, it is said: "Every express executory agreement in writing, whereby the contracting party sufficiently indicates an intention to make some particular property, real or personal, or fund, therein described or identified, a security for a debt or other obligation, or whereby the party promises to convey or assign or transfer the property as security, creates an equitable lien upon the property so indicated, which is enforceable against the property in the hands not only of the original contractor, but of his heirs, administrators, executors, voluntary assignees, and purchasers or encumbrancers with notice."

See, also, the recent case of Hunt v. Curry, 153 Tenn. 11, 23, 282 S. W. 201, 205, from which we quote the following: "It has been said by this court that every express, executory agreement in writing, whereby the contracting party sufficiently indicates an intention to make some particular property therein described or identified a security for a debt or other obligation, or whereby the party promises to convey or assign or transfer the property as security, creates an equitable lien on such property, good against the original contractor, his heirs, representatives, voluntary assignees, or purchasers or incumbrancers without notice. ([Southern] Ice & Coal Co. v. Alley, 154 S. W. 536, 127 Tenn. 173.)"

From the above it clearly follows that, while here there was not an express lien given, there was an agency coupled with an interest or else an equitable lien created. Upon either theory the judgment of the court below should be sustained. In this connection it might also be noted that the interest of Beamish in these lands passed out of his hands by foreclosure proceedings in 1915. Beamish himself died in the year 1916. D. A. McColgan succeeded to the interest of Beamish directly, and the land company was allowed to proceed for seven years after this date and for six years after the death of Beamish before the present claimant, R. McColgan, came upon the scene. The land company was during all this time in exclusive possession of the property, and he took title subject to all equities in favor of said company. I am unable to see how, upon any theory of equity or justice, R. McColgan can prevail in this case without paying the items claimed by the land company. The judgment should be affirmed.

We concur: CURTIS, J.; LANGDON, J.

206 Cal. 286

In re RILEY'S ESTATE.

RILEY v. HEUER.

(Sac. 4226.)

Supreme Court of California. Jan. 28, 1929.

1. Appeal and error ⚷1002—Conflicting evidence will not be construed to upset jury's verdict.

Supreme Court will not construe genuinely conflicting evidence so as to upset verdict of jury and judgment of court thereon.

2. Wills ⚷55(5)—Jury's finding of testamentary incapacity of testator, suffering from tuberculosis and from psychosis, held sustained.

Evidence of tuberculosis of all testator's vital organs, of psychosis or toxic condition causing insanity by poisoning system, and of his dislike of wife and apparent hallucinations as to her conduct, *held* to sustain jury's finding of testamentary incapacity at time of execution of will excluding wife and giving all his property to sister.

3. Wills ⚷337—Refusal of new trial, in will contest, for testimony of testator's relatives as to his statements concerning bad conduct of wife, whom he excluded from will, held not abuse of discretion.

In proceedings for contest of will in which testator excluded his wife, trial court's refusal of new trial for testimony of testator's sister-in-law and mother as to his statements concerning his wife's bad conduct and cruel treatment towards him *held* not abuse of discretion, since testimony should have been produced at trial in exercise of due diligence, and merely indicated continuance of hallucinations on part of testator.

4. Trial ⚷352(8)—Failure of foreman to attach signature to answer to special issue did not render verdict defective, where foreman signed at bottom of verdicts and verdicts were assented to.

In action tried on special issues, failure of foreman of jury to sign his name after jury's answer to first of three special issues *held* not to render verdict defective, where foreman's name appeared after other issues and at bottom of the verdicts, and foreman read the verdicts aloud in open court and they were assented to by the jury.

In Bank.

Appeal from Superior Court, Sacramento County; Peter J. Shields, Judge.

Proceedings by Mabel Estella Heuer for the probate of the will of Norman Sidney Riley, deceased, contested by Margie Dee Riley. From a judgment denying probate, proponent appeals. Affirmed.

P. H. Johnson, of Sacramento, for appellant.

T. A. Farrell, of Sacramento, for respondent.

PRESTON, J. Contest of will before probate. Norman Sidney Riley died in the Veterans' Hospital, Livermore, Cal., on January 19, 1928. On January 16, 1928, three days previously, the instrument here in question was published. It was prepared by an attorney by the name of Callaghan, residing at Livermore, and was witnessed by him and also by a young man in the employ of said Veterans' Hospital. The sole legatee of the will was Mabel Estella Heuer, a sister of decedent, and her husband, James C. Heuer, was named in said will as executor. The will was prepared in the office of the attorney before consultation with decedent upon information furnished by the said James C. Heuer. Admittedly the information respecting the whole document, except as to one or two spaces left blank until the time of execution, was given to said legatee above mentioned and by her transmitted to her husband and by him to the said attorney.

The contestant is Margie Dee Riley, the widow of decedent. The grounds of contest are unsoundness of mind and undue influence. Both proponent and executor remained in the sickroom during the execution of the document. The verdict of the jury was in favor of contestant on both issues, and judgment denying probate to the document as the will of decedent followed. The legatee and proponent has appealed from said judgment.

[1, 2] A careful reading of the record fails to disclose any reason whatsoever for the reversal of this judgment. Counsel presenting this appeal did not try the case in the court below, and but for his known sincerity we would make still greater dispatch of this appeal. It must be borne in mind that this court will not construe genuinely conflicting evidence so as to upset the verdict of the jury and the judgment of the court thereon. On the contrary, we do just the opposite. With this rule in mind, an examination of the record shows a veritable avalanche of evidence that decedent, prior to execution of the will and for some days previously, was in a settled condition of mental unsoundness to such an extent as to prevent him from making valid testamentary disposition of his property. This abundantly appears from the lips of three physicians and some six or eight intimate acquaintances, with practically no disinterested evidence whatsoever to the contrary. Ample evidence also was introduced justifying the conclusion that decedent was possessed with the delusion that his wife was the cause of his condition and had been otherwise unfaithful and derelict. The jury was well warranted in believing that for some years past an estrangement had existed between decedent and the members of his own family, who, the record discloses, consisted of his mother, his sister, and at least one brother. Repeatedly declarations had been made by decedent to the effect that he

---

⚷For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

did not want them or any of them to have any of his property.

Decedent was a soldier during the late war, and as a result of poisonous gases his lungs and other vital organs were affected, and this trouble in later years developed into tuberculosis. For some period of time next before his death he suffered from what the doctors say was tuberculosis of practically all the organs of his body. About the year 1925, Margie Dee Riley was employed by the government as a nurse. In the early part of the year 1927 decedent and said nurse intermarried. The evidence shows, that, adhering to his purpose not to leave any of his property to his blood relatives, he did, on October 17th of that year, at a time when his mind was sound, deed his real property, consisting of a house and lot in Sacramento, to his wife and assigned to her his policy of insurance issued to him by the government of the United States, placing the documents in escrow for delivery upon his death.

During the greater part of the married life of decedent and contestant they were happily mated, but it appears that on or about January 6, 1928, the condition of decedent had grown so much worse that he was at that time in practically a dying condition with tuberculosis, as above stated, of all his vital organs. He was at that time suffering from what is known as psychosis, a toxic condition, which means insanity due to absorption of the poison produced by disease other than a true disease of the mind. In this case the toxic condition was caused by the absorption of pus throughout the body, which affected the mind of decedent, which condition resulted from tuberculosis of the lungs, intestines, intestinal tract, bladder and kidneys. At about the above-mentioned date, decedent took a violent dislike to his wife, charging that she was the cause of his physical condition and attributing to her all kinds of humiliating and disgraceful conduct. It is true that proponent claims that this belief on the part of decedent may have been well founded, but there is ample evidence to show that the jury was warranted in believing that it was wholly unfounded and was in fact but a delusion or hallucination of mind on the part of decedent. The evidence was abundant from which the jury concluded that the wife was dutiful and affectionate and had borne her part faithfully and well and was greatly humiliated by the sudden aversion on the part of decedent toward her.

About this said 6th day of January, 1928, decedent caused some third party to request the proponent to come to his house, whereupon she came and practically took charge of the sickroom; contestant, the wife, remaining in the kitchen but still doing all she could for the comfort of decedent. A deep ill-feeling developed between the wife and sister during this period, so much so that it resulted in a free for all hair-pulling fight on or about January 7, 1928, over the papers which had theretofore been delivered in escrow for the benefit of the wife; the sister having undertaken to get possession of them.

On or about the 10th day of January, 1928, decedent was removed to the Veterans' Hospital. The doctors who saw him on and about this day and friends and acquaintances who saw him during the same period all pronounced him of unsound mind, stating that his conversation was incoherent and there was a wild look in his eyes; that he often failed to recognize his friends and physician. Those acquaintances who saw him later in the hospital were of the same opinion for similar reasons, as was also the physician in charge of the hospital. One of the subscribing witnesses had no opinion as to the sanity or insanity of decedent, and the attorney, the other subscribing witness, gave unconvincing evidence on that question, due no doubt to lack of acquaintance with and knowledge concerning decedent.

If the evidence in this case was not sufficient to uphold the verdict of unsoundness of mind, it would be hard to imagine a case that could be upheld. The evidence amply warranted the belief that decedent was either in a settled state of mental unsoundness on account of his disease and impending dissolution, or that he was suffering from the hallucination or delusion which directly affected the claims of his wife. Estate of O'Connor, 51 Cal. App. 339, 196 P. 792.

[3] The first and most important ground of appeal seems to be that the court erred in denying a motion for a new trial based upon the affidavits of Bertha M. Riley, a sister-in-law of decedent, and Lillian Riley, the mother of decedent, to the effect that they apparently for the first time had visited decedent in the hospital after the making of the will and a day or two before his death, and there had a conversation with him in which he stated that he wanted the old past differences existing between himself and the family to be forgotten and renewed his love for his family, and then and there stated that his wife was well provided for and he did not want her to have any of his property and had arranged it so that she would not get anything; that he used a great deal of vile language respecting his wife, to the effect that she was immoral, degenerate, and "the vilest scrappings of the earth"; that she had threatened to kill him and had admitted she poisoned his food and much other similar language. In view of the fact that these affiants were relatives of the proponent and apparently in constant association with her and willing to aid her, due diligence would have elicited this information earlier; and in view of the further fact that the affidavits, if credited, show no more than a continuation of the hallucination against the wife above described, we cannot see any abuse of discretion whatsoever in the action of the court in refusing to grant a new trial.

[4] The further point that the verdict was

not in proper form is untenable. The form of the verdict was as follows:

"Question: Was Norman Sidney Riley on the 16th day of January, 1928, and at the time of the alleged execution of the document purporting to be his last will and testament and filed herein for probate as such, of sound or unsound mind?

"Answer: Unsound.

"Question: Did the deceased at the time of the execution of the proposed will possess testamentary capacity?

"Answer: No.

"F. H. Dickson, Foreman.

"Question: Was the execution of the alleged will of Norman Sidney Riley, filed herein for probate and dated January 16, 1928, obtained through the undue influence of Mable Heuer?

"Answer: Yes.

"F. H. Dickson, Foreman."

Appellant contends that the verdict as to unsoundness of mind was not properly authenticated, in that the signature of the foreman does not appear immediately following the answer to said special issue, whereas the next two questions following on the same page are answered by the signature of said foreman of the jury. In our opinion one signature alone at the bottom would have been a sufficient authentication of a verdict on all three interrogatories. Estate of Keithley, 134 Cal. 9-11, 66 P. 5. Moreover, the foreman himself read aloud in open court the verdicts and they were assented to by the jury.

We have read carefully the instructions given by the court. They were specific and ample, and not only with respect to the rights of the contestant, but equally with respect to the rights of the proponent. The specific criticisms made we do not deem of sufficient importance to require any detailed discussion. The issue of undue influence thus becomes unimportant and need not be discussed.

The judgment is affirmed.

We concur: WASTE, C. J.; LANGDON, J.; SHENK, J.; CURTIS, J.; SEAWELL, J.; RICHARDS, J.

---

206 Cal. 353

PEOPLE v. ELLIS. (Cr. 3176.) ★

Supreme Court of California. Jan. 30, 1929.

Rehearing Denied Feb. 28, 1929.

1. Infants 🔑20—Instruction that presumption that defendant in murder case was over 18 prevails until preponderance of contrary evidence is introduced held not erroneous (Pen. Code, § 190, as amended in 1921).

Instruction that death penalty may not be imposed on any one for murder committed before he was 18 years of age, but that burden of proof as to age is on defendant, and that law presumes defendant was over 18 years of age, and that this presumption must prevail unless preponderance of evidence convinces jury to contrary, *held* not erroneous, under Pen. Code, § 190, as amended in 1921, because of use of word "presumption," in view of Code Civ. Proc. §§ 1959, 1961, as against contention that it should have stated that, if jury had reasonable doubt as to defendant's age, death penalty could not be imposed.

2. Criminal law 🔑421(3)—Person's age may be proved by his own testimony.

A person's age may be proved by his own testimony.

3. Infants 🔑20—Evidence that defendant in murder case was not under 18 held sufficient to show that jury could not have entertained reasonable doubt on question.

In prosecution for murder, in which sole defense was that defendant was under the age of 18 years when offense was committed, evidence that defendant was not under 18 years of age *held* sufficient to show that jury could not have entertained reasonable doubt on the question.

4. Criminal law 🔑1159(3)—Decision of trial court and jury, supported by substantial, though conflicting, evidence, will not be disturbed.

Decision of the trial court and jury on conflicting evidence will not be disturbed, where there is substantial evidence to support it.

5. Criminal law 🔑531(3)—Evidence held to warrant trial court's ruling that confession in murder case was voluntary, and therefore admissible.

In prosecution for murder, trial court's ruling that defendant's confession, made while under arrest, was voluntary and therefore admissible in evidence, *held* sustained by evidence.

6. Criminal law 🔑1169(7)—Proof of other offenses committed by codefendant, admitted solely against him, held not prejudicial to defendant.

In prosecution for murder, admitting evidence of other crimes committed by codefendant, and solely against him, *held* not prejudicial to defendant.

7. Criminal law 🔑1170(1)—After defendant's father denied making misstatements of defendant's age in school registration, and registration was signed by his mother, excluding father's testimony to purpose of misstatement held harmless.

In prosecution for murder, in which sole defense was that defendant was under 18 years of age when offense was committed, and prosecution, in rebuttal of testimony of defendant's father that he made no statement to school authorities as to age of any of his children, introduced in evidence school registration card, showing date of defendant's birth, signed by defendant's mother, rejection of father's testimony that misstatement in registration card was deliberately made for certain purposes *held* not prejudicial error.

★Rehearing denied.

8. Infants ⚷20—School registration and census cards, made out on information given by defendant's mother, held evidence of defendant's age beyond reasonable doubt, as respects death penalty for murder.

In prosecution for murder, where death penalty was inflicted, in which sole defense was that defendant was under 18 years of age, when offense was committed, school registration and census cards, made to school authorities of another state, and verified by or made out on information given by defendant's mother at a time when, in nature of things, truth would be stated, and for which sufficient foundation was laid, constituted evidence of defendant's age beyond a reasonable doubt.

In Bank.

Appeal from Superior Court, Fresno County; Charles R. Barnard, Judge.

Allen Ellis and another were convicted of murder in the first degree, and the named defendant appeals. Affirmed.

William A. White, of Fresno, for appellant.

Glenn M. Devore and H. F. Briggs, both of Fresno, U. S. Webb, Atty. Gen., and Emery F. Mitchell, Deputy Atty. Gen., for the People.

SHENK, J. An information was filed, jointly charging Allen Ellis, Lowell Davis, and Bill Krieger with the crime of murder. Ellis and Krieger were jointly tried. The verdict found the defendant Krieger guilty of murder of the first degree and recommended life imprisonment. The defendant Ellis was also found guilty of murder of the first degree and the jury fixed the extreme penalty. This is an appeal by the defendant Ellis from the judgment of conviction, and from an order denying his motion for a new trial.

According to the written confessions of all three participants in the crime, each was 18 years of age and resided at Sanger. About 7 o'clock in the evening of June 13, 1928, the three left Sanger in a Ford roadster and proceeded to Fresno. As they passed through Selma, the suggestion was made by one of them that they "hold up somebody" in Fresno. After they entered Fresno, they rode around the city for a while, finally arriving, at about 10:30 p. m., in the vicinity of the end of the street car line in a section known as the "Normal district," where they saw a man alight from a street car. They drove around the block. Ellis and Davis got out of the automobile and walked some distance toward the man, who had left the street car and was proceeding to his home. Krieger remained away in the car. Davis was armed with a loaded billy, and Ellis had a .45 caliber automatic Colt's United States army pistol. Ellis and Davis met the man face to face, and Ellis ordered him to put up his hands. The man replied: "Go to hell." Whereupon Ellis fired the gun twice. The first shot did not take effect, but the second shot penetrated the vitals of Francis O. Weisert, a man engaged in the automobile business in the city of Fresno, and who had a wife and four children. The victim staggered to the ground, and died a few hours later as a result of the wound. After the shooting, Ellis and Davis jumped into the Ford roadster, and with Krieger as the driver, returned to their respective homes at Sanger. They were apprehended by police officers early on the morning of the next day.

[1] The sole defense of the defendant Ellis was that he was under the age of 18 years at the time the offense was committed. The jury found against him on this issue. In support of the appeal 18 errors are specified. Four of them only need be discussed. The first to be noted is the claim that prejudicial error was committed by the court in submitting a certain instruction to the jury relating to the burden of proof as to the age of the appellant. The pertinent portion of the instruction is as follows:

"You are instructed that every person guilty of murder of the first degree shall suffer death, or confinement in the state prison for life, at the discretion of the jury trying the case, * * * provided, however, that the death penalty shall not be imposed or inflicted upon any person for murder committed before such person shall have reached the age of 18 years; provided, further, that the burden of proof as to the age of said person shall be upon the defendant.

"From the foregoing you are to understand that it is not incumbent upon the prosecution to prove that at the time of the homicide the defendant, Allen Ellis, was over the age of 18 years. The law presumes that the defendant was over the age of 18 years. This presumption of the defendant being beyond the age of 18 years must prevail, unless from a preponderance of the evidence introduced you are convinced that any such defendant was under the age of 18 years at the time of the commission of the offense."

Section 190 of the Penal Code, as amended in 1921, provides that where the age of the defendant is in issue, "the burden of proof as to the age of said person shall be upon the defendant." It is insisted that the court erred in declaring that the law "presumes" that the defendant was over the age of 18 years. We are satisfied that the effect of the provision in said section 190 is that if there be no proof that the defendant was under eighteen years of age at the time of the commission of the offense, and no circumstance, such as the appearance of the defendant, is present sufficient to establish that he was under age, the jury would be bound to find that he was of the age of 18 or over.

There would seem to be no valid reason, and the appellant has suggested none, why the word "presumption" might not properly be used in this connection. Section 1959 of the Code of Civil Procedure defines a presumption as a "deduction which the law expressly directs to be made from particular facts." It is in the nature of evidence, and, unless conclusive, may be controverted by other evidence, but unless controverted the jury is bound to find in accordance with the presumption. Section 1961, Code Civ. Proc. A presumption is the equivalent of proof, without express or affirmative proof, and is conclusive in the absence of any evidence contravening it. See People v. Harris, 169 Cal. 53, 145 P. 520. When the law provides on whom shall rest the burden of proof, it establishes a rule as to which party shall first proceed and go forward with the evidence, or prove the issue, the presumption then being against the party having the burden of proof. 22 Corp. Jur. 83.

It is also insisted that the court erred in that portion of the instruction wherein the jury was told that the burden was upon the defendant to prove "by a preponderance of the evidence" that he was under the age of 18 years at the time of the commission of the offense, and it is contended that the instruction should have been that, if the jury should find from the evidence that the defendant had not reached the age of 18 years before the offense was committed, or if the jury should have a reasonable doubt on that point, then, under the law, the death penalty could not be imposed on the defendant. This point apparently has not been passed upon in this jurisdiction.

It is the established law of this state that, when the plea of insanity is interposed in a criminal case, the burden of proof is upon the defendant, and in order that the defendant may prevail on that issue the proof must be by a preponderance of the evidence. In the concurring opinion in People v. Harris, supra, it was well said at page 71 (145 P. 527): "When insanity is interposed as a defense, that one particular issue is removed from the operation of the rule of reasonable doubt. It forms an exception to it. Our law is this: If the jury entertain a reasonable doubt concerning the proof of any material issue in a criminal case, it must give the defendant the benefit of that doubt and acquit him, unless the particular issue be that of insanity. As to this issue a reasonable doubt is not sufficient to justify an acquittal at the hands of the jury, but they must be convinced that the defense of insanity is established by a preponderance of evidence." To denominate the plea of insanity a "defense" to crime is not strictly accurate. More correctly it is a special plea to the effect that, assuming the homicide to have resulted from the act of the defendant, he is not amenable to punishment under the law.

So, too, assuming the commission of the crime by the defendant, the plea of under age does not go to the question of guilt but only to the question of the amenability of the defendant to suffer the death penalty. When by legislative enactment the state has placed on the defendant the burden of proof as to the issue of under age, the law has established another exception to the general rule as to the quantum of proof required on an issue in a homicide case and has removed the issue of under age from the operation of the rule of reasonable doubt. Since the law has imposed the burden of proof by a preponderance of evidence on the defendant on the issue of insanity we discover no good reason for prescribing a different rule where the burden of proof is placed on the defendant on the issue of under age. Each is in the nature of a special plea and is interposed on the assumption that the commission of the overt act may be proved beyond a reasonable doubt.

The appellant seeks to have the rule in alibi cases applied here, and relies on such cases as People v. Winters, 125 Cal. 325, 57 P. 1067, where an instruction including the following was approved: "In other words, the defendant is not bound or required to prove an alibi beyond a reasonable doubt to entitle him to an acquittal. It is sufficient if the evidence upon that point, if any, raises a reasonable doubt in your minds of his presence at the time and place of the commission of the crime charged." From this state of the law in the case of an alibi, it is argued that the same rule should apply to an issue of under age. We cannot so conclude. The question of the presence of the defendant at the scene of the homicide is an inherent element in the prosecution's case and goes directly to the question of guilt, excepting, for example, in cases of homicide by poison and conspiracy to commit a felony. In other words, when an alibi is sufficiently established, an acquittal would necessarily result. On the other hand, when sufficient proof of the homicide is otherwise shown, adequate proof that the defendant was under 18 years of age at the time of its commission would not prevent a verdict of guilty. The proof of the age of the defendant in such cases would affect only the extent of the punishment, by relieving the defendant of the extreme penalty as matter of law.

[2, 3] If we were to hold otherwise on the point just discussed, nevertheless we would feel compelled on the record before us to conclude that the appellant had suffered no prejudice by reason of the instruction complained of. As proof of the age of the appellant at the time of the killing there was in evidence the statement of his age as eighteen made by the appellant to the officers soon after his arrest and in his signed statement to the same effect made before the trial.

A person's age may be proved by his own testimony. People v. Ratz, 115 Cal. 132, 46 P. 915; 10 Cal. Jur. p. 1054; 22 Corp. Jur. p. 171. As further proof of the defendant's age there was in evidence a verified statement, signed on March 25, 1923, by the mother of the defendant before a school census trustee in the state of Texas, showing that the defendant was born on June 4, 1910. There was also received in evidence an enrollment card, made by the superintendent of schools at Marshall, Tex., and constituting a part of the public records of his office, enrolling the defendant as a pupil, and assigning him to a particular public school. This document shows that the defendant was born on June 4, 1910. The father and the mother of the defendant testified at the trial that their son Allen was 17 years of age at the time of the commission of the crime. In rebuttal the prosecution introduced in evidence a document headed "Registration of Minors." This card was signed and sworn to by the defendant's mother at Sanger on October 4, 1927, before a registrar of minors, pursuant to section 1610 of the Political Code, and shows that Goldie Ellis, a daughter of these same parents, was born on February 2, 1911. With the defendant's written confession and the other documents in evidence, it is difficult to perceive how the jury could well entertain a reasonable doubt on the question of the defendant's age, notwithstanding the testimony of the parents given under these distressing circumstances.

[4, 5] The signed confession of the appellant was admitted in evidence over the objection of his counsel that the same was involuntary. In the early morning after the homicide, the appellant was interviewed at Sanger by Constable Street and Officer Tullis before the appellant was taken to Fresno. On cross-examination Constable Street testified that he told the appellant to tell the truth—that it was the best thing for him to do. Officer Tullis testified that he was present during the whole conversation, and that no such statement was made to the appellant by Constable Street. At that conversation the appellant refused to admit that he was in the city of Fresno on the evening of the homicide, and steadfastly maintained his position until he was questioned a second time some four hours later in the office of the chief of police at Fresno, when he was confronted with the fact that Krieger had confessed. He was then questioned again, and again asked if he was in Fresno the night before, to which he answered, "No." He was then advised that Krieger had told all about the commission of the crime.

The appellant then turned to Krieger and asked him, "Did you tell them?" to which Krieger replied, "Yes, go ahead, I have—I told them all about it already." The appellant then admitted that he participated in the commission of the crime. Neither Officers Street nor Tullis appear to have been present at the time of the confession, and it was not shown that any inducements were held out to Krieger to obtain his confession. Even as to the conversation between the appellant and Officers Street and Tullis at Sanger, the record discloses a conflict in the evidence as to which the decision of the trial court and jury will not be disturbed, where, as here, there is substantial evidence to support it. People v. Fowler, 178 Cal. 657, 174 P. 892. We therefore find no error in the ruling of the trial court, and the implied finding of the jury that the appellant's confession was voluntary.

[6] Counsel for the appellant states that perhaps the most serious error complained of is that wherein the court admitted evidence of other crimes committed by the defendant Krieger. When Krieger was questioned in the office of the chief of police in Fresno on the morning after the homicide, the history of his past life was quite thoroughly developed. He made full disclosure of his part in the crime under investigation and in the commission of other crimes, one of which was committed in conjunction with his father, who, after conviction was sentenced to San Quentin. It also appeared that Krieger's mother was at the time confined in the hospital for the insane at Stockton. The statement was reduced to writing, was read over, and signed by Krieger. It was admitted in evidence and read to the jury. This evidence was offered by the prosecution only as against the defendant Krieger, and he is not appealing.

It is insisted, however, by the appellant, that evidence of the other crimes committed by Krieger, three of which were robberies committed by Krieger within 60 days prior to June 13, 1928, had the effect of prejudicing the jury against the appellant. Evidence of other robberies committed by Krieger was offered by the prosecution against Krieger, on the theory that it tended to establish the intent on his part to commit the crime of robbery on the evening in question; for, it is insisted, unless it was proved that Krieger had formed the intent to commit robbery on that night, it might have been difficult to establish as against him the crime of murder in the first degree. There is authority for the respondent's position. Hillen v. People, 59 Colo. 280, 149 P. 250, 251.

The appellant relies upon People v. Arnold, 199 Cal. 471, 250 P. 168, wherein it was held that, where the crime of robbery was being committed by concert of action on the part of the defendants, the law does not require proof of intent to commit murder, and all that the law exacts is proof that a human being was killed by one of the participants in the robbery. But in that case the crime of robbery was brought home to the defendants. In this case Krieger was not present at the time and place of the homicide, and his intention to commit robbery was proper to be shown, in order to charge him with murder in the first degree. However, at all events, it is difficult to perceive how proof of other crimes by Krieger was prejudicial to the rights of the appellant, Ellis. Apparently such proof, together with the showing of his unfortunate home environment, had the opposite effect on the jury as against the defendant Krieger, for he was relieved of the extreme penalty.

[7, 8] When the defendant's father was called as a witness on behalf of his son, he testified that during the time he had lived in Marshall, Tex., he had never made any statement concerning the age of his children, and particularly that he did not make any statement to the school authorities in Texas as to the age of any of his children. He further testified that he did not write at all. In rebuttal the prosecution introduced in evidence the registration card made to the public school authorities at Marshall, Tex., showing the date of the birth of the appellant as June 4, 1910, and to which the name of A. R. Ellis had been signed by the mother. After the close of the rebuttal by the prosecution, the appellant's father was recalled, and it was sought to be proved by him that the date of birth of the appellant on the school registration card was a misstatement, deliberately made so, in order that the age of appellant might appear as one year older than he really was, to the end that the appellant's sister might be allowed to enter school.

Objection by the prosecution to this offered testimony was sustained on the ground that it appeared in evidence, by the testimony of this same witness, that he had nothing to do with reference to the school registration card, and it otherwise appeared that he did not sign his name thereto. Under these circumstances we find no prejudicial error in refusing to permit this witness to so testify. Furthermore, it is not clear how this proffered "explanation" would in fact explain the misstatement on the card to the appellant's benefit. Sufficient foundation was laid for the introduction of the registration and school census cards and since they were verified by or were made out on information given by the mother at a time when, in the nature of things, the truth would be stated, they constituted evidence of the appellant's age beyond a reasonable doubt.

Other alleged errors were assigned by the appellant, but those discussed are most relied upon. The others, upon examination, are found to be without merit and require no further notice.

The judgment is affirmed.

We concur: WASTE, C. J.; RICHARDS, J.; SEAWELL, J.; CURTIS, J.

---

96 Cal. App. 364

STORELLI v. ROBERTSON, Constable. (Civ. 3605.)

District Court of Appeal, Third District, California. Jan. 21, 1929.

Mandamus ⚷4(3)—Justice court order, refusing to release from attachment property claimed as exempt, being appealable, writ of mandate was not available (Code Civ. Proc. § 1086).

Since petitioner had right to have reviewed on appeal to superior court order of justice court refusing to release from attachment property claimed by petitioner to be exempt, she was not entitled to writ of mandate to compel property to be released from attachment, under Code Civ. Proc. § 1086, regardless of whether she availed herself of such remedy.

Appeal from Superior Court, Solano County; W. T. O'Donnell, Judge.

Mandamus proceeding by Mrs. J. Storelli against James Robertson, as Constable in and for Vallejo Township, Solano County. From an adverse judgment, petitioner appeals. Affirmed.

J. E. Colthurst, of Vallejo, for petitioner.

Lindauer & Horan, of Vallejo, for respondent.

PLUMMER, J. This matter is before us upon an appeal from a judgment entered after an order had been made sustaining the respondent's demurrer to the plaintiff's petition for a writ of mandate. The petition for writ of mandate alleges that on or about the 5th day of January, 1927, James Robertson, as constable in and for the township of Vallejo, in Solano county, under a writ of attachment placed in his hands, where the petitioner was named as defendant, attached certain property belonging to the petitioner; that thereafter the petitioner claimed a return of said property as exempt from execution and filed a claim of exemption in the justice court of Vallejo township, from which court said writ of attachment was issued, and moved said court for an order releasing said property from attachment, but that the justice of the peace of said township has refused at all times to order said constable to release said property from attachment.

The demurrer to the petition was sustained on the ground that it does not state facts sufficient to warrant the issuance of a writ of mandate. If the facts stated in the petition are correct, it shows that the petitioner had a plain, speedy, and adequate remedy at law. Under the Code provisions the petitioner had a right to have the order of the justice court refusing to release the property claimed as exempt reviewed upon appeal to the superior court. It does not appear in the petition that the petitioner ever sought to avail herself of such remedy. The fact that such remedy existed, whether availed of or not by the petitioner, precludes the issuance of a writ of mandate. Under section 1086 of the Code of Civil Procedure a writ of mandate will issue only where the petitioner has not a plain, speedy and adequate remedy in the ordinary course of law. See, also, 16 Cal. Jur. p. 784, § 17. The authorities are clear that when an appeal lies, unless there is some extraordinary circumstance rendering an appeal inadequate, mandamus will not lie. See annotations to section 1086 of the Code of Civil Procedure, in part 2 of Kerr's Cyc. Codes.

Finding nothing of merit in the appeal, the judgment of the superior court should be affirmed, and it is so ordered.

I concur: FINCH, P. J.

CALIFORNIA PACKING CORPORATION v. LOPEZ et al. (Civ. 3664.) ★

District Court of Appeal, Third District, California. Jan. 19, 1929.

Appeal from Superior Court, Solano County; W. T. O'Donnell, Judge.

On petition for rehearing.

For former opinion, see 273 P. 587.

T. A. Farrell and George A. Work, both of Sacramento, and W. U. Goodman, of Fairfield, for appellants.

Rufus H. Kimball and Pillsbury, Madison & Sutro, all of San Francisco, and Joseph M. Raines, of Fairfield, for respondent.

PER CURIAM. A petition for a rehearing of the above-entitled cause having been made to this court, it is hereby ordered that the same be denied; it is further ordered that the following paragraphs of the opinion herein filed the 22d day of December, 1928, be stricken therefrom, it being the opinion of the court that whatever rights appellants may have under the contract executed by the Wright Corporation to Manuel Lopez can only be reached by an action for damages:

"The undisputed evidence in this case also shows that the respondent purchased the land for value without notice of appellants' claim that the John Lopez estate or Manuel Lopez had any interest in said land.

"Appellants contend that Manuel Lopez was in possession of the premises in controversy at the time the Wright Corporation sold the same to the respondent and that such possession was notice to respondent. The authorities are uniform in holding that the possession necessary to put a purchaser on notice must be open, notorious and exclusive. Campbell v. Grennan, 13 Cal. App. 481, 110 P. 156. Notice to be effectual must be precise and complete enough to put the purchaser on his guard. Kowalsky v. Kimberlin et al., 173 Cal. 506, 160 P. 673. There is practically no evidence that tends in any degree to show notice on the part of respondent.

"Witness Tonnengen, superintendent of respondent, who, on behalf of respondent, made the examination of the property in controversy before its purchase by respondent, stated that in making that examination, he was accompanied by Wm. G. Wright, the president of the Wright Corporation and that Wright informed him that there were no incumbrances against the land, that Wright made no mention of the fact that appellants or either of them were in possession of said land or claimed any interest therein by lease or otherwise; nor did Tonnengen see Manuel Lopez on the land, nor anything indicating such possession. There is an entire lack of evidence showing that respondent had any notice or knowledge that appellants claimed any interest in the said one hundred acres, or were in possession of the same prior to its purchase thereof."

96 Cal. App. 451

PASADENA NAT. BANK v. SHORTEN. (Civ. 6199.)

District Court of Appeal, Second District, Division 1, California. Jan. 28, 1929.

1. **Appeal and error 🔑1010(1)—Appellate court cannot disturb findings supported by evidence.**

Where there was sufficient evidence to support trial court's findings complained of, appellate court cannot interfere with findings as made.

2. **Bills and notes 🔑356—Bank crediting J., later connected with bank, with amount of defendant's notes, where J. did not deliver money to defendant as promised, was innocent purchaser.**

Where defendant delivered notes to J., who promised to secure money from bank for defendant, and bank, with which J. later became connected, credited J. with full amount, and J. withdrew whole of such amount, bank was an innocent purchaser for value before maturity of notes.

3. **Bills and notes 🔑443(3)—Where defendant made two notes payable to himself at bank and another payable to bank's order, and delivered them to J., who sold them to bank, bank was real party to bring action.**

Where defendant executed two notes payable to order of himself at bank and another note payable to order of bank, and delivered them to J., who was to secure money from bank for defendant, and J. sold notes to bank, which gave J. full credit therefor upon its books, and J. later withdrew whole amount,

---

★Superseded by opinion of Supreme Court 279 P. 664.

bank was properly the real party to bring action on notes.

4. Bills and notes 🔑365(1)—All defenses were not available against bank purchasing notes, where, after bank started suit, directors put up moneys to protect bank.

All defenses to note were not available against bank, an innocent purchaser of notes, where, immediately after bank instituted suit on notes, bank directors, at demand of bank examiner, personally put up sufficient moneys to protect bank for full amount of notes.

5. Bills and notes 🔑380—That one to whom defendant delivered notes did not deliver money to defendant was not defense available against bank purchasing notes.

That one to whom defendant delivered notes did not turn over money received from bank on notes, as he had promised to do, was not a defense available to defendant against bank which purchased notes.

Appeal from Superior Court, Los Angeles County; W. T. O'Donnell, Judge.

Action on promissory notes by the Pasadena National Bank against Albert Shorten. From a judgment for plaintiff, defendant appeals. Affirmed.

Faries & Williamson and Edwin Heizman, all of Los Angeles, for appellant.

Dunham & Thompson and Bicksler, Smith & Parke, all of Los Angeles, for respondent.

YORK, J. Plaintiff bank obtained judgment in the superior court against defendant on three promissory notes, two of them being notes which the defendant signed and indorsed, and both were made payable to order of "myself at Pasadena National Bank"; both were for $2,000, and the third note for $1,250, signed by defendant, was made payable to the order of the Pasadena National Bank, Pasadena, Cal.

These three notes were delivered to one Irvin Jordan by defendant, and were turned over by Jordan to the plaintiff bank, who gave said Jordan full credit therefor upon its books, and the said Jordan withdrew the whole of said amount.

The peculiarity of the transaction can be briefly stated as follows: The defendant met said Irvin Jordan at the Standard Union Finance Corporation, with which organization said Jordan was then connected. Said Jordan informed him that he was about to become the principal owner of the Pasadena National Bank and that, if defendant would sign the notes, Jordan would secure the money for the said defendant at said bank. The defendant testified that he received absolutely nothing, excepting this promise from Irvin Jordan for said three notes. Thereafter, Jordan for a short time was in control of the Pasadena National Bank, but was ousted from control, and, according to the evidence, was for a time apparently a fugitive from justice. The plaintiff instituted suit upon these notes, and immediately thereafter at the demand of the bank examiner, the directors of the Pasadena National Bank put up, hurriedly and informally, but personally, sufficient moneys to protect the bank for the full amount of these notes. The action proceeded in the name of the bank.

The first objection of the appellant is that the trial court allowed an amendment to the complaint, which was an amendment to conform to the proof, to be filed at the time of trial. An examination of the record discloses the fact that the trial judge properly exercised his discretion.

The next point made by appellant is that the court abused its discretion in refusing to grant a continuance to the defendant after the filing of the amendment to the complaint. An examination of the record discloses that this was not an abuse of the discretion vested in the trial court.

[1] As to the third point reciting certain alleged errors in findings of fact, there was sufficient evidence to support each of these findings complained of; therefore, this court cannot interfere with the findings as made.

[2] The fourth point made by appellant, that the bank was not an innocent purchaser for value before maturity, is not well taken. There is no evidence that the bank itself was in possession of any information as to any fraud committed by Irvin Jordan on the defendant, and the notes were handed to the bank and accepted by the bank *before* the said Irvin Jordan became connected in any way with said institution.

[3] The fifth objection, that the bank is not the real party in interest, and the defendant, therefore, would not be protected by the judgment from further litigation, is not well taken. The notes were filed as evidence in the case, and the bank was properly the real party to bring the action.

[4] The sixth objection of appellant is that the directors became purchasers after the maturity of the notes, and that, therefore, all defenses are available against the bank, particularly the objection that the directors were either the purchasers after maturity with notice of fraud, or else the directors paid the full amount of the notes. The action was already commenced before the directors' money was deposited with the plaintiff bank, and the circumstances relating to that deposit do not establish that the directors either purchased or paid the notes.

[5] The other point of appellant that, as to the third note, there was a total failure of consideration, is answered by the record, which discloses the fact that this note was handed to Irvin Jordan for the purpose of having said Jordan secure money for the defendant, Albert Shorten, at the plaintiff

bank. Jordan was to take the notes there and secure the money which he did. The fact, that the money was not turned over by Jordan to the defendant, as he promised defendant he would do, is not a defense available to appellant. The said Irvin Jordan was not, at the time of the transaction between himself and the appellant, either a director or officer of the plaintiff bank, his connection with the bank having occurred after that time.

The judgment is therefore affirmed.

We concur: CONREY, P. J.; HOUSER, J.

---

96 Cal. App. 371

RELIANCE ACCEPTANCE CORPORATION v. LUNDBLADE. (Civ. 3693.)

District Court of Appeal, Third District, California. Jan. 21, 1929.

1. Appeal and error 🔑478—Allegations of answer to petition for supersedeas must be accepted as true, in absence of evidence.

The burden of proof being on petitioner for writ of supersedeas, allegations of answer to petition must be accepted as true, in absence of any evidence.

2. Appeal and error 🔑479(1)—Appellant not making timely effort to have sureties on undertaking to stay execution justify after service of notice of exception on his attorney held not entitled to supersedeas (Code Civ. Proc. § 1015).

Appellant, making no effort to have sureties on his undertaking to stay execution justify, nor to give undertaking with other sureties, within time allowed by law after service of notice of exception to sufficiency of sureties on his attorney, as required by Code Civ. Proc. § 1015, *held* not entitled to writ of supersedeas to require justification thereof on ground that he had no knowledge of such exception.

Action by the Reliance Acceptance Corporation against Fred H. Lundblade, doing business under the name of the Fred H. Lundblade Company. Judgment for plaintiff, and defendant appeals. On appellant's application for a writ of supersedeas to require justification of sureties on his undertaking to stay execution. Application denied.

Henry L. Ford and W. Ernest Dickson, both of Eureka, for appellant.

Eugene S. Selvage, of Eureka, for respondent.

FINCH, P. J. [1, 2] This is an application by the defendant for a writ of supersedeas. The parties have stipulated that the matter be submitted on the records and files. The facts, therefore, must be ascertained from an examination of the petition for the writ and the plaintiff's answer thereto. Since the burden of proof is on the petitioner, the allegations of the answer, in the absence of any evidence, must be accepted as true. The following facts, among others, are stated in the answer:

May 28, 1928, judgment was entered in favor of the plaintiff against the defendant, petitioner herein, for $566.04 and costs. August 7, the defendant's motion for a new trial was denied. September 5, defendant served notice of appeal and thereafter filed an undertaking to stay execution. September 28, the plaintiff duly excepted to the sufficiency of the sureties on the undertaking and served notice thereof on counsel for the defendant. The defendant made no effort to have the sureties justify or to give an undertaking with other sureties until November 22, 1928, when the petition herein was filed. In such petition it is alleged that the defendant had "no knowledge of the said exceptance to his undertaking staying execution pending the said appeal, and thereupon through inadvertence he failed to have his sureties justify within the time allowed by law." It was unnecessary to serve the defendant personally with the notice of exception to the sureties, but it is required that service of such a notice "must be upon the attorney instead of the party." Code Civ. Proc. § 1015. In the language of the Supreme Court in Williams v. Borgwardt, 115 Cal. 617, 618, 47 P. 594, 595, "there is nothing to show either accident, surprise, inadvertence, or excusable neglect, and for this court to extend the relief asked would be equivalent to making a rule that the appellant may always neglect to follow the procedure prescribed by the statute, secure that upon his mere request this court will issue its supersedeas upon the filing of a bond to be approved by us. We do not think such practice should be sanctioned or encouraged. It would necessarily involve greater expense and inconvenience to respondents, and would seriously encroach upon the time of this court."

The application is denied.

I concur: PLUMMER, J.

96 Cal. App. 1

PEOPLE v. WEAVER. (Cr. 1057.)★

District Court of Appeal, Third District, California. Dec. 27, 1928.

As Modified, on Denial of Rehearing, Jan. 11, 1929.

1. Criminal law 🔑740, 1159(5)—In prosecution for passing fictitious check, claim of irresponsibility through illness held for jury, whose finding must be accepted by appellate court (Pen. Code, § 476a).

In prosecution under Pen. Code, § 476a, for passing fictitious check, claim that defendant was ill on date check was issued, and did not know of acts committed on such day, *held* for jury, and conclusion of jury, refusing to accept claim of mental aberration, must be accepted by District Court of Appeal.

2. False pretenses 🔑22—Issuance of fictitious check held not made lawful by payment of other checks before prosecution for passing check (Pen. Code, § 476a).

In prosecution under Pen. Code, § 476a, for passing fictitious check, proof that defendant took up or paid before trial all but one of various checks issued on bank in which defendant had no funds or credit did not relieve acts of defendant in issuing checks of their criminality, though such fact might be considered in mitigation of punishment.

3. False pretenses 🔑49(2)—Implied finding that defendant issued check with intent to defraud, and knowing he had no funds or credit with bank, held supported by evidence (Pen. Code, § 476a).

In prosecution under Pen. Code, § 476a, for passing fictitious check, evidence that defendant had neither funds nor credit in bank on which check was drawn, and had issued numerous fictitious checks on same date, *held* to support implied finding of jury that defendant issued check knowing he had no funds or credit with bank and with intent to defraud.

4. False pretenses 🔑51—Whether date of fictitious check was changed held for jury, in determining whether check proved was check alleged in information (Pen. Code, § 476a).

In prosecution under Pen. Code, § 476a, for passing fictitious check, question whether check was originally dated 1925, and changed to 1926, or whether originally dated 1926, and changed to 1925, *held* for jury under evidence, in determining whether check proved was check set forth in information, charging defendant with passing check dated 1925.

5. False pretenses 🔑6—Date of check is no element of offense of passing fictitious check (Pen. Code, § 476a).

Under Pen. Code, § 476a, prohibiting giving to another with intent to defraud of check by party knowing at time that he had not sufficient funds or credit with bank to meet check on its presentation, date of check is no element or ingredient of offense.

6. False pretenses 🔑38—Proof of false check alleged, dated 1926, held not material variance from information charging passing of fictitious check dated 1925, under evidence (Pen. Code, § 476a).

In prosecution under Pen. Code, § 476a, for passing fictitious check alleged in information to be dated October, 1925, proof of check alleged to be dated 1926 *held* not material variance, fatal to conviction, under evidence showing check delivered to prosecuting witness as set forth in information was check received in evidence, and that no other check had been delivered to prosecuting witness by defendant.

7. Criminal law 🔑1170(2)—Error, if any, in excluding testimony that defendant paid fictitious check, held cured by district attorney's introduction of same testimony through prosecuting witness (Pen. Code, § 476a).

In prosecution under Pen. Code, § 476a, for passing fictitious check, error, if any, in disallowing testimony by defendant that prosecuting witness was paid amount of check *held* cured by bringing out same testimony through questioning of prosecuting witness by district attorney.

8. Criminal law 🔑400(8)—Cashier's testimony that defendant, prosecuted for passing fictitious check, did not have funds or credit in bank, held not inadmissible as not best evidence (Pen. Code, § 476a; Code Civ. Proc. § 1855, subd. 5).

In prosecution under Pen. Code, § 476a, for passing fictitious check, testimony by cashier of bank on which check was drawn that defendant did not have funds or credit with bank to pay check *held* admissible, under Code Civ. Proc. § 1855, subd. 5, and not objectionable as not best evidence, where proof thereof, if required to be shown by records of bank, would have necessitated examination of many books of bank.

9. False pretenses 🔑49(1)—Testimony by bank cashier that he did not know defendant passing fictitious check supported implied finding that defendant had no credit with bank (Pen. Code, § 476a).

In prosecution under Pen. Code, § 476a, for passing fictitious check, testimony by cashier of bank on which check was drawn that he had no acquaintance with defendant, either before or at time check was delivered, or at any time thereafter, was sufficient to support implied finding by jury that defendant had no credit with bank whatever.

10. Criminal law 🔑354—Question to defendant, claiming illness causing mental lapse when fictitious check was passed, whether he had previously had similar illness, was properly excluded (Pen. Code, § 476a).

In prosecution under Pen. Code, § 476a, for passing fictitious check, defended on ground that defendant was ill on date check was passed, causing him not to remember what occurred, question to defendant as to whether he had ever before been in physical or mental condition resulting in mental lapses was properly excluded, as immaterial, in absence of defense of insanity.

★Rehearing denied.

11. Criminal law 🔑761(3)—"Stock" instruction of Code, requiring union of act and intent, or criminal negligence, for crime, was not erroneous as assuming criminal negligence was issue in prosecution for passing fictitious check (Pen. Code, §§ 20, 476a).

In prosecution under Pen. Code, § 476a, for passing fictitious check, where court instructed on essentials of crime as defined by statute, and that essential element thereof was intent with which check was delivered, "stock" instruction of Pen. Code, § 20, that every crime requires union of act or intent, or criminal negligence, was not erroneous as assuming criminal negligence was element in case.

12. Criminal law 🔑761(3)—"Stock" instruction that all persons are of sound mind who are not idiots or insane held not harmful, in prosecution for passing fictitious check (Pen. Code, §§ 21, 476a).

In prosecution under Pen. Code, § 476a, for passing fictitious check, defended on ground that defendant was unconscious of doing act by reason of temporary mental sickness, "stock" instruction of Pen. Code, § 21, that all persons are of sound mind who are neither idiots nor affected with insanity, *held* not harmful, as assuming defense of insanity was set up.

13. Criminal law 🔑815(4)—Conviction for passing fictitious check implied consideration of question whether check was postdated and prosecuting witness informed thereof, under instructions (Pen. Code, § 476a).

In prosecution under Pen. Code, § 476a, for passing fictitious check, where court instructed that, if defendant delivered check with knowledge that he had no funds or credit in bank, it is immaterial whether check was dated 1925 or 1926, providing check was taken without information that drawer had no funds, question whether prosecuting witness accepted check knowing it was not to be presented until year after date of delivery was presented to jury, and verdict of conviction necessarily implied that check was not postdated, and prosecuting witness was not informed that it was not to be presented for year.

14. Criminal law 🔑1173(1)—That defendant's rejected instructions were more specific held not ground for reversing criminal case, where evidence of guilt appeared conclusive.

That instructions proposed by defendant and rejected by court were on certain issues more specific and direct than those by court on same questions, and should have been preferred, is not ground for reversing criminal case, where evidence appeared to be conclusive of defendant's guilt.

Appeal from Superior Court, El Dorado County; George H. Thompson, Judge.

C. E. Weaver was convicted of passing fictitious check, and he appeals. Affirmed.

Theodore E. Bowen, of Los Angeles, E. Fitzgerald, of Placerville, and J. Edward Keating, of Los Angeles, for appellant.

U. S. Webb, Atty. Gen., and J. Chas. Jones, Deputy Atty. Gen., for the People.

HART, J. Defendant was charged by information in the superior court of El Dorado county with the crime defined in section 476a of the Penal Code, in that, on the 10th day of October, 1925 he did (now quoting from the information) "willfully, unlawfully, knowingly, fraudulently, and with intent to defraud one Tim Haw, make, utter, draw and deliver to said Tim Haw a certain check and draft on a bank and depositary for the payment of money, to wit, the Placerville National Bank, which said check and draft was in words and figures following, to wit: 'Placerville, Calif. Oct 10, 1925. No. 78. The Placerville National Bank 90–971. Pay to the order of Tim Haw $50.00, Fifty and no/100 Dollars. C. E. Weaver.'" He was convicted by the jury of said offense. He moved for a new trial, but the motion was denied. He appeals from the judgment of conviction and the order denying his motion for a trial de novo.

The appeals are sought to be supported upon the claim that the evidence is insufficient to have justified his conviction, and that error was committed in rulings admitting and excluding certain testimony, and in the action of the trial court in the giving and the refusal to give certain instructions.

[1] 1. There is no merit in the contention that the record does not disclose evidence sufficient to support the verdict. The fact that the defendant issued the check or draft as alleged in the information, and the further fact that, when issuing and delivering the document to Haw, he had no funds in or credit with the bank upon which it was drawn, to meet or satisfy said check, stand in the record wholly undisputed. He, however, claimed at the trial, and undertook to sustain that claim by his own testimony alone, that, because of being ill on the day he issued the check, and of the effect of such illness upon his mind, he knew and remembered nothing of many of the acts he did on that day, and had no recollection of issuing and delivering to Haw the check in question. His illness on said day, he stated, proved, as it progressed, to be typhoid fever, from which he suffered and for which he was required to remain in a hospital in the city of San Francisco under medical treatment for a period of two or more months. But this phase of the case need not be given herein extended consideration, since it was a matter solely for the jury's determination. The verdict conclusively shows that the jury refused to accept the defendant's story of mental aberration on the day and at the time in question, and we, in turn, must accept the jury's conclusion in that respect. It will, though, conduce to a clearer understanding of the situation, as it was created by the several transactions with which the offense charged in the information was more or less connected, if the facts be in a general way stated.

The defendant had, for a period of time prior to the 10th day of October, 1925, been associated (for a time as a partner and then as superintendent of the mine) with another party in prosecuting operations in a certain mine situated not far distant from Placerville. During that period of time, he occupied, whenever remaining overnight in Placerville, a sleeping room in a rooming house conducted by said Haw in that city. At some time of the afternoon of said 10th day of October, he appeared at said rooming house, and, meeting Haw, handed to the latter a bar of gold bullion to keep for him until he later called for it. It appears that he was indebted to Haw in quite a sum, and that, between 6 and 7 of the evening of the day just mentioned, he returned to the rooming house, and, meeting Haw on the outside of and near said house, stated to the latter that he desired to pay him (Haw) a sum of money to be credited on his indebtedness to Haw. Thereupon the two entered the house and the defendant then prepared and signed the check which forms the basis of the information herein and delivered the paper to Haw, who thereupon returned the bar of bullion to the defendant. It may here be stated that the accused testified that he had no recollection of the circumstance of the return of the bullion to him, either by Haw or his wife, to whom (the wife), instead of Haw himself, he thought he had delivered the bar on the 10th of October. No trace of the bullion was ever discovered, and, so far as the record here advises us, no one actually knew or knows what finally became of it.

[2] It further appears that, on the same day (October 10th), the defendant issued five other checks, and another on the following day (October 11th), in favor of as many other different persons residing in and about Placerville, and delivered the same to the parties in whose favor, respectively, they were drawn. All the checks, save and except one, which was drawn in favor of and delivered to one Max Baer for the sum of $45, were drawn on the Placerville National Bank, in which the accused had never at any time had any funds, and with which he never at any time had any credit. In fact, the officers of said bank had no acquaintance whatever with the defendant. The check issued and delivered by defendant to Baer was drawn on the El Dorado County Bank, located at Placerville, in which the defendant had on deposit the sum of $3.12 only, and with which he had no credit. All the checks, with the exception of two, of which that issued and delivered to Haw was one, were postdated, viz.: "Oct. 10, 1926." All the checks were introduced in evidence in the order in which the testimony of those to whom, respectively, they were issued and delivered was given at the trial. The checks called for sums varying in amount from $5 to $50 and the total amount thereof was the sum of $225.50. The defendant was allowed to prove that he took up or paid all but one of the checks a day or two prior to the date of the trial. The fact, though, that he did so, if the court had deemed it, in view of the circumstances of the case, proper for that purpose, might have been considered as in mitigation of the punishment to be imposed, or upon the question of admission of the accused to probation; but it obviously in no measure or degree relieved the acts of the defendant in issuing the checks of their criminality, within the purview of section 476a of the Penal Code.

[3] As first above stated, the fact that the defendant issued and delivered to Haw the check upon which the information is founded, and the fact that he had in or with the bank upon which it was drawn neither funds nor credit with which to meet the same, were not and are not controverted. There is no ground for any doubt that there is sufficient evidence to support the implied finding of the jury that the accused issued and delivered the check to Haw, knowing at the time that he had no funds in or credit with said bank with which the check could or might be satisfied or met, and that he so issued and delivered said check with the intent to defraud Haw. Thus a complete offense under the section of the Penal Code upon which the information is based was made out.

[4, 5] 2. The defendant objected to the introduction of the Haw check in evidence on the ground that it was not the check pleaded in the information. The objection was overruled. A photostatic copy of the check appears in the transcript. The question thus raised and presented involves two points, viz.: (1) That the check received in evidence as in proof of the crime charged not being the check set forth in the information, the verdict, therefore, is without sufficient evidentiary support to uphold it; (2) that there is thus created a material variance, fatal to the judgment of conviction, between the pleading and proof. The variance claimed arises from the fact that, in the blank space for the designation of the year of the issuance of the check in the printed form of check used by the defendant for the preparation of the check, the final numeral or figure seems first to have been a "5," which, obviously, would make the date of the check, even with the date of its issuance, viz. "1925," and that (as also appears to be the fact) the writer of the check then attempted to change the date thereof, so far as the year was concerned, by substituting for and writing over the figure "5" the figure "6," thereby making the check bear date "Oct. 19, 1926."

The conclusion that the date line of the check was first made to read "1925," and thereafter changed to "1926," is based upon the opinion of the writer of this opinion, formed from such an inspection of the date line of the paper as the limited means of a nonexpert for the investigation of such matters will permit; but it is not at all impossible that an expert in the deciphering of hieroglyphical confusions, with the aid of instruments suitable to such purpose, might conclude that the figure "6" was first written, and then an attempt made to substitute the figure "5" therefor, in the manner above indicated. In any event, however, the question was one for the jury to determine. But the point as to the variance is of no material importance, in so far as is concerned the statement of the crime denounced by section 476a of the Penal Code. In other words, the gist of the offense defined in said section is entirely in the giving to another, with intent to defraud, any check or draft on a bank, banker, or depositary for the payment of money, by a party who knew at the time that he had not sufficient funds in or credit with such bank, etc., to meet such check or draft in full upon its presentation; the date of the check being, therefore, no element or ingredient of said offense. People v. Bercovitz, 163 Cal. 636, 638, 126 P. 479, 43 L. R. A. (N. S.) 667.

[6] This proposition, though, is not combatted by counsel for the defendant. The point that they make is that the variance is such that the defendant would be without legal protection against any future prosecution which might be inaugurated and pressed against him for the same offense. The evidence leaves no ground for doubting that the check delivered to Haw, and as set forth in the information, was the check received in evidence. Haw testified that he delivered the check on the day he received it to a Judge Shanklin. When shown the check as he was testifying, Haw stated that it was the check the defendant gave him on the 10th day of October, 1925; that he had not seen the check after handing it to Judge Shanklin until the preliminary examination of the accused on the charge stated in the information, held a short time before the trial and over two years after the check was delivered to him by the defendant. In the course of his examination he also stated that he "presumed" that the check shown to him while he was testifying for the people was the check he received from the defendant. There was no testimony that the defendant delivered to Haw any other check on the 10th day of October or at any other time. Indeed, no attempt was made to show that any other check was issued and delivered to Haw by the accused at any time.

As has been shown, the defendant relied for an acquittal solely upon the single defense interposed by him that, because of illness which affected his mentality, he had no recollection of having delivered any check to Haw. He did not deny that he delivered to Haw the check received in evidence. In the case of People v. Freeman, 29 Cal. App. 543, 156 P. 994, the accused was charged with and convicted of the offense charged against the accused here. In that case the date line of the check set out in the information read: "Brawley, Cal. 3—2 1915." The check, when offered and received in evidence, corresponded in all respects with the copy set out in the information, except that the figure "1" appeared in the date line, making it read: "3—12 1915," instead of "3—2 1915." The claim on behalf of the defendant there, as here, was that there was as to the check a variance between the allegations of the information and the evidence offered, but an objection on that ground for the defendant was overruled. The Court of Appeal, upholding the trial court's ruling, said, quoting from People v. Arras, 89 Cal. 223, 26 P. 766: "A material variance between the proof and the information arises when an acquittal of the defendant under the information would be no bar to a further prosecution for the same offense"—and, proceeding further, expressed the following views, which are peculiarly applicable to the instant case, in so far as the present consideration is concerned: "As we view the evidence, there could have been no question but that the check offered in evidence was the one by the use of which the crime charged was perpetrated; and we have no doubt at all but that the appellant would not be embarrassed, in making proof under a possible subsequent charge, made affecting the same check, that he had theretofore been convicted of the crime, and hence had been once in jeopardy. It follows, then, that the variance was immaterial."

[7] The court sustained objections by the district attorney to questions propounded by counsel for defense to Haw, designed to elicit information as to whether the defendant, after returning or being returned to El Dorado county, paid Haw the amount of the check. Even if such testimony was material (and it certainly was not), the error in disallowing it was, subsequent to the rulings complained of in that connection, cured by bringing out practically the same testimony through the questioning of Haw by the district attorney. As seen, Haw stated that, on the day immediately preceding the day on which the trial of this case was opened, the defendant paid him (Haw) all he (defendant) owed him.

[8, 9] The cashier of the Placerville National Bank, upon which the check to Haw was drawn, was, over objection by the defendant, permitted to testify that the defendant, either at the time he delivered the check to Haw, or at any time subsequent thereto, had no funds in or credit with said bank "to meet said check or draft in full upon presentation." The ground upon which objection was made and urged against the acceptance of that testimony was that, as offered, it was not the best evidence of the fact thus sought to be

proved; the argument being that the only competent way in which the fact could be proved would be by the records or books of the bank. The testimony complained of was proper. The testimony was of a negative fact, which, if required to be shown by the records of the bank, might have necessitated the examination of every book, or many of the books, of the bank. This would of necessity have entailed much loss of time, inconvenience, and trouble. Because of this, the Legislature has declared that in such instances, in the trial of a case, one of the exceptions to the rule that there can be no evidence of the contents of a writing, other than the writing itself, is "when the original consists of numerous accounts or other documents, which cannot be examined in court without great loss of time, and the evidence sought from them is only the general result of the whole." Code Civ. Proc. § 1855, subd. 5.

In just such a case as this, the appellate court, in People v. Kawano, 38 Cal. App. 613, 614, 177 P. 174, held, we think properly, that the testimony of the "credit remittance man" of the bank in that case was proper and competent as in proof of the fact that the defendant had no funds in or credit with such bank at the time the defendant drew and delivered the check to the party named therein as the payee, or at any other time. But the defendant here lays particular stress upon the proposition urged by him that the statement by the cashier that he (defendant) had no "credit" with the bank involved the conclusion of the witness. Conceding the point to be well taken, it remains true that the cashier also stated that he had no acquaintance with the defendant, either before or at the time he delivered the check to Haw, or at any time thereafter, which statement itself constituted testimony sufficient to support the implied finding by the jury that the defendant never had with said bank any credit whatever.

[10] There was no error in the ruling sustaining the objection by the district attorney to the question asked the defendant by his counsel as to whether he (defendant) had ever before his attack by typhoid fever been "in a physical or mental condition" which had the effect of causing him "not to remember what occurred." As the learned trial judge stated, when ruling on the objection, the plea of insanity was not interposed by the accused. The claimed mental lapses of the defendant were, according to his testimony, alone due to a disease of a sporadic nature, one of the characteristics of which is a fever which ofttimes causes cerebral disorder to the extent of producing unconsciousness. The fact that the defendant might, previously to the occasion in question, have been seized with a similar disease, or any other sporadic malady, which, from the nature of its processes, causes mental disturbances in the patient, would impart no added significance to the fact, if it was a fact, that he was suffering at the time of the transactions involved herein from the mental derangement as claimed by him. Had he set up and undertaken to prove the defense of insanity, the question might have been proper, in that the testimony called for thereby might tend to prove at least periodical attacks of insanity.

There are a few other rulings regarding the evidence which are obviously so far removed from any legitimate ground for just criticism that they do not merit special notice herein.

[11] 3. There is no merit in the defendant's objections to the given instructions based on sections 20 and 21 of the Penal Code. The instructions are in the language of those sections. Section 20 reads: "In every crime or public offense there must exist a union, or joint operation of act and intent, or *criminal negligence*." The objection to the instruction embracing the language of that section is that it erroneously assumes that "criminal negligence" was an element in the instant case; that the instruction was misleading for the reason that the crime herein charged involves the element of specific intent; and that, "criminal negligence" being wholly foreign to said offense, the jury could gather from the instruction the erroneous impression or notion that, if there was no evidence to prove such intent, but there was some evidence showing that it was through negligence that the defendant delivered the check to Haw, a verdict upon that theory against the accused would be justified in law. The instruction on section 20 of the Penal Code is what may well be termed as a "stock" instruction, like the instruction on the doctrines of reasonable doubt and the presumption of innocence, and given by the trial court in every criminal case, where, as here, specific intent is an essential ingredient of the offense.

As to the essentials of the crime herein charged, the court instructed the jury in the language of section 476a of the Penal Code, defining said crime, and elsewhere in its charge explained to the jury in plain language that one of the essential elements thereof was the intent with which he issued and delivered the check to Haw. No jury composed of persons of common intelligence, on considering all the instructions given as a single charge upon the law, could for an instant suppose that "criminal negligence" was an element of the crime or was a question in the case.

[12] Nor is the objection interposed here to the instruction based on section 21 of the Penal Code tenable. The part of the instruction objected to is against the last sentence thereof, which is in the precise language of said section, viz.: "All persons are of sound mind who are neither idiots nor lunatics, nor affected with insanity." As to this, it is complained that the court thus assumed that the

defense of insanity was set up. The instruction is another one of those statements, which a trial court generally gives to a jury in a criminal case in which a specific intent is an ingredient of the offense, which constitute "stock" instructions. It, like the one first hereinabove considered, involves an abstract statement of a legal proposition, and, as is manifest, simply enumerates generally the class or classes of persons who are, by reason of mental infirmity from some cause, incapable of committing crime. The defendant could not have suffered the least harm to his rights from the instructions, particularly in view of the fact that, while not pleading insanity, he did make the plea that at the time he delivered the check he was unconscious of doing that act by reason of temporary mental sickness.

[13] The court in effect submitted to the jury the proposition that, assuming that the check was postdated or intended to be postdated, so that it would not be ripe for presentation to the bank for payment until October 10, 1926, the burden was upon the defendant to prove that, when he gave the check to Haw, he informed the latter that the check was not subject to presentation for payment until the date mentioned. It is contended by the defendant that in that respect the instruction is erroneous; that, rather than on the defendant, it rested upon the prosecution to show beyond a reasonable doubt that at the time of the delivery of the check no understanding or agreement was had between Haw and the defendant, or no information given to the former that the date of presentation was to be postponed to the 10th day of October, 1926. The defendant offered and requested an instruction in accord with his contention regarding this question, but the court rejected it. There is language in some of the cases from which it may be inferred that the intention was to hold that the rule as it was stated by the trial court in its instructions in the present case is correct. People v. Bercovitz, 163 Cal. 636, 126 P. 479, 43 L. R. A. (N. S.) 667; In re Griffin on Habeas Corpus, 83 Cal. App. 779, 257 P. 458; People v. Wilkins, 67 Cal. App. 759, 228 P. 367. It would follow that the position of the defendant regarding the abiding place of the burden in such instances is unsound.

But, conceding that the burden was on the people to prove that Haw did not accept the check with the understanding that he was not to present the check for payment until October 10, 1926, for the reason that the defendant would not until then have sufficient funds in the bank to meet it, the fact is, assuming that it was postdated as claimed by the defendant, that the check, which was introduced in evidence by the people, was itself some evidence that Haw accepted it with such an understanding—indeed, evidence which might be sufficient to sustain a finding to that effect, unless it was controverted by other credible and more persuasive or convincing evidence. The court instructed the jury that, if the defendant delivered the check to Haw with knowledge by him (defendant) at the time of such delivery that he had no funds in or credit with the bank upon which it was drawn to meet it in full on presentation, "then in such case it is immaterial whether *you regard* said Haw check as dated either in 1925 or 1926, or with no certain date, for section 476a, Penal Code, covers checks or drafts either antedated or postdated or not dated, *provided, however, such check or draft is taken by the defrauded taker without information given him that the drawer had* no funds or credit." The plain converse of the proposition stated by the italicized portion of the language of said instruction is (and the jury must so have understood it) that, if Haw took the check with information that the defendant, at the time of the delivery of the check, had no funds in or credit with the bank to meet the check on its presentation for payment on the date of its delivery, or any subsequent time within one year from its delivery, the charge against the accused could not be sustained.

Thus the question whether Haw accepted the check with information that it was not to be presented for payment until October 10, 1926, was fairly and intelligibly put before the jury upon some evidence (the check itself, assuming that it was postdated as claimed), and it is therefore necessarily to be implied from the verdict that the jury considered that proposition and that their conclusion was that the check was not postdated and that Haw received no information from the defendant, at the time the check was delivered to him (Haw), that the check was not to be presented for payment until a year from the date of its delivery. And the court, by the same instruction, submitted to the jury the question whether the check was or was not postdated, in the following language of the instruction: "* * * Then, in such case, it is immaterial whether *you regard* (find) said Haw check as dated either in 1925 or 1926," etc. Of course, it must be understood that the court, by the statement that "it is immaterial" whether the check was dated in "1925 or 1926," was referring to the offense itself as defined by section 476a—that is, that the date of the check was not an element or ingredient of the crime itself. And, accepting the decision in the cases of People v. Freeman, supra, and People v. Arras, 89 Cal. 223, 226, 227, 26 P. 766, as laying down a sound rule as to variances between the pleadings and proof in criminal cases, the variance in the instant case, if there be a variance, in the legal concept of that term, is immaterial, since, as we have before stated, the evidence leaves no room for doubt that the check which the information alleges that the defendant delivered to Haw is the identical check that was introduced in evidence by the people to support the charge, and therefore, we may repeat, the defendant could suffer no embarrassment in supporting the pleas of former conviction and once in jeopardy, should any attempt be made hereafter to prosecute him for and convict him of the offense of which he is here accused.

In the case of People v. Edwards, 59 Cal. 360, the defendant was charged with the crime of burglary, and the information alleged that he entered a building "known as the store of one S. Loupe," etc. The evidence showed that the store was owned and belonged to "S. Loupe, L. Loupe, and A. Haas, partners doing business" in said building and store, but which was known as "Loupe's store." The Supreme Court, upon the plea on appeal that there arose a material variance between the information and the proof in that case, held the variance to be immaterial.

[14] The charge of the court contained a fair statement of the law and in language so clear that the jury could not have been led into any misapprehension as to the issues which the nature of the case required them to consider and decide. It would, of course, have been well if some of the instructions proposed by the defendant and rejected by the court had been given, since, upon certain of the issues, they were more specific and direct than those by the court upon the same questions. But for that reason alone there should not be a reversal in a criminal case, where, as here, the evidence appears to be so conclusive of the defendant's guilt as to amount almost to demonstration.

The judgment and the order are affirmed.

We concur: FINCH, P. J.; PLUMMER, J.

On Petition for Rehearing.

HART, J. The petition for a rehearing of this cause will be denied for reasons hereinafter to be stated. Before presenting those reasons, however, there are certain modifications of the language of the opinion originally filed which should be and are hereby made.

On page 2 of the original opinion, line 6 from the top (58 Cal. App. Dec. 57, lines 22 and 23 from the top) the following language in parenthesis, is hereby stricken out: "(save the sum of $3.12 and no more)."

On page 3 of the original opinion, line 11 from the bottom (58 Cal. App. Dec. 58, line 23 from the top) the words "as seen" are hereby stricken out. Line 10 from the bottom of page 3 of the original opinion (line 24 from the top of page 58, Cal. App. Dec.) the word "also" is hereby stricken out.

The following language on page 12 of the original opinion, lines 1, 2, and 3 from the top (58 Cal. App. Dec. 63, lines 24, 23, 22, and 21 from the bottom) is hereby stricken out: "so far as is concerned the nature of the proof required to establish a case for the People as against the pleas of former conviction and once in jeopardy is also immaterial," and the following language substituted therefor: "if there be a variance, in the legal concept of that term, is immaterial, since, as we have before stated, the evidence leaves no room for doubt that the check which the information alleges that the defendant delivered to Haw is the identical check that was introduced in evidence by the People to support the charge, and, therefore, we may repeat, the defendant could suffer no embarrassment in supporting the pleas of former conviction and once in jeopardy should any attempt be made hereafter to prosecute him for and convict him of the offense of which he is here accused."

The petition merely involves a repetition of the argument advanced in the briefs of counsel for the defendant in support of the points herein made. After a careful consideration of the petition, we have found no reason for departing from the conclusion announced in our original opinion upon said points. We deem it proper, however, to give further notice to the point that the trial court committed prejudicial error by allowing the witness Irish (the cashier of the bank upon which the check in question was drawn) to testify that the defendant, neither at the time the check was drawn nor at any other time thereafter during said witness' official connection with said bank, had any funds in or credit with the bank to meet said check upon its presentation for payment. In the petition it is said that the case of the People v. Kawano, 38 Cal. App. 613, 177 P. 174, cited in our original opinion as holding that the testimony of a bank officer actively connected with the bank in the management of its business that a party has no funds in or credit with such bank, is competent or legally proper for the proof of that fact, is in the facts, so clearly distinguishable from the instant case that it cannot stand as an authority supporting the ruling allowing the testimony by the cashier in this case; that the specific distinction between the two cases is this: That, in the Kawano Case, the "credit remittance man" of the bank concerned therein was specially charged with the duty of handling all business with "outside California banks"; that he testified that previous to giving his testimony, he had made a personal inspection of the books of the bank with reference to the particular account of Kawano, the defendant in said case, and that the latter had no account or credit with said bank at the time he drew the check involved in that case; whereas, so it is, in effect, declared by the accused here, the cashier did not testify nor was it shown that he had inspected the books of the bank or made any special investigation with reference to the defendant to ascertain whether he had any funds in or credit with the bank at the time the check was drawn or at any time thereafter to meet the same upon its presentation for payment. While this is all true, Irish did testify that he had been cashier of the Placerville National Bank from and including the day upon which the check was drawn continuously to the date of the trial in June, 1928; that he had no acquaintance whatever with the defendant during the period of time that he had been cashier of said bank, and, in fact, had never seen him until the day upon which he (defendant) was given his preliminary hearing on the charge upon which the information is founded; that he (the cashier) was "fairly" familiar with all of the books of the bank, and that the defendant had no account or credit with said bank at any time during his connection therewith as cashier. The irresistible inference from Irish's testimony, viewed in its entirety, is that he was sufficiently familiar with all of the books of the bank and the business thereof to justify him in declaring, as unequivocally and unqualifiedly he did declare, that the accused never at any time had any funds in or credit with said bank during Irish's occupancy of the office of cashier. The only real difference between the Kawano Case and this as to the present consideration is that, while the "credit remittance man" in the case first named gained his knowledge of the fact that Kawano had no funds in or credit with the bank therein concerned from an inspection of the books, in the instant case the cashier acquired his knowledge of the same fact as to the defendant from his general familiarity with the books of the bank and his intimate familiarity with the business of that institution, and from the further fact that he had never known the accused and never had seen him until a brief time before the date of the trial of this case. We can see no substantial difference between the situation in the Kawano Case and the situation in the present case regarding the matter in hand. It cannot be said that the cashier in this case any the less acquired his knowledge of the fact that the defendant had no funds in or credit with the bank of which he was cashier from his own perception than that the "credit remittance man" in the Kawano Case, thus acquired his knowledge with reference to the same fact regarding Kawano. But regardless of this latter consideration, we still adhere to the view expressed in the original opinion that this is an instance which comes within the provisions of section 1855, subdivision (5), of the Code of Civil Procedure.

There is, as to the facts, no analogy between the case of People v. Frey, 165 Cal. 140, 144, 131 P. 127 (cited by defendant), and this case. There the only evidence offered and received in support of the charge that the defendant, drawer of the check, had no funds in the bank upon which the check was drawn, was a notation in writing across the face of the check as follows: "No account." The opinion in that case stated that "there was no testimony on the part of any one connected with th ebank that the words 'no account' on the face of the check were written by any person connected with the banking corporation in Nevada, or by any one who knew or could know the facts," and held, therefore, that no case was made against the accused. Clearly, as we have already substantially stated, the Frey Case is far from being such a case as we have here.

The petition for rehearing is denied.

We concur: FINCH, P. J.; PLUMMER, J.

JONES et ux. v. KELLY. (Civ. 6546.)★

District Court of Appeal, First District, Division 1, California. Jan. 22, 1929.

Rehearing Denied Feb. 21, 1929. Hearing Granted by Supreme Court March 21, 1929.

1. Action ⟹27(2)—Complaint charging that landlord maliciously, oppressively, and wantonly disconnected water supply from tenants' dwelling held to charge breach of contract and not tort.

Tenants' complaint, alleging that landlord, after having rented to them a dwelling house including supply of water for domestic purposes, disconnected and destroyed such supply, *held* to charge breach of contract and not a tort, notwithstanding allegations that landlord acted maliciously, oppressively and wantonly and that complaint expressly disavowed seeking compensation for breach of contract and confined its object to recovery of damages for landlord's alleged tort.

2. Damages ⟹57—Motive of party in failing to carry out contract is immaterial on question of damages.

The motive of a party to a contract in failing to carry out its terms is immaterial, and fact that such motive may have been malicious and wanton does not authorize recovery of exemplary damages.

3. Judgment ⟹252(1)—Courts will not compel litigant to take relief which he expressly disclaims.

Courts will not compel a litigant to take relief which he expressly disclaims.

Appeal from Superior Court, City and County of San Francisco; T. I. Fitzpatrick, Judge.

Action by Charles Jones and wife against Michael J. Kelly. Judgment for defendant, and plaintiffs appeal. Affirmed.

George D. Collins, Jr., of San Francisco, for appellants.

J. C. Flannery, of San Francisco, for respondent.

★Superseded by opinion of Supreme Court 280 P. 942.

PER CURIAM. Action to recover damages, both actual and exemplary, for the alleged destruction by defendant of the plaintiff's water supply; the parties occupying the relation of landlord and tenant. A demurrer, both general and special, to the amended complaint, was sustained without leave to amend, and judgment thereupon entered in favor of the defendant. The plaintiffs appeal.

[1] The complaint, after alleging the plaintiffs to be husband and wife, proceeds as follows:

"2. Aver by way of inducement to the cause of action for the trespass hereinafter alleged, that heretofore, to-wit, in the month of March, 1924, the plaintiffs hired from defendant and he let to them as his tenants from month to month, at a monthly rental, and for the use, occupancy and habitation of plaintiffs, as and for their home and dwelling place, the dwelling house and premises then and there owned by defendant and situated at No. 22 Harper street, in the city and county of San Francisco, together with a sufficient supply of water to the same, for the household and domestic uses of the plaintiffs in said dwelling house and home and for their drink, bathing, washing of clothes, and also for necessary toilet and culinary purposes therein.

"That thereupon and with the consent of defendant and upon said terms of tenancy, including said water supply, the said plaintiffs on the 15th day of March, 1924, and as said tenants entered into the possession and occupancy of said dwelling house as their home and habitation, and paid the said rental therefor to defendant until the trespass hereinafter alleged. That during all the times said premises were occupied by plaintiffs as said tenants the said water supply was necessary for said purposes and essential to the beneficial use and enjoyment of said dwelling house as a fit and suitable place of habitation for human beings. That accordingly, and by reason of the fact that said water supply was necessary for said purposes during the existence of said tenancy, the defendant furnished said plaintiffs, as tenants, with said water and in said dwelling house from said 15th day of March, 1924, until the time of the trespass hereinafter alleged, to-wit, on the 22d day of May, 1926.

"3. That while said dwelling house was occupied as aforesaid by plaintiffs, and during the continued existence of said tenancy, and while plaintiffs as said tenants were in the quiet and peaceable possession, occupancy and enjoyment of said dwelling house as their home, place of abode and habitation, and were then actually using said water supply therein solely for the necessary purposes hereinbefore stated, the said defendant, on the 22d day of May, 1926, without the consent of plaintiffs and against their will and without notice or warning to either of them, did wilfully, maliciously and with express malice and evil motive, wantonly, oppressively and solely for the malevolent purpose of annoying, inconveniencing, harassing and injuring the plaintiffs, cut off, disconnect, discontinue, terminate and destroy said water supply and entirely deprive the plaintiffs of the same, and did thereby seriously, maliciously, oppressively, wantonly, wilfully annoy, inconvenience and harass plaintiffs and greatly injure them in their feelings and inflict upon them by said wilful and malicious trespass very great trouble, severe hardship, detrimental privation, personal indignities and mental suffering, all of which is to their actual damage in the sum of three thousand dollars and in the further sum of two thousand dollars exemplary damages. That in support of said claim to exemplary damages the plaintiffs aver that this action is not brought for a breach of an obligation arising out of said contract of tenancy in failing to supply water to plaintiffs in said premises, but is brought solely to recover for said trespass in maliciously, oppressively and wantonly cutting off said water supply, to the great annoyance, harassment, hardship and injury of plaintiffs as hereinbefore alleged."

It is apparent from their pleading that the plaintiffs are attempting to recover as for an unlawful, willful, and malicious trespass upon allegations showing no more than a breach of contract. If for the moment we disregard the averment that the deprivation by defendant of plaintiffs' water supply was malicious, oppressive, and wanton, we have a complaint charging that the defendant, having rented to the plaintiffs a dwelling house, including a supply of water for domestic purposes, discontinued that supply, or, as the pleading has it, did cut off, disconnect, terminate, and destroy it. These allegations are not made concerning a stranger to the plaintiffs, who has intruded upon their premises and interfered with or destroyed the water conduits; nor of a person or corporation who has undertaken the duty of serving the public generally; but they are made concerning one who is merely under contract to supply the plaintiffs with water and has failed to do so by cutting it off without, so far as the complaint shows, any other interference with the plaintiffs' occupancy of the premises. The only obligation of the defendant is a contractual one, arising from the lease of the premises by him to the plaintiffs. The complaint expressly disavows seeking compensation for a breach of this obligation, and has ex industria confined its object and purpose to the recovery of damages for the alleged tortious act of the defendant described therein.

[2] The breach of duty charged being one of contract, its character as such is not changed by alleging it to have been maliciously, oppressively, and wantonly committed.

The motive of a party to a contract in failing to carry out its terms is immaterial. This is the rule at common law (Jones v. Steamship Cortes, 17 Cal. 487, 496, 79 Am. Dec. 142), and in general the law of California on the subject of damages may be regarded as a faithful reflection of the common law (8 Cal. Jur. "Damages," § 4, p. 735). In the work cited, it is said, at page 871 of the same volume: "In general, exemplary damages for breach of contract are not recoverable, and this has been held to be the rule even though the breach complained of be wilful. And in this connection it has been said that 'the rule as to damages in actions upon contract is the same, whether the breach be by mistake, pure accident or inability to perform it, or whether it be wilful and malicious; the motives of the party breaking the contract are not to be inquired into' (citing Baumgarten v. Alliance Assurance Co. [C. C.] 159 F. 275, Brown v. Chicago, etc., Ry. Co., 54 Wis. 342, 11 N. W. 356, 911, 41 Am. Rep. 41). Where, however, the action is not on the contract, but is based upon the fraud by which it was induced, the fact that the contract fixes compensation does not prevent recovery of exemplary damages. And where the breach also involves an infraction of duty imposed by law it may be thus punished (citing Gorman v. Southern Pacific Co., 97 Cal. 1, 31 P. 1112, 33 Am. St. Rep. 157, and Mendelsohn v. Anaheim Lighter Co., 40 Cal. 657). Thus an action for wrongful refusal to supply irrigating water in violation of the constitutional obligation imposed on irrigating companies through the declaration that the use of water, rental or distribution shall be a public use subject to state control, is based on the constitutional obligation, and not on contract, so that punitive damages for the refusal may in a proper case be allowed (citing Lowe v. Yolo County Consol. Water Co., 157 Cal. 503, 108 P. 297)."

This difference in the measure of damages recoverable for breach of contract, breach of an obligation not arising from contract (tort), and a similar breach accompanied by fraud, oppression, or malice, is expressly recognized as the law of this state by sections 3300 (breach of contract), 3333 (tort), and 3294 (tort accompanied by malice, etc.), of the Civil Code, and by the very terms of the last-mentioned section exemplary damages are only allowed "for the breach of an obligation not arising from contract where the defendant has been guilty of oppression, fraud or malice."

The appellant has cited several cases in which exemplary damages were recovered, in some of which a breach of contract was involved; but it will be found upon examination that in each of them the foundation for such judgment was a breach of duty other than the direct obligation of the contract. In some of the cases cited there is found the expression that a party may waive the breach of contract and recover for the tort. This does not mean that, where there is only a breach of contract the injured party has the option to sue either in contract or tort. It means merely that, where there is both a breach of contract and an unlawful act or omission, or where the breach itself consists of an act or omission otherwise unlawful, the injured party may waive the breach of contract and sue in tort; the advantage to him in doing so accruing in the shape of a more liberal measure of damages.

[3] We conclude that the complaint in the case at bar shows merely a breach of contract, for which the plaintiffs would be entitled to recover compensatory damages upon proper allegations and proof. If the allegations of the complaint concerning the lease and its breach could be given effect as directed to the failure of the defendant to furnish the supply of water agreed, a cause of action for breach of contract would be stated and the general demurrer to the complaint would have to be overruled; but, as we have seen, the plaintiffs emphatically disclaim seeking in this action relief for such breach, and they declare in their pleading (and again in their brief on appeal) that they are seeking damages for the alleged malicious tort of the defendant, and that their averments regarding the lease and the obligation of the defendant to furnish a water supply are made for the sole purpose of laying a foundation for such damages. Courts will not compel a litigant to take relief which he expressly disclaims. In the consideration of the general demurrer, therefore, the effect of the averments relating to the lease existing between the parties is to be confined to the specific purpose for which plaintiffs made them. So regarded, the complaint fails to state a cause of action, and the general demurrer thereto was properly sustained.

The judgment is affirmed.

96 Cal. App. 498

McHUGH v. VOYCE et al. (Civ. 6571.)

District Court of Appeal, First District, Division 2, California. Jan. 30, 1929.

1. Municipal corporations 🔑484(1)—Warrant, assessment, diagram, and affidavit of demand and nonpayment of street improvement assessment made prima facie case of regularity of assessment, and burden was on property owners to prove contrary.

Under street improvement ordinance making warrant, assessment, and diagram with affidavit of demand and nonpayment prima facie evidence of regularity and correctness of assessment, introduction in evidence of such documents in contractor's actions to foreclose street improvement liens, and property owners' action to cancel assessments on which liens were based, made out prima facie case, and burden was on property owners to prove contrary.

2. Municipal corporations 🔑488, 489(5)—Any defects or irregularities in street improvement proceedings held waived by failing to appeal to proper public authorities.

Under curative provisions of street improvement ordinance property, property owners' failure to make any protest, objection, or appeal to the board of public works or supervisors, prior to date of publication of notice of award and to making of assessment, *held* to waive any such defects or irregularities.

3. Municipal corporations 🔑303(1)—Passage of San Francisco's 1913 street improvement ordinance held not to exhaust power given by charter so as to invalidate subsequent ordinance.

Passage of San Francisco street improvement ordinance in 1913 *held* not to exhaust power conferred on board of supervisors by city charter so as to invalidate 1918 street improvement ordinance as being in excess of charter authority.

4. Municipal corporations 🔑513(7), 568(3)—Evidence held insufficient to establish that street improvement contract was let without competitive bidding as result of conspiracy between contractors.

In contractor's actions to foreclose street improvement liens and action by property owners to cancel assessments on which liens were based, evidence *held* insufficient to establish that contract was awarded as result of unlawful conspiracy between street contractors to eliminate competitive bidding so as to render assessment void.

Appeal from Superior Court, City and County of San Francisco; C. P. Vicini, Judge.

Actions by Frank J. McHugh against Alfred Voyce, Jr., and others, and by Alfred Voyce, Jr., against Frank J. McHugh and others, which actions were consolidated and tried together. From the judgment Alfred Voyce, Jr., and others appeal. Affirmed.

Sawyer & Sawyer and F. W. Sawyer, all of San Francisco, for appellants.

Grover O'Connor, of San Francisco, for respondent.

LUCAS, Justice pro tem. Four actions are involved in this appeal, three brought by Frank J. McHugh, a street contractor, against several property owners to foreclose certain street improvement liens created pursuant to the "1918 street improvement ordinance" of San Francisco, and one by said property owners against the same McHugh and members of the board of public works of San Francisco to cancel the assessments upon which the liens were based. In this latter action the said McHugh filed a cross-complaint similar to his complaints filed in the other three actions.

In all four actions the liens in question arose by reason of the same assessment proceedings. They were therefore consolidated and tried together. But one judgment was rendered. This was in favor of the said McHugh. From this judgment appeal is taken by the property owners, plaintiffs in one suit and defendants in the others.

[1] Under the provisions of the 1918 street improvement ordinance of San Francisco, in actions of this character, the "warrant, assessment and diagram, with the affidavit of demand and nonpayment, shall be held prima facie evidence of the regularity and correctness of the assessment and of the prior proceedings and acts of the Board of Public Works and of the Supervisors upon which said warrant, assessment and diagram are based, and like evidence of the right of the plaintiff to recover in the action."

At the trial there was offered and received in evidence in behalf of the respondent herein, and without objection by appellants, the warrant, assessment, and diagram, together with the affidavit of demand and nonpayment covering the liens in question. This made out a prima facie case in so far as the foreclosure suits were concerned and cast upon the appellants the burden of proving the matters set out in their answers. As to the action brought to cancel the assessments, the burden of proof at all times rested upon appellants.

[2] Appellants in their several pleadings attempt to contest the validity of the liens in question upon various grounds, and attack the validity and legality of the respective steps taken in the street improvement proceedings upon which the liens are based. At the trial they offered certain evidence relating thereto, to which offer objections were sustained by the trial court. Appellants now contend that in this the court erred, although they fail, with but one exception, to point out in their brief the particular rulings complained of. However, an inspection of the

record reveals that all the rejected evidence related to proceedings had prior to the publication of the notice of award and prior to the making of the assessment.

The 1918 street improvement ordinance, which was offered in evidence but not fully set out in the record, contains two curative clauses. One is to the effect that all objections to any act or proceeding occurring prior to the date of publication of notice of award must be made to the board of public works, in writing, within a certain specified time, or they shall be deemed waived, and the other that no proceedings prior to the assessment shall be, by any court, held invalid for any error, defect, or informality in the same, provided (and this provision relates to both curative clauses) the resolution of intention has actually been published and notices of improvement posted. The ordinance also provides that after the contractor has completed the work and the assessment has been made, the property owner may then appeal to the board of supervisors and point out to them any defects or irregularities in the proceedings.

It is frankly admitted by appellants that none of them, at any time, ever made any protest, objection, or appeal, either to the board of public works or to the supervisors; neither did they show or attempt to show that the resolution of intention was not published nor that notice of improvement was not posted, as required by law.

Curative provisions similar to those contained in the 1918 ordinance have uniformly been upheld by the courts. Bienfield v. Van Ness, 176 Cal. 585, 169 P. 225; City Street Improvement Co. v. Pearson, 181 Cal. 640, 185 P. 962, 20 A. L. R. 1317.

Errors not jurisdictional are waived by failure to appeal to the proper board or authority. Federal Construction Co. v. Newhouse, 186 Cal. 284, 199 P. 519.

Under the above-mentioned provisions of the ordinance the appellants were afforded an opportunity to make their objections and point out to the proper authorities any defects or irregularities in the proceedings, and having utterly failed so to do, and there being no showing that the board of public works or the board of supervisors were without jurisdiction in the matter, it must be held that all defects and irregularities were waived, and that the objections to the proposed evidence offered by appellants were properly sustained.

[3] Appellants also attempted without success to introduce in evidence the 1913 street improvement ordinance, claiming that by the passage of said ordinance the board of supervisors exhausted the power conferred upon them by the charter and that the 1918 ordinance, under which the work was done, was in excess of charter authority. But the case of Cooper v. Reardon, 71 Cal. App. 649, 236 P. 180, in which a hearing was denied by the Supreme Court, definitely disposes of this contention adversely to appellants.

[4] It is alleged by appellants in their pleadings that by reason of an unlawful conspiracy between said Frank J. McHugh and other (unnamed) street contractors there was no competitive bidding upon the improvements in question, and that the assessment is therefore void, illegal, and against public policy. Much stress is laid upon this point for the reason that the 1918 ordinance provides that if at any time it is found that the person to whom a contract has been awarded has colluded with any party or parties for the purpose of preventing any other bids being made, his contract shall be void.

We are unable to find in the record, and appellants have not pointed out, any evidence in support of this allegation other than the testimony of the assistant secretary of the board of public works, found on page 49 of the reporter's transcript, to wit:

"Q. Were there any other bids? A. I don't think so; I don't recall.

"Q. Why don't you think so? A. Well, for the reason that it was a 'wherenot' and the ethics among the contractors is that no other contractor will bid on another man's 'wherenot.' That is the reason I don't think there was another bid."

The witness made no explanation as to what was meant by the term "wherenot," and none appears in the record, nor did he say that no other bids were in fact presented—he merely stated that he thought there were none, his reason for such thought being that a certain unexplained code of ethics existed among the contractors as above set forth. No attempt was made to show that the respondent McHugh was a party to or even knew of this code of ethics, or that he had ever in any way agreed to or recognized the same. Such evidence falls far short of proving unlawful conspiracy.

No collusion or conspiracy having been shown, it is not necessary to pass upon the question as to whether or not the curative provisions of the ordinance are applicable thereto.

The judgment appealed from is affirmed.

We concur: KOFORD, P. J.; STURTEVANT, J.

96 Cal. App. 383

KLEIN et al. v. LOEFFLER. (Civ. 3324.)

District Court of Appeal, Third District, California. Jan. 22, 1929.

1. Landlord and tenant 🔑288—Unlawful detainer is statutory proceeding not available for purposes not enumerated in statute.

The action of unlawful detainer is a statutory proceeding, designed to provide a speedy and summary remedy to determine right to possession of realty in cases specified in statute, and cannot be used for other purposes than those enumerated therein.

2. Landlord and tenant 🔑290(1)—To maintain action of unlawful detainer, conventional relation of landlord and tenant must be shown.

To maintain as action of unlawful detainer, the conventional relation of landlord and tenant must be shown to exist; the action being limited to cases in which tenant is estopped to deny landlord's title.

3. Landlord and tenant 🔑290(1)—Unlawful detainer held not maintainable by one claiming ownership and right of possession under deed from grantee of purchaser at sale on defendant's default in payment of note secured by trust deed (Civ. Code, § 2924; Code Civ. Proc. § 692).

Summary action of unlawful detainer *held* not maintainable by parties, claiming to be owners and entitled to possession of property under deed from grantee of purchaser at sale under Civ. Code, § 2924, and Code Civ. Proc. § 692, on defendant's default in payment of note secured by trust deed; conventional relation of landlord and tenant not existing between parties.

Appeal from Superior Court, San Joaquin County; C. W. Miller, Judge.

Action by Samuel Klein and another against John Loeffler. Judgment for plaintiffs, and defendant appeals. Reversed, with direction.

C. M. Gill and A. H. Carpenter, both of Stockton, for appellant.

J. O. Stemmler, of Stockton, for respondents.

FINCH, P. J. The original complaint herein sets forth a cause of action for forcible detainer by defendant of real property described in the complaint. The answer denies the allegations of the complaint, and alleges ownership and "the quiet, peaceable, open and notorious possession of said premises" by the defendant. In an amended complaint, made after trial, "so as to conform to the proof," it is alleged that at all times after October 11, 1926, the plaintiffs were the owners of the property and entitled to the possession thereof; that the "defendant, who, after having entered peaceably upon said real property as a gratuitous occupant thereof, holds possession of the premises hereinbefore described, and refuses to vacate said premises"; that the usual thirty-day notice to terminate the defendant's tenancy and the three-day notice to vacate the premises were duly served; and that the defendant refused to surrender possession thereof. The court found that at the time of the commencement of the action the plaintiffs were entitled to the possession of the property; that at all times after October 11, 1926, they were the owners thereof; that during that time the defendant "entered peaceably upon said real property as a gratuitous occupant thereof"; and that the alleged notices were duly served, but that defendant refused to vacate the premises and "is now holding possession of said premises wrongfully and unlawfully." Judgment was entered in favor of the plaintiffs for the restitution of the premises and the rental value thereof for one month. The defendant has appealed from the judgment.

There is no conflict in the evidence. It appears therefrom that on October 8, 1920, the defendant was the owner of the property described in the complaint; that on that day he conveyed the property to George F. Schuler, who thereupon executed a promissory note for $8,000, borrowed by the defendant from the Sacramento-San Joaquin Bank, and a deed of trust conveying the property to Frank A. Guernsey and Will E. Morris, as trustees, to secure payment of the note. On the same day and as a part of the same transaction, a separate written agreement between Schuler and the defendant was executed, by the terms of which the property was to be reconveyed to the defendant upon his payment of the note and interest within two years from the date thereof, and, upon defendant's default, Schuler was authorized to sell the property "in accordance with law and the provisions of the deed of trust, * * * or, * * * at his option, personally sell the said property in accordance with the provisions of section 2924 of the Civil Code and section 692 of the Code of Civil Procedure, and out of the proceeds of said sale * * * retain the amount due to him under this contract." The defendant failed to make payment, and on January 20, 1926, pursuant to the terms of the agreement, Schuler sold the property to Cora I. Weber, who thereafter conveyed it to Schuler and he to the plaintiffs.

[1-3] The respondents have not filed a brief, and no appearance was made for them at the time set for the oral argument. The amended complaint and the findings eliminate any question of forcible detainer, and the only question remaining is whether, under the circumstances shown, the summary action of unlawful detainer is maintainable. The conventional relation of landlord and tenant did not exist, but both parties claimed the ownership of the property. "The action

of unlawful detainer is a statutory proceeding and is governed solely by the provision of the statute creating it. It was designed for the purpose of providing a speedy and summary remedy to determine the right to the possession of real property in the cases specified in the statute. It cannot be used for any other purpose than those enumerated therein." Bekins v. Trull, 69 Cal. App. 40, 45, 230 P. 24, 26. "In order that such an action mav be maintained the conventional relation of landlord and tenant must be shown to exist. In other words, the action is limited to those cases in which the tenant is estopped to deny the landlord's title. And when a defendant in an action which under our code is the equivalent of one in unlawful detainer proves the nonexistence of such relation, the plaintiff must fail." Francis v. West Virginia Oil Co., 174 Cal. 168, 170, 162 P. 394, 395. If the plaintiffs are the owners of the property and entitled to the possession thereof, they must establish those facts in an appropriate action in which the respective claims and rights of both parties may be put in issue and litigated.

The judgment is reversed and the trial court is directed to dismiss the action.

I concur: PLUMMER, J.

BROWN et al. v. DE CARLO. (Civ. 6463.)★

District Court of Appeal, First District, Division 2, California. Feb. 1, 1929.

Rehearing Granted March 1, 1929.

1. Brokers ⚷44—Authority to sell property for commissions, reciting understanding that it is not exclusive contract, held not irrevocable.

Authorization to list and sell property with agreement to pay commission, should broker succeed in selling property, reciting understanding that authorization was not exclusive contract for 30 days, had neither time limit nor consideration, and was not irrevocable.

2. Brokers ⚷58—Broker obtaining contract signed by salesman for alleged purchaser who could not be compelled to purchase held not to have performed contract to sell.

In action for real estate brokers' commissions, evidence that brokers obtained agreement of purchase signed by real estate salesman for alleged purchaser without written authority to sign purchaser's name, and evidence raising inference that brokers procured only semblance of contract to secure further time, and that purchaser never signed agreement, so that he could be compelled to purchase, and that alleged purchaser's interest was assigned to another after defendants repudiated transaction, was sufficient to sustain finding that brokers did not perform contract to sell.

3. Brokers ⚷65(1)—Owner's signature to contract of sale, if obtained by broker's misrepresentations, cannot be used to owner's detriment as between owner and broker.

Brokers, suing for commissions for sale of property, are bound to act with good faith towards owner, and, if in any respect owner's signature to contract of sale was obtained by broker's misrepresentation, then, as between broker and owner, owner's signature cannot be used to detriment of owner.

Appeal from Superior Court, Alameda County; Leon E. Gray, Judge.

Action by Clarence A. Brown and another, copartners doing business under the firm name and style of Brown & Smedley, against Michael Alphonso de Carlo. Judgment for defendant, and plaintiffs appeal. Affirmed.

R. H. Countryman, of San Francisco, for appellants.

C. Leonard Rosenberg, of Oakland, for respondent.

KOFORD, P. J. Plaintiffs sought by this action to obtain a judgment of $450 as real estate broker's commission. In general, it was the defense of the defendant that the plaintiffs had not succeeded in making a bona fide sale of the property, but had made a "wash" or pretended sale only. Judgment was in favor of defendant. The court in its written findings found that the appellants did not consummate a sale of the property; did not perform the contract by which the property was listed with them; did not produce a purchaser; and did not obtain a valid and binding contract from their alleged purchaser. Appellants argue several points of law in their briefs, but their attack upon the judgment is in reality a claim that the evidence is insufficient to support the court's findings.

[1] Our examination of the evidence convinces us that the court's findings are sufficiently supported by the evidence. Respondent in writing authorized appellants to list and sell certain property, and agreed to pay a commission, should appellants "succeed in selling it." The authorization concluded with the following: "I understand that this is not an exclusive contract for thirty days." It was dated September 6, 1926. The authorization was not of the kind that could not be revoked. It had neither time limit nor consideration. After the lapse of about two weeks or more, the respondent notified appellants that at 6 o'clock p. m. of September 25 the authorization to sell upon the terms therein detailed would expire. Thereafter, and at 8 o'clock p. m. on the said 25th day of September, the appellants came to the respondent and told him that they had succeeded in selling the property. Respondent accepted their statement in good faith, and approved what purported to be an agreement of purchase signed by the alleged purchaser,

---

★Rehearing granted, 275 P. 992.

At that time appellants had signed a $50 receipt specifying terms of sale. Below this receipt was the indorsement: "I hereby agree to purchase the above described property—on the terms—specified. * * * In the event of my failure to comply with the terms of this contract the agent may retain the said deposit and all my rights hereunder shall terminate." To this document the name of the alleged purchaser, J. C. James, had been written by N. C. Hart. The said Hart had no written authorization to sign James' name to the document. Hart was a real estate salesman in another office. James appears from the testimony to have been a favored and favoring client of Hart's real estate office. Three days thereafter respondent, in pursuance of a previous verbal promise, agreed in writing to pay 10 per cent. commission instead of 5 per cent. Finally, respondent repudiated the entire transaction. A week or more after this James assigned whatever interest he had to a man named Ulrich, and a tender of a prepared deed from respondent to said Ulrich was made, but respondent refused to consummate a sale to said Ulrich.

[2] The foregoing is but a skeleton of the testimony. Leaving out of consideration the various legal questions which are suggested by the foregoing statement, the evidence is sufficient to warrant the conclusion that the appellants had not performed the broker's contract within the time given them. It is quite susceptible of the inference that appellants procured only the semblance of a contract in order to pretend to have found a purchaser at the very latest time permitted them so as to give themselves more time to see what further might be done in the matter without risk but with profit to themselves. Within the time limit appellants never put James in a position where he was compelled to buy. They let James stay in the sheltered position where he could disclaim and repudiate his signature made by Hart, and that was not done until it was evident that respondent did not wish longer to sell at the price named. This was not performance, and Ulrich was produced too late. This question of fact determines the appeal, and makes unnecessary a consideration of those legal points touched upon by appellants, which are based upon the assumption that the alleged purchaser and contract were bona fide.

[3] It is also claimed that respondent is precluded from questioning the genuineness of the alleged purchaser and of the claimed contract of sale by reason of the fact that he indorsed his approval upon the document to which the name of James was thus signed. It is stated that, after the seller enters into a valid contract of sale with the purchaser procured by the real estate broker, the latter's commission is not thereafter dependent upon the performance of said contract by the purchaser. On the other hand, the appellants were bound to act with good faith towards respondent, and if in any respect respondent's signature was obtained by appellants' misrepresentation, then as between respondent and appellants his signature thus obtained cannot be used to his detriment. In other words, the question still is whether the appellants in good faith obtained a bona fide purchaser of the property within the time and for the terms as specified by the respondent. The evidence does not compel this conclusion, and the trial court's finding will not be disturbed.

It is ordered that the judgment appealed from be, and the same is hereby, affirmed.

We concur: STURTEVANT, J.; NOURSE, J.

96 Cal. App. 560

GARVER v. COUNCIL OF CITY OF OAKLAND et al. (Civ. 6777.) ★

District Court of Appeal, First District, Division 1, California. Feb. 1, 1929.

Rehearing Denied March 1, 1929. Hearing Denied by Supreme Court April 1, 1929.

Municipal corporations 🔑46—Constitutional provisions, prescribing method of city charter amendment, held exclusive and controlling over inconsistent charter provisions (Const. art. 11, § 8).

Const. art. 11, § 8, providing that city charter may be amended by proposals therefor submitted by legislative body of city on its own motion or on petition signed by 15 per cent. of registered electors, or both, and prescribing procedure to be followed, *held* exclusive and controlling over inconsistent city charter provisions.

Mandamus proceeding by Paul Garver against the Council of the City of Oakland and John L. Davie and others, members thereof, to compel them to transmit to the county clerk petition for submission to the people of a charter amendment. Writ granted.

Breed, Burpee & Robinson, of Oakland, for petitioner.

Preston Higgins, City Atty., and John W. Collier, Deputy City Atty., both of Oakland, for respondents.

PER CURIAM. A petition was filed on September 6, 1928, with the council of the city of Oakland to submit to the electors a proposal to establish a council-manager form of government for the municipality, and to amend certain sections of its charter. This proceeding is one in mandamus to compel the council and its members, who are made respondents, to transmit the petition to the county clerk of Alameda county for verification of the signatures thereon, and to provide the expense of making the verification.

It is provided by section 8 of article 11 of

★Rehearing denied. Hearing denied by Supreme Court.

the Constitution that: "The charter of any city or city and county may be amended by proposals therefor submitted by the legislative body of the city on its own motion or on petition signed by fifteen per cent of the registered electors, or both. Such proposals shall be submitted to the electors only during the six months next preceding a regular session of the Legislature or thereafter and before the final adjournment of that session and at either a special election called for that purpose or at any general or special election. Petitions for the submission of any amendment shall be filed with the legislative body of the city or city and county not less than sixty days prior to the general election next preceding a regular session of the Legislature. The signatures on such petition shall be verified by the authority having charge of the registration records of such city or city and county, and the expenses of such verification shall be provided by the legislative body thereof. If such petitions have a sufficient number of signatures the legislative body of the city or city and county shall so submit the amendment or amendments so proposed to the electors. Amendments proposed by the legislative body and amendments proposed by petition of the electors may be submitted at the same election. The amendments so submitted shall be advertised in the same manner as herein provided for the advertisement of a proposed charter, and the election thereon held at a date to be fixed by the legislative body of such city, not less than forty and not more than sixty days after the completion of the advertising in the official paper. If a majority of the qualified voters voting on any such amendment vote in favor thereof it shall be deemed ratified, and shall be submitted to the Legislature at the regular session next following such election; and approved or rejected without power of alteration in the same manner as herein provided for the approval or rejection of a charter. In submitting any such charter or amendment separate propositions, whether alternative or conflicting, or one included within the other, may be submitted at the same time to be voted on by the electors separately, and, as between those so related, if more than one receive a majority of the votes, the proposition receiving the larger number of votes shall control as to all matters in conflict."

It is admitted that the petition is sufficient in form under the above section, and that it purports to have attached the signatures of more than 15 per cent. of the registered electors of the city.

The charter by article XXI also prescribes a method of procedure whereby initiative measures proposed by the electors of the city may be voted on at an election; and this article also provides that its provision, unless prohibited by the state Constitution, shall apply to the proposal, submission, and adoption of charter amendments. Respondents contend that this, rather than the procedure prescribed by the Constitution should have been followed in the present instance, and that the petition was consequently insufficient.

While the charter has the force and effect of law (Taylor v. Cole, 201 Cal. 327, 257 P. 40), and legislation may be enacted to facilitate the operation of self-executing provisions of the Constitution and to safeguard the exercise of rights thereby secured (Chester v. Hall, 55 Cal. App. 611, 204 P. 237), here the Constitution lays down a complete scheme of charter amendment with which the charter provisions are in many respects inconsistent, and which, if applied to such proceedings, would hamper rather than facilitate or safeguard the exercise of the rights granted to the electors by the Constitution.

The court, in Blanchard v. Hartwell, 131 Cal. 263, 63 P. 349, referring to the above section, said: "Since a procedure for the amendment of such a charter is expressly provided, the presumption would be (independently of the declaration that all the provisions of the Constitution are mandatory and prohibitory unless the contrary is expressly stated) that such mode is exclusive. Under such a Constitution this seems indisputable. The one mode of amendment is commanded, and all others are prohibited."

In State v. Kansas City, 233 Mo. 162, 134 S. W. 1007, the same question was involved, and it was held that the Constitution of Missouri, by expressly providing the manner of amending the charters of municipalities, was self-executing, and a different method provided by the charter of respondent city was consequently invalid.

We are satisfied that the provisions of the charter, in so far as they prescribe a method of amending the same, are in conflict with the provisions of the Constitution; that the latter are exclusive and controlling, and that respondents' contention to the contrary cannot be sustained.

In Garver v. Williams, as Auditor, etc. (Cal. App.) 273 P. 604, was presented the question whether the signatures to the petition involved in the present proceeding should be verified by the city clerk of the city or the county clerk of Alameda county. It was there held that the provisions of the above section of the Constitution, that "the signatures on such petition shall be verified by the authority having charge of the registration records of such city, * * *" referred to the county clerk of Alameda county, he being the only officer having charge of the registration records of the city of Oakland. This being true, the above, with the further provision, that "the expenses of such verification shall be provided by the legislative body thereof," make it the plain duty of the respondents to transmit the petition to the county clerk of

Alameda county for verification, and to provide the expense of making the verification.

It is therefore ordered that a peremptory writ of mandate issue as prayed for.

CHUN KAM v. MYERS. (Civ. 3485.)★

District Court of Appeal, Third District, California. Jan. 17, 1929.

As Modified on Denial of Rehearing Feb. 16, 1929. Hearing Granted by Supreme Court March 18, 1929.

1. Money received 🔑1—Assumpsit lies against one intrusted with money which in good conscience should be returned.

Action in assumpsit for money had and received will lie against one who has been intrusted with specific sum of money, or with property which has been converted into money, which in good conscience should be returned to plaintiff.

2. Executors and administrators 🔑439—Estate should be joined in litigation involving controversy with its lessee over charging of expenses necessary to secure release from marketing contract.

Estate should be made party to litigation involving controversy between lessee and estate, as lessor, as to who should be charged with sum expended to release estate from contract to deliver fruit to marketing association.

3. Money received 🔑14—Lessee of estate, claiming fraud as to division of crops by false entry in statement of receipts and disbursements, held not entitled to recover in assumpsit from administrator's agent, not shown to have received portion of fund.

Lessee of property of estate, who claimed to have been defrauded, with respect to division of proceeds of sale of crops under contract, by false entry in statement of receipts and disbursements of payment made to release estate from marketing contract, *held* not entitled to recover in assumpsit against agent of administrator, acting in capacity of farm manager, and handling special farm fund subject to administrator's approval, where estate was not made a party, and it did not appear that agent individually received any specific sum of money which was due plaintiff.

4. Principal and agent 🔑184(1)—Remedy for wrongful acts of agent is generally by tort action for damages (Civ. Code, §§ 2338, 2343, subd. 3).

Agent is responsible to third persons for his wrongful acts, under Civ. Code, § 2343, subd. 3, and remedy for such acts is generally by action for tort; principal being responsible for wrongful acts of agent and agent's willful omissions in course of employment, under Civ. Code, § 2338.

Appeal from Superior Court, Sacramento County; Peter J. Shields, Judge.

Action by Chun Kam against L. J. Myers. Judgment for defendant, and plaintiff appeals. Affirmed.

W. H. Hatfield and V. L. Hatfield, both of Sacramento, for appellant.

Gaffney & Zagoren, of Sacramento, for respondent.

THOMPSON, Justice pro tem. This is an appeal from a judgment in favor of the defendant in an action in assumpsit for the recovery of money alleged to have been received for the benefit of the plaintiff.

November 1, 1923, the plaintiff leased, for the term of one year, from the estate of L. W. Myers, deceased, a portion of the ranch known as "camp 1 of the home place," situated in Sacramento county. The expressed consideration for the lease was that the "party of the second part is to receive 50 per cent. of fruit, and 65 per cent. of vegetables [produced thereon]." The lease provided for neither the time nor the manner of dividing the crops. It was, however, assumed by the respective parties that the estate was to market the crops, and that the plaintiff was to receive his proportion of the proceeds after the necessary expenses were paid. Henrietta Myers, the surviving widow of said deceased, was duly appointed and qualified as the administratrix of the estate of her deceased husband, and served in that capacity until January, 1925. She then resigned, and the California Trust & Savings Bank of Sacramento was thereupon appointed, and continued to act as such administrator. The defendant is the son of Henrietta Myers, and acted as field manager of the ranch under the supervision of the administrator of the estate. In 1924, an account was opened in the California National Bank of Sacramento, which account was entitled "L. J. Myers, Special." In 1925, after the bank became the administrator of the estate, another account was opened in the name of "L. W. Myers, Deceased; Ranch Account, L. J. Myers." These special accounts were maintained "for running the ranch." They were for the benefit of the entire ranch, including the proceeds from camp 1 of the home place. Mr. Roy Blair, an officer representing the administrator, California Trust & Savings Bank, testified that the funds of these special accounts "were the property of the estate," and that L. J. Myers was authorized to draw upon these funds for the payment of claims against the farm account, but that the administrator reserved the right to approve or reject such claims.

Pursuant to the terms of the lease, the plaintiff farmed that portion of the ranch known as "camp 1," and delivered to the agent of the estate, at the river landing, all fruit and vegetables which were produced thereon. The record is silent as to the disposition of these crops, but it may be assumed

---

★Superseded by opinion of Supreme Court 279 P. 156.

they were sold by the estate, and the proceeds deposited in these special funds, together with the proceeds from the sale of products from other portions of the estate ranch. In the fall of 1924 a written statement, purporting to itemize the receipts and disbursements incident to the farming and marketing of crops from the ranch, was made out by the defendant and handed to the plaintiff. This statement contained a charge of $481.90, which was represented by the defendant to have been necessarily expended by the estate to release it from a contract requiring the delivery of this fruit to a marketing association. Based upon this statement, a check for $2,170.88 was drawn by the defendant against this special farm fund and delivered to the plaintiff as payment in full for his share of the crops of 1924. A similar transaction occurred with respect to the division of the proceeds of the sale of the crops of 1925. It is now claimed by the appellant that he was deceived and defrauded by the false entry of the alleged payment to release the estate from its obligation to deliver the crops to the marketing association, and that the respondent holds the sums represented by these items in trust for him as money had and received for his benefit.

[1] It will be observed that this is a simple action in assumpsit for money had and received. The action is not based upon fraud or tort. Neither the estate nor its representative is a party to the action. It was instituted against L. J. Myers in his individual capacity, and the sole question is whether he individually holds this money in trust for the appellant. An action in assumpsit for money had and received will lie against one who has been intrusted with a specific sum of money, or with property which has been converted into money or its equivalent, and which in good conscience should be returned to the owner. 19 Standard Ency. of Proc. 842, A; 2 R. C. L. 778, § 34; Biurrun v. Elizalde, 75 Cal. App. 44, 242 P. 109; In re Interborough Consol. Corp. (C. C. A.) 288 F. 334, 347 (32 A. L. R. 932). In the last-cited authority it is said: "Every person who receives money to be paid to another, or to be applied to a particular purpose, to which he does not apply it, is a trustee, and may be sued either at law for money had and received, or in equity as a trustee, for a breach of trust."

[2, 3] In the present case, however, neither the farm produce nor the money secured by means of its sale was intrusted to the respondent individually. Upon the contrary, the produce was delivered to the agent of the estate of Myers to be sold. Sometimes the respondent received delivery of the produce as that agent, and sometimes he did not. The respondent was a mere agent for the administrator of the estate, acting in the capacity of a farm manager, and handling the special farm fund subject to the approval of the administrator. There is no evidence that this farm fund was intrusted to the respondent, with directions to pay any specific sum to the appellant. In the handling of this farm fund the respondent was constituted a trustee for the benefit of the estate. His authority was limited to the payment of claims which were subject to the approval of the administrator. The evidence discloses no relationship of trustor and trustee between the appellant and the respondent. There was no privity of contract between them as individuals, or otherwise. This farm fund included the receipts from the sale of produce from the entire farm. The proportion of the net receipts to which the appellant was entitled depended upon an accounting between him and the estate. If an erroneous statement of expenditures resulted in the payment to him of less than the appellant was entitled to, the respondent did not profit by that error. The balance still remains in the fund belonging to the estate. If a controversy exists between the appellant and the estate as to whether their account should be charged with a sum alleged to have been necessarily expended to release the estate from its contract to deliver all fruit to a marketing association, then the estate should have a right to be heard regarding this matter. Under the circumstances of the present case it may not be said that the respondent, individually had or received any specific sum of money for the appellant, or that the respondent would be personally liable in assumpsit. 17 Cal. Jur. 606, § 4; Minor v. Baldridge, 123 Cal. 187, 55 P. 783; Whittier v. Home Sav. Bank, 161 Cal. 311, 119 P. 92; Miller v. Murphy, 78 Cal. App. 751, 757, 248 P. 934; Wells v. Collins, 74 Wis. 341, 43 N. W. 160, 5 L. R. A. 531; 21 R. C. L. 852, § 31.

[4] An agent is responsible to a third person for his wrongful acts. Civ. Code, § 2343, subd. 3. Ordinarily the remedy for such wrongful acts of an agent is by means of an action for damages for the tort. 2 C. J. 812, §§ 486, 498; Minor v. Baldridge, supra. A principal is also responsible for the wrongful acts of his agent which were performed in the course of his employment, as well as for the agent's willful omission to perform that duty. Civ. Code, § 2338; 21 R. C. L. 848, §§ 28, 30. In the present case, however, the principal was not made a party to the action. It does not appear from the record that the respondent profited by his alleged fraudulent statement. He makes no claim to any portion of the special farm fund. It does not appear that he withdrew the money which is claimed by the appellant. It must therefore be assumed that this sum still remains in the special farm fund, which the evidence indicates is the property of the Myers estate.

The judgment is affirmed.

We concur: HART, Acting P. J.; PLUMMER, J.

96 Cal. App. 341

YOUNG et ux. v. BURCHILL et al.
(Civ. 6523.)

District Court of Appeal, First District, Division 1, California. Jan. 19, 1929.

1. Estoppel 🔑92(2)—Payee's acceptance without objection of delayed payments was not estoppel of right to exercise accelerated maturity clause of notes.

Payee's acceptance without objection of delayed payments *held* not to have constituted a waiver and estoppel of right to have exercised accelerated maturity clause of notes, since the refusal without notice to continue to accept such delayed payments did not constitute fraud.

2. Mortgages 🔑335—Agreement that default in payments should create option to insist on payment of whole debt is not "forfeiture."

Agreement that default in payments should leave it optional with creditor to insist on payment of the whole debt does not constitute a "forfeiture," in that there is nothing to forfeit or any penalty to be imposed.

[Ed. Note.—For other definitions, see Words and Phrases, First, Second, and Third Series, Forfeit; Forfeiture.]

3. Mortgages 🔑338—Equity cannot relieve one from breach of agreement authorizing creditor in case of default to insist on payment of whole debt.

As respects right to injunction against sale under trust deed, a court of equity has no power to relieve one from the breach of a valid agreement providing that in case of default in payments creditor has option to insist on payment of whole debt unless fraud or improper conduct is proved; the election of such a right not in itself constituting fraud, deceit, or oppression.

Appeal from Superior Court, Alameda County; T. W. Harris, Judge.

Action by Leland T. Young and wife against W. H. Burchill and others. Decree for defendants, and plaintiffs appeal. Affirmed, and restraining order theretofore granted dissolved.

J. W. Bingaman and Ralph W. Arnot, both of Oakland, for appellants.

F. H. Arb, of Hayward, for respondents.

TYLER, P. J. Appeal from a decree refusing to enjoin the sale of certain real property under a deed of trust. There is no dispute as to the facts. Plaintiffs and appellants were the owners of the real property here involved. On November 28, 1925, they executed to defendants Burchill and wife two promissory notes, one for the sum of $4,000 and the other for $500. Both notes carried interest at the rate of 7 per cent. per annum. The $4,000 note was, by its terms, payable in monthly installments of $45 commencing on December 28, 1925, and the $500 note was payable in the sum of $50 per month commencing on the 10th day of December, 1925. Each of said notes was in the usual installment form providing that payment first be applied to accrued interest and the balance to principal. Concurrently with the execution of said notes and to secure their payment, the plaintiffs executed a deed of trust of their real property to defendants Parsons and Haley, as trustees. Thereafter they commenced payments on the notes; the first being made on December 28, 1926, and the last on June 14th following. Each of the installments paid by plaintiffs was made subsequent to the due date and at periods varying from 6 to 16 days after they were due. Defendants accepted each of the delayed payments without any objection, and they never notified the plaintiffs that the payments would thereafter have to be made on the due dates. On July 1, 1926, 16 days after plaintiffs had made their last payment to defendants, the latter filed with the county recorder their notice of breach and election to sell under the provisions of section 2924 of the Civil Code as provided for under the deed of trust. This act was done without any notice to the plaintiffs and without any prior demand or notice to them that the defendants would require the installments to be paid on the due date. On the same day, however, defendants' attorney notified plaintiffs that defendants had declared a default and had elected to declare the full amount of the indebtedness due. The Bank of Hayward had been collecting from plaintiffs the payments they made upon the notes; the trustees being officers of that institution. On the day following the receipt of the notice referred to, plaintiffs visited the bank and offered to make certain payments, but they were informed that the notes had been withdrawn and further payments were refused. Thereafter, and shortly after the expiration of the notice of default and election, and when defendants were threatening to sell plaintiffs' property under the deed of trust, plaintiffs instituted this proceeding praying for an injunction to enjoin said sale. The trial court found that plaintiffs were not entitled to the relief sought or to any relief whatsoever. A temporary injunction, however, was granted, and the same has been in force pending the hearing of this appeal.

[1, 2] The main contention of appellants is that the action of defendants in accepting without objection the delayed payments constituted a waiver and an estoppel of their right to exercise the accelerated maturity clause of the notes, and that their refusal to accept any installments after so declaring said notes accelerated, excused plaintiffs from making any further payments. They also contend that the sale under a deed of trust

amounts to a forfeiture, and the mere fact that it is brought about by accelerating a maturity clause of a note does not change it in fact from being a forfeiture, and that the rule announced in such cases as Boone v. Templeman, 158 Cal. 290, 110 P. 947, 139 Am. St. Rep. 126, and Myers v. Williams, 173 Cal. 301, 159 P. 982, apply. While the principle declared in the cases relied upon may properly be applied to vendor and purchaser contracts involving and authorizing forfeitures for breach of covenants as to time payments, it has no application to a case of the character here involved. Jump v. Barr, 46 Cal. App. 338, 189 P. 334. A provision for such accelerated maturity is not in the nature of a penalty or forfeiture, but simply an agreement as to the time when a debt shall become due and enforceable according to its terms, and is valid. Dunn v. Barry, 35 Cal. App. 325, 169 P. 910. Nothing contained in the contract is contrary to equity or good conscience. Parties may lawfully contract that interest as such shall be payable at stated periods of time, or stipulate that a default in payments shall leave it optional with the creditor to insist upon payment of the whole debt. Such an agreement contains no element of a forfeiture, for there is nothing to forfeit, or any penalty to be imposed. Nor does it fall within the application of any principle of equity for which relief against a forfeiture is sometimes extended. Whitcher v. Webb, 44 Cal. 127; Clemens v. Luce, 101 Cal. 432, 35 P. 1032. Here the defendant is claiming nothing by way of forfeiture that has been paid; he is simply exercising his right under a contract to decline to further extend his loan, for the reason that plaintiffs have failed to promptly comply with their agreement relating to the payment of interest. This he certainly has the right to do. The situation is entirely different from an agreement of sale wherein, upon failure of payment of an installment, the vendor is attempting to retain payments made and also the property itself, the subject of the sale. While it is the province of a court of equity to see to it that a party invoking its aid shall have dealt fairly before relief is given, there is nothing objectionable in a contract which provides in case of failure to make punctual payments of installments of principal and interest, the payment of the entire amount due shall be accelerated. Refusal without notice to continue to accept delayed payments does not constitute fraud, nor does it create an estoppel or waiver.

[3] The rule is well established that the acceptance of a payment of interest after default does not have this effect. 1 Wiltsie on Mortgage Foreclosure (4th Ed.) § 65. A court of equity has no power to relieve one from a breach of this valid agreement unless fraud or improper conduct is proved. 2 Jones on Mortgages (2d Ed.) § 185. As above stated, the election of such a right does not constitute fraud, deceit or oppression. The case of McCue v. Bradbury, 149 Cal. 108, 84 P. 993, cited by appellants as upholding a contrary doctrine, is not in point. In that case deceit and fraud were involved. Nor is there any merit in the further claim that the belated tender relieved plaintiffs from their default. After defendants had exercised their election to consider the whole amount due in conformity with the terms of the trust agreement, it was too late for plaintiffs to perform without the consent of defendants. The right of election accrued to defendants upon the default of plaintiffs, and there is no element in the case which would justify a court, upon the theory of waiver or estoppel, to deny defendants the right to rely and enforce the express terms of the agreement with reference to payments. Wiltsie on Mortgage Foreclosure (4th Ed.) § 59 et seq.

The judgment is affirmed, and the restraining order dissolved.

We concur: KNIGHT, J.; CASHIN, J.

---

96 Cal. App. 418

LOS ANGELES LAND & WATER CO. v. KANE et al.

HANSEN v. KANE et al.

(Civ. 6198.)

District Court of Appeal, Second District, Division 1, California. Jan. 25, 1929.

1. Deeds ⚷150—Condition prohibiting particular business on property conveyed is valid, in absence of monopoly or unlawful purpose.

A condition subsequent, prohibiting the carrying on of a particular business on property conveyed, is valid, and will be upheld, where question of monopoly is not involved or purpose is not unlawful.

2. Deeds ⚷176—Whether condition that property conveyed should not be used for manufacture or sale of crushed rock created monopoly was fact question for trial court.

Whether condition in deed that property should not be used for manufacture or sale of crushed rock, gravel, or sand created a monopoly, was a question of fact for the trial court.

3. Deeds ⚷166—Grantor did not waive condition, prohibiting use of lot conveyed for manufacture or sale of crushed rock, by operating rock crushers on reserved lands.

Grantor *held* not to have waived condition in deed that property should not be used for

---

⚷For other cases see same topic and KEY NUMBER in all Key-Numbered Digests and Indexes manufacture or sale of crushed rock by operating two rock crushers three-fourths of mile and two miles from lot conveyed on stone lands reserved by grantor, when grantee contracted to sell lot to lessor of parties constructing and operating rock crushing plant thereon.

4. Deeds 🔑150—Condition prohibiting use of land conveyed for manufacture or sale of crushed rock held not void as preventing grantee from selling rock therefrom.

Condition in deed that property conveyed shall not be used for manufacture or sale of crushed rock, gravel, or sand *held* not void for repugnancy to estate granted as preventing grantee from selling any rock, gravel, or sand from such land; prohibition being against use of property itself for purposes of sale or manufacture.

Appeals from Superior Court, Los Angeles County; Frank C. Collier, Judge.

Action by the Los Angeles Land & Water Company, a corporation, against Mrs. Lewis Kane, Homer A. Hansen, and another, in which defendant Hansen filed a cross-complaint against codefendants. From a judgment for plaintiff and cross-complainant, cross-defendants appeal. Affirmed.

L. E. Dadmun, of Los Angeles, for appellants.

Anderson & Anderson, of Los Angeles, for respondent Water Company.

Clyde Moody, of San Fernando, for respondent Hansen.

CRAIL, Justice pro tem. The plaintiff owned a tract of land containing about 2,700 acres, located in the San Fernando Valley, which for several years has been within the city limits of Los Angeles and which is subdivided into five-acre lots with streets running through it. The land is composed of the detritus washed down from the mountains, and is covered with a thin layer of soil, except that portion within the two washes or beds of the Big Tejunga creek. The plaintiff sold lot 2 of block 22 thereof to Homer A. Hansen by a deed which contained the following conditions: "Subject to the condition subsequent that no part of said property shall be *used* for the manufacture or sale of crushed rock, gravel or sand prior to January 31, 1934." All other sales in the tract were made subject to the same condition. On May 7, 1924, about 75 dwellings had been erected upon those lots. On that date the said Hansen executed a contract of sale of said lot to the defendant Mrs. Kane, subject to the same condition. She in her turn leased the lot to other defendants, who, with full knowledge of said conditions, began the construction of a rock-crushing plant upon said property in spite of a notice to all defendants calling their attention to said condition and that their rights in the lot would be forfeited. The plant was finished and operations begun when plaintiff brought this action, asking for the recovery of the property and an injunction. Hansen on his part filed a cross-complaint against the other defendants, asking the same relief. Answers were filed and a trial had, and thereafter a judgment was entered as prayed in favor of the plaintiff and also in favor of Hansen against the appellants. It is from this judgment that the appeal is taken; and appellants raise three points for reversal.

[1, 2] It is first contended that the condition is in restraint of trade and therefore void. Appellants claim that any contract which forbids or prevents the manufacturing of crushed rock is in restraint of trade in that particular line of business and void. It will be noticed that the restriction is against the use of the property. There is nothing to prevent the removal of the rock, gravel, or sand from the lot and doing with it whatever one chooses. It is the settled law of California that a condition subsequent prohibiting the carrying on of a particular business upon property conveyed is valid and will be upheld where the question of monopoly is not involved or the purpose of the condition is not unlawful, and possibly other exceptions which do not exist here. Southern Pacific R. Co. v. Blaisdell, 33 Cal. App. 239, 164 P. 804; Los Angeles Investment Co. v. Gary, 181 Cal. 680, 186 P. 596, 9 A. L. R. 115; 9 Cal. Jur. 356. With regard to the creation of a monopoly by the condition, that is a question of fact to be determined by the trial court, and the court found facts which preclude the possibility of a monopoly arising out of the condition. The evidence not alone sustains the trial court. We are inclined to say it could not have found otherwise.

[3] It is next contended that the plaintiff waived the condition by operating two rock crushers on the tract. The question of waiver is again a question of fact. The crushers were three-quarters of a mile and two miles distant from appellants' lot, were on the stone lands or reserved lands, and were in full operation when Hansen contracted to sell the lot to Mrs. Kane. There is no merit in this contention. In any event, neither this nor the preceding contention has any bearing upon the judgment of Homer A. Hansen.

[4] Lastly, it is contended that the condition is repugnant to the estate granted, and therefore void. In this regard appellants claim that "the condition not only attempts to prevent the manufacturing of crushed rock, gravel and sand, but prevents the grantee from selling from said land any rock, gravel or sand." As heretofore stated, there is no prohibition against the removal of rock, sand, or gravel from the premises or selling the same when removed. The prohibition is against the use of the property itself for the purposes of sale or manufacture. Again, in

this case the violation of the condition, which was found by the trial court and which is admitted by appellants, is the operation of a rock-crushing plant for the purpose of manufacture and sale of the product. There are two conditions, one against the use of the property for the manufacture of, and one against the use of the property for the sale of, crushed rock, sand, and gravel. The prohibition against the use for sale might be rejected as void, yet the prohibition against the use for manufacture would remain in full force and effect. Appellants do not claim that the latter condition is repugnant to the estate granted.

There is no merit in the appeal.

Judgment affirmed.

We concur: HOUSER, Acting P. J.; YORK, J.

96 Cal. App. 427

KNIESE v. FAIRFAX INCLINE R. CO.★

(Civ. 6406.)

District Court of Appeal, First District, Division 2, California. Jan. 26, 1929.

Rehearing Denied Feb. 20, 1929. Hearing Denied by Supreme Court March 25, 1929.

Corporations 🔑1—That assignor of claims against corporation owned all corporation's stock held not to warrant disregarding separate corporate entity.

In action to recover on assigned claims against corporation, fact that, during all of times that plaintiff's assignor was making advancements to corporation, said assignor owned all of corporation's stock, *held* not to authorize disregarding fact that corporation was a separate entity from assignor, in absence of evidence showing fraud or injustice.

Appeal from Superior Court, City and County of San Francisco; George H. Cabaniss, Judge.

Action by George J. Kniese against the Fairfax Incline Railroad Company. Judgment for plaintiff, and defendant appeals. Affirmed.

See, also, 274 P. 383.

Martin Stevens, of San Francisco, for appellant.

Wm. T. Eckhoff, of San Francisco, and Geo. H. Harlan, of San Rafael, for respondent.

STURTEVANT, J. The plaintiff commenced an action against the defendant to recover a money judgment on certain assigned claims. The defendant appeared and answered, and a trial was had before the court sitting without a jury. The court made findings in favor of the plaintiff on his fourth count, and from a judgment entered thereon the defendant has appealed, and has brought up a bill of exceptions.

There are few disputed facts, but the most of the facts were developed on the trial by the testimony of G. C. F. Seidel, plaintiff's assignor. The defendant is a corporation having 10,000 shares of capital stock, all of which was, at the times mentioned in the pleadings, owned by G. C. F. Seidel. The corporation owns and operates a railroad about 1,400 feet long, running up the side of the mountain at Fairfax, in Marin county. The company has a full corporate organization. As a railroad corporation, reports, applications, etc., were duly made from time to time by it to the Railroad Commission. A formal set of corporate books was kept. On or about August 15, 1921, G. C. F. Seidel bought the corporate stock and took over the management. He was elected president, treasurer, and general manager. In addition to filling those offices, he did the manual work, made purchases, paid out moneys, and duly entered in the books a correct statement of his transactions, and, in the reports of the corporation, truly summarized those entries. He so continued to conduct the defendant's affairs until August 16, 1923. As of that date, as shown by the books, there was owing to G. C. F. Seidel $1,074.95. The court so found. There was apparently a full and complete record sustaining the finding; but we will pass now to the points made by the defendant.

The first four points presented by the defendant are but different methods of presenting one question of law. The defendant calls attention to those parts of the record which show beyond dispute that during all of the times that G. C. F. Seidel, plaintiff's assignor, was making advancements, said Seidel owned all of the corporate stock, and that therefore the corporation was but the corporate double of Seidel. Thereupon defendant further contends that the indebtedness sued upon was Seidel's debt; that, when he paid a debt, the debt was paid as against him, as well as against the corporation; and that the same person may not be both obligor and obligee. In this connection the defendant says a great deal about Rivers Bros. These statements are nearly all of them outside of the record. There is nothing in the record showing that any fraud or injustice has been worked as against Rivers Bros., or against any other person. In the absence of additional facts, the proof introduced would not warrant us in disregarding the fact that the corporation is a separate entity from G. C. F. Seidel. Erkenbrecher v. Grant, 187 Cal. 7, 11, 200 P. 641.

In making its award the court estimated the wages of G. C. F. Seidel at $200 per month. The defendant claims the estimate was too high. There was evidence to support it.

★Rehearing denied. Hearing denied by Supreme Court.

Finally, it is claimed that G. C. F. Seidel admits that he received $4,037.13, and should have been charged that, instead of $3,125.05. Defendant is mistaken. He admitted that the corporation received $4,037.13, but he claimed that he received only $3,125.05, and the balance was used to pay corporate debts.

Summarizing what we have stated above, it is, we think, quite clear that, if G. C. F. Seidel was the bona fide owner of 75 per cent. of the capital stock of the defendant, and John Doe was the bona fide owner of 25 per cent. of the capital stock of the defendant, and, except with the change indicated, each and every other fact contained in the record was proved, just as stated above, then and in that event we do not believe it would be debatable but what the plaintiff should have been given the judgment which was given him. The mere fact that he owned all of the stock, standing alone, and not supported by any other fact or facts showing fraud or injustice, would not support a ruling reversing the judgment.

We find no error in the record. The judgment is affirmed.

We concur: BUCK, Presiding Justice pro tem.; NOURSE, J.

KNIESE v. FAIRFAX INCLINE R. CO.★
(Civ. 6405.)

District Court of Appeal, First District, Division 2, California. Jan. 26, 1929.

Rehearing Granted Feb. 20, 1929.

1. Trial ⚿396(1)—Finding wholly outside of issues is nugatory.

A finding wholly outside of the issues is nugatory, and a judgment based thereon must be reversed.

2. Evidence ⚿417(12)—Evidence that sale contract making no mention thereof included assignment of claims against corporation held inadmissible (Code Civ. Proc. § 1856).

Where written instrument described corporate assets sold as certain incline railroad and realty, without mentioning any other property, evidence that sale included assignment of claims for advancements was inadmissible, until instrument had been reformed, and in absence of fraud or mistake, under Code Civ. Proc. § 1856.

Appeal from Superior Court, City and County of San Francisco; George H. Cabaniss, Judge.

Action by George J. Kniese against the Fairfax Incline Railroad Company. From the judgment, plaintiff appeals. Reversed.

Wm. T. Eckhoff, of San Francisco, for appellant.

Martin Stevens, of San Francisco, and Geo. H. Harlan, of San Rafael, for respondent.

STURTEVANT, J. This is an appeal by the plaintiff from the judgment under consideration in the case entitled Kniese v. Fairfax Incline Railroad Co. (No. 6406) 274 P. 382, this day decided. The plaintiff has brought up a bill of exceptions which is more full and complete than the bill in the other case.

[1, 2] The stock in the defendant corporation was formerly owned by Rivers Bros., a corporation. While so owned, the railroad was operated at a loss. While the stock was owned by plaintiff's assignor, the road was also operated at a loss. During the period while the stock was owned by Rivers Bros., and during the period while it was owned by plaintiff's assignor, the deficits were paid by the respective owners of the stock, and the amounts so paid were carried on the books of the defendant as deficits, and were so reported to the Railroad Commission. The plaintiff's entire claim included the total of all deficits; that is, $2,405.63 while Rivers Bros. owned the stock, and $1,774.95 while plaintiff's assignor owned the stock. The last item was the subject-matter of the case above mentioned. The first item is the subject-matter of this case. In claiming to be reimbursed on that item, the plaintiff alleged that, at the time Rivers Bros. sold the stock in the defendant railroad, it assigned to G. C. F. Seidel its claim against the railroad of the advancements so made. The defendant denied that allegation. The trial court made a finding in favor of the plaintiff on the issue so framed. However, it did not stop at that point. It also made a finding that, at the time Rivers Bros. made the alleged advancements, it was the sole stockholder of the defendant, personally and primarily liable, and that it made such advancements in payment of its stockholder liability, and that at the time of its alleged assignment to the plaintiff's assignor Rivers Bros. had no claim to assign, and that plaintiff's assignor took nothing by the purported assignment.

As to this last finding the plaintiff asserts that it is wholly outside of the issues, it should be disregarded, and the trial court should be directed by this court to enter judgment on the other findings in favor of the plaintiff. It is true the finding is wholly outside of the issues, nugatory, and that the judgment must be reversed. However, we are not inclined to direct a judgment in favor of the plaintiff. The sale by Rivers Bros. to plaintiff's assignor was evidenced by a written instrument, which was signed by the vendor and vendee. It states what things were being sold, and what was being paid therefor. As to the things being sold, that paper

---

★Superseded by opinion 277 P. 347.

describes them as including "the Fairfax Incline Railroad and the piece of land known as the 'Park' at the head of the Incline Railroad. * * *" No mention is made of any other property. Until that instrument had been reformed, and in the absence of fraud or mistake, there could not legally be any evidence as to the things sold except that paper. Code Civ. Proc. § 1856; Harrison v. McCormick, 89 Cal. 327, 330, 26 P. 830, 23 Am. St. Rep. 469. Under this state of the record it would seem that the trial court never had these facts in mind when it made the finding that Rivers Bros. assigned to G. C. F. Seidel any claim against the defendant for advancements made by Rivers Bros.

The judgment is reversed.

We concur: BUCK, Presiding Justice pro tem.; NOURSE, J.

---

96 Cal. App. 386

McKENZIE v. LOS ANGELES LIFE INS. CO. et al. (Civ. 3592.)

District Court of Appeal, Third District, California. Jan. 22, 1929.

1. Insurance 🔑618—As respects venue, original insurer, joined with its assignee, but not served, was not released, though complaint referred to single defendant (Code Civ. Proc. § 17; Civ. Code, § 14).

As respects right to change of place of trial, insurance company which assigned its assets and liabilities, and which was joined as defendant in action on accident policy together with its assignee, remained liable under the policy, and could be made to answer the demands of plaintiff's complaint, though it was not served with summons and did not appear, and complaint used singular number of "defendant"; singular including the plural under Code Civ. Proc. § 17, and Civ. Code, § 14.

2. Insurance 🔑618—Venue, as against original insurer, of insured's suit on accident policy, is in county where accident occurred (Const. art. 12, § 16).

Cause of action of insured under accident policy, as against original insurer, arises in county where injury occurred, and trial should take place there under Const. art. 12, § 16.

3. Insurance 🔑618—Venue of action on accident policy against defendant assuming liabilities of original insurer held properly laid in county of accident, though defendant entered into contract for assumption of liabilities in another county (Const. art. 12, § 16).

Venue of action by insured on accident policy against successor of original insurance company *held* properly laid in county where accident took place, though defendant had its principal place of business and entered into contract for assumption of liabilities in another county, and though original insurance company, joined in complaint, was not served with summons and did not appear, since defendant by its contract became obligated to perform insurance contracts at place where under the law its assignor was bound to render performance under Const. art. 12, § 16.

Appeal from Superior Court, Sacramento County; Peter J. Shields, Judge.

Action by James H. McKenzie against the Los Angeles Life Insurance Company and the People's Mutual Life Insurance Company. From an order denying a motion for change of venue, defendant last named appeals. Affirmed.

See, also, 263 P. 338.

A. B. Weiler, of San Francisco, for appellant.

J. J. Henderson and W. A. Green, both of Sacramento, for respondent.

PLUMMER, J. This cause is before us upon an appeal by the People's Mutual Life Insurance Company, a corporation, from an order made and entered in the trial court denying said defendant's motion for a change of venue.

On the 28th day of September, 1927, the plaintiff filed an amended complaint in this cause, from which it appears that the corporation known as the Mutual Indemnity Accident, Health & Life Insurance Company of California, and having its principal place of business at Los Angeles, Cal., was regularly incorporated on the 20th day of February, 1924; that thereafter, and on or about the 15th day of December, 1926, the name of said corporation was changed to that of Los Angeles Life Insurance Company; that on or about the 25th day of May, 1926, said corporation, while doing business under the name of Mutual Indemnity Accident, Health & Life Insurance Company of California, for a valuable consideration, issued to the defendant a policy of insurance, a copy of which is attached to the complaint, whereby it agreed to pay the plaintiff certain sums in the event of any injury occurring to the plaintiff, as provided and set forth in said policy of insurance, and thereby insuring the plaintiff against any injury that should be received from external, violent, or accidental means; that after the issuance of said policy, and on the 4th day of August, 1926, the plaintiff, while engaged in his work in the county of Sacramento, as a plasterer, was injured by reason of a scaffolding, upon which he was standing, slipping from under him and precipitating him to a sidewalk below, resulting in the fracture of the bones of the plaintiff's left foot, and also spraining the plaintiff's left ankle, etc.; that, at the time of the plaintiff's receiving the injuries above stated, the insurance policy referred to was in full force and effect, and the said Mutual Indemnity

Accident, Health & Life Insurance Company of California became charged with the duty of paying to the plaintiff the sums of money specified as indemnity in the policy of insurance issued by it to the plaintiff. It further appears that on or about the 31st day of May, 1927, the People's Mutual Life Insurance Company, a corporation, duly organized and existing under the laws of the state of California, and having its principal place of business in the city of San Francisco, duly authorized to transact an insurance business, assumed all the insurance contracts entered into by the said Mutual Indemnity Accident, Health & Life Insurance Company of California, and agreed to discharge all outstanding insurance contracts and liabilities incurred by the said Mutual Indemnity Accident, Health & Life Insurance Company of California, including, among said contracts of insurance so assumed, the liability of said Mutual Indemnity Accident, Health & Life Insurance Company of California, by reason of its policy theretofore issued to the plaintiff herein, as heretofore stated. It further appears from the allegations of the complaint that there became due and payable to the plaintiff under the terms of said policy of insurance the sum of $1,380, of which sum there has been paid $440, leaving a balance due in the sum of $940. It is for the purpose of obtaining payment of this latter sum that this action is prosecuted.

On the 22d day of October, 1927, the defendant and appellant, People's Mutual Life Insurance Company, filed a demurrer and its motion in said action, supported by an affidavit of merits, asking a change of place of trial of this cause from the county of Sacramento to the county of San Francisco, alleging as a reason therefor that San Francisco was the principal place of business of said defendant, and that the contract between the Los Angeles Life Insurance Company (formerly known as the Mutual Indemnity Accident, Health & Life Insurance Company of California) and the People's Mutual Life Insurance Company, whereby the latter company took over and assumed all liabilities theretofore incurred and then existing on the part of the said Los Angeles Life Insurance Company, was entered into in the city and county of San Francisco. This appeal is from the order of the trial court denying this motion for a change of place of trial.

The sole reliance of the appellant is upon the fact that the contract, by which it assumed the liabilities of the Los Angeles Life Insurance Company and agreed to pay all claims against the Los Angeles Company, was made in the city of San Francisco, and that, while such contract was made for and would inure to the benefit of third persons, it was only to be performed at the city of San Francisco.

[1] While the record shows that at the time the defendant People's Mutual Life Insurance Company, a corporation, appeared in this cause and made its motion for a change of place of trial from the county of Sacramento to the city and county of San Francisco, the defendant Los Angeles Life Insurance Company (formerly known as the Mutual Indemnity Accident, Health & Life Insurance Company of California) had not made any appearance, the complaint in the action does name said Los Angeles Life Insurance Company as well as the People's Mutual Life Insurance Company, as a defendant, and, while the complaint uses the singular term of "defendant," in paragraph VII thereof, and also in the prayer of the complaint, the allegations of the complaint include the Los Angeles Life Insurance Company (formerly known as the Mutual Indemnity Accident, Health & Life Insurance Company of California) as well as the appellant, and states a cause of action against said Los Angeles company. Under section 17 of the Code of Civil Procedure and section 14 of the Civil Code the singular term includes the plural, and, there being nothing in the complaint or in the record indicating that the plaintiff had ever consented to release the Los Angeles Life Insurance Company (formerly known as the Mutual Indemnity Accident, Health & Life Insurance Company of California) from its obligations under the policy of insurance issued to the plaintiff, that company, so far as the record shows, is still liable upon said policy, and may be made to answer to the demands of the plaintiff's complaint.

[2, 3] It is well settled that under the terms of section 16 of article 12 of the Constitution, when the accident occurred resulting in injury to the plaintiff, a cause of action arose in favor of the plaintiff against the Los Angeles Life Insurance Company, etc., and that the place of trial of said cause of action was and is at the place where the plaintiff suffered the injury, to wit, the county of Sacramento. This is definitely settled by the case of Robinson v. Order of Railway Employees, 53 Cal. App. 404, 200 P. 87. This cause of action then existed, and so far as the record shows still exists against the Los Angeles Life Insurance Company. There is nothing in the record which shows that the service of summons upon the Los Angeles Life Insurance Company was not contemplated, or that said Los Angeles Life Insurance Company (formerly known as the Mutual Indemnity Accident, Health & Life Insurance Company of California) was not made a defendant in good faith. That said company had not been served with summons and had not appeared in this action at the time the appellant filed its motion for a change of place of trial is wholly immaterial. A cause of action was set forth in the complaint which under the Constitution, and as shown by the case to which we have referred, was a cause

of action against the Los Angeles Life Insurance Company, etc., triable in the county of Sacramento. This, of course, would preclude the right of the appellant to have the cause of action transferred to the county of San Francisco for trial, if the right so to do otherwise existed. However, the right of action, as shown by the pleadings, against the Los Angeles Life Insurance Company, was fixed when the defendant People's Mutual Life Insurance Company assumed to discharge its obligations. When it took over the business or policies issued by the Los Angeles Life Insurance Company, the People's Mutual Life Insurance Company became obligated to perform all and singular the acts covenanted and agreed to be performed by its assignor, and in so doing we think that it covenanted and agreed to perform those obligations so far as third parties are and were concerned, at the place where, under the law, its assignor was bound and obligated to render performance. In other words, by the contract of insurance assigned by the Los Angeles Life Insurance Company, etc., to the People's Mutual Life Insurance Company, and the liabilities thereunder assumed by the People's Mutual Life Insurance Company, the appellant became immediately charged with the duty of rendering performance, at the same place, with which its assignor, the Los Angeles Life Insurance Company, etc., stood charged and obligated.

For the reasons set forth therein, we conclude that the appellant herein was not entitled to a change of place of trial.

The order of the superior court is therefore affirmed.

I concur: FINCH, P. J.

96 Cal. App. 390

HAMMOND LUMBER CO. v. HAW.★
(Civ. 6390.)

District Court of Appeal, First District, Division 1, California. Jan. 23, 1929.

Rehearing Denied Feb. 21, 1929. Hearing Denied by Supreme Court March 21, 1929.

1. Boundaries 🔑55—Obliteration of survey monument does not justify adoption of proportionate method of locating lost corner, where field notes refer to discoverable natural objects.

Obliteration of monument made in survey does not destroy survey, nor justify court in disregarding it or adopting proportionate method of locating common lost corner, where field notes refer to natural objects, which can be found along line mentioned, so as to locate place occupied by monument approximately.

2. Boundaries 🔑55—Evidence held sufficient to permit approximate location of quarter corners established under original survey, so as to justify rejection of proportionate method.

In action to determine location of boundary line between parties' timber lands, evidence *held* sufficient to permit approximate location of quarter corners, established under original survey, on the ground, so as to justify court in rejecting proportionate method of locating them, notwithstanding discrepancies between certain distances given in field notes and found by court.

3. Boundaries 🔑3(3)—Distances in field notes give way to natural objects noted and found on ground at approximately such distances.

Distances as recorded in surveyor's field notes must give way to natural objects, noted and found on the ground at approximately the distances given in such notes, in determining boundary.

4. Trial 🔑398—Contention that findings that plaintiff's allegations were untrue and that he owned lands described in complaint were inconsistent, held without merit, in view of answer.

Where defendant denied claiming interest in lands as complaint alleged, and court found that all allegations in answer were true, plaintiff's contention that findings that his allegations were not true and that he owned lands described were inconsistent and failed to give him relief prayed was without merit; defendant being entitled to finding that all allegations of complaint were untrue.

Appeal from Superior Court, Humboldt County; George D. Murray, Judge.

Action by the Hammond Lumber Company against W. H. Haw. Judgment for defendant, and plaintiff appeals. Affirmed.

Nelson & Ricks, of Eureka, for appellant.
Puter & Quinn, of Eureka, for respondent.

TYLER, P. J. This action, while one in form for trespass and to quiet title to land, has for its object the determination of the location of the proper boundary line between certain timber lands owned by plaintiff and defendant. All the lands are situated in township 2 south, range 3 east, Humboldt base and meridian. The complaint contains two causes of action. The first alleges the ownership in plaintiff of the south half of the northeast quarter of section 10, township 2 south, range 3 east, H. M., and it recites that said land had growing thereon a large number of redwood trees. It then charges that defendant, with full knowledge of plaintiff's ownership, willfully chopped down, removed and carried away some sixty of the said trees, which were of the value of $1,203.51, and that defendant by such willful trespass became liable for treble damages under section 733, Code of Civil Procedure. The second cause of action alleges defendant claims an interest in the lands above described adverse to plaintiff, which claim is

---

★Rehearing denied. Hearing denied by Supreme Court.

without right, and it is prayed plaintiff's title be quieted as against defendant. In his answer to the first cause of action, defendant denied that he entered upon the lands described in plaintiff's complaint at any time, and he likewise denied that he chopped down or removed any of the redwood trees growing thereon. He admitted title in plaintiff to the land described in the complaint, but denied that he claimed any interest therein adverse to the plaintiff. He further alleged ownership in himself of contiguous lands described as the northwest quarter of the southeast quarter of section 10, and recited that all of the trees cut or chopped down by him were standing and growing within the boundaries thereof. Defendant prayed that plaintiff take nothing by his action.

The land of defendant adjoins the land of plaintiff for the distance of a quarter of a mile. The common boundary line between the two tracts is a line which runs theoretically east and west through the center of section 10. The difference between the contention of the parties is due to the fact that they do not locate the common boundary in the same position on the ground. It was plaintiff's contention at the trial that no known or recognizable monuments as established in the original government survey could be found which fixed the exterior boundaries of section 10 or which determined the location of any corners to said section or the quarter corners on the east, south, and west lines thereof, as the same had disappeared and could not be found, nor could the same be ascertained or determined from any calls contained in the original government notes, either as to courses or distances. Accordingly, and in order to prove its case, plaintiff introduced evidence to show that he employed a surveyor, one Lentell, who made a survey upon which plaintiff relied. This witness testified that according to his survey he could find no known, fixed, or recognizable monuments as established in the original government survey nor could he determine the location of the corners to said section or the quarter corners on the east, south and west lines thereof from any calls contained in the original government notes, either as to courses or distances and that in consequence he adopted the proportionate measurement method in establishing the exterior boundaries of section 10, and likewise determined the line running east and west through the center of said section which would be the common boundary line to the lands of the parties hereto. In addition to following the proportionate measurement method, plaintiff attacked, upon various grounds, the sufficiency of a certain survey relied upon by defendant to establish the disputed lines and corners. It was and is defendant's claim that there were sufficient marks and objects upon the ground corresponding to those referred to in the government field notes to establish the lost lines and corners, and, this being so, the rule of establishing lost corners by proportionate method does not apply. Defendant introduced various witnesses to prove the existence of the boundary lines by natural objects, marks on trees, and topography described in the field notes of the government survey.

The trial court found, upon the first cause of action, that the location on the ground of the common boundary line was established by the evidence produced by defendant, the finding in this connection being that the common boundary line upon the ground between the said south half of the northeast quarter of said section 10 and the northwest quarter of the southeast quarter of said section is the east and west subdivisional line running through the center of said section and particularly described as follows: "Beginning at the quarter section corner on the East line of said Section 10, which said quarter section corner is now marked by an iron pipe driven in the ground on the west edge of the County Road on the East line of said section Ten, and from which iron pipe there is a pine stump 24 inches in diameter south 61½ degrees East 62 links; thence from said quarter section corner running West to the quarter section corner on the West line of said Section Ten, which said quarter section corner is designated by an old growth pine tree about two feet in diameter which stands on the east slope of the ridge, and has a block chopped out on the west side of the tree exposing a flat face upon which the mark ¼ is carved upon the wood."

It is appellant's contention that the finding locating the quarter corner on the east line of section 10 evidenced by an iron pipe, and generally referred to in the evidence as the "Hubbard Corner," and the location of the quarter corner on the west line of said section 10, evidenced by a "¼" mark cut on a fir tree and generally referred to as the "Pine Tree" quarter corner, is not supported by the evidence as the location by the trial court of the same upon the ground does not accord with any of the calls in the original government field notes either as to distances or topography, and that the same were not established as required by law; that the true boundary line, as established by the preponderance of the evidence, is that found and established by plaintiff's surveyor, J. N. Lentell, under the proportionate measurement method.

[1] The law is well established that the obliteration of a monument made in a survey does not destroy such survey nor justify a court in disregarding it, where enough data remain to locate the place occupied by the monument by reference to the natural objects referred to in the survey. Nor does such obliteration justify the adoption of the proportionate method of locating a common corner as a lost corner, where the field notes refer to

certain natural objects which can be found along the line mentioned so as to approximately locate it. Weaver v. Howatt, 171 Cal. 302, 152 P. 925.

[2, 3] We are of the opinion that there is abundant evidence in the record from which the location on the ground of the quarter corners as established under the original survey could be approximately identified, and that the trial court was therefore justified in rejecting the proportionate method of locating such corners. Nor do we think the evidence is impaired, as claimed by appellant, because of any discrepancies between certain distances given in the field notes and the distances found by the court. Distances, as recorded in the field notes must give way to natural objects noted and found upon the ground at approximately the distance given in the notes. Weaver v. Howatt, supra. As hereinabove stated, the evidence relied upon by the trial court, as a whole, sustains the location on the ground of the common boundary line and fully supports the finding of the trial court upon the subject. Defendant produced as witnesses several licensed surveyors who for many years were familiar with the location and who had surveyed the lands in question. The testimony of these witnesses shows that they experienced no difficulty in ascertaining the lines of section 10 or the corners or quarter corners thereof as established by the original survey. They testified that the section lines and certain corners as thus established were well marked by blazes on trees which conformed to the field notes. One of these witnesses, John Haugh, was employed by the government on the original survey made in 1874. He testified that when so employed he surveyed the identical land, ran the section lines thereof, and wrote up the field notes. He further testified as to the proper location on the ground of one of the section corners. In going over the section lines shortly before the trial, he recognized the markings of the original survey, some of which he testified were made by himself. He also found one of the old stakes on the south line of the section. In addition to the markings on the trees, he recognized the topography of the land described in the field notes. Other witnesses, including defendant, who had resided in the immediate vicinity for many years, testified as to the proper location of certain corners of the section. In the face of this and other evidence supporting the finding of the trial court, we have no power to disturb the finding.

[4] The further contention is made that, as to the second cause of action, the findings are inconsistent and fail to give plaintiff the relief prayed for, which necessitates a new trial. Upon this subject the court found that the plaintiff's allegations were not true, and that each and all the denials of the defendant were true and sustained by the evidence. There is a specific finding of ownership in plaintiff of the lands described in its complaint. Defendant in his answer denied any claim of interest in the lands so described, and there is a further finding that all the allegations contained in the answer are true. Defendant was entitled to a finding that all the allegations of the complaint were untrue, for, as his pleading alleged, and the evidence showed, he never claimed any interest in plaintiff's lands, and plaintiff's allegation that he did was untrue. There is no merit in the objection.

The judgment is affirmed.

We concur: KNIGHT, J.; CASHIN, J.

96 Cal. App. 520

HILLS v. SHAFFER et al. (Civ. 5891.)★

District Court of Appeal, First District, Division 1, California. Jan. 31, 1929.

Rehearing Denied March 2, 1929.

1. Libel and slander ⟹129—Defendant, in order to recover attorney's fees in action for slander, need not move for dismissal because of plaintiff's failure to file bond (Deering's Gen. Laws 1923, Act 4317; Code Civ. Proc. § 581).

Defendant, in action for slander, need not necessarily move for dismissal on account of failure of plaintiff to file bond required by Deering's Gen. Laws 1923, Act 4317 (St. 1871–72, p. 533), in order to entitle him to recover attorney's fees; the dismissal referred to therein applying to dismissals generally, as provided for by Code Civ. Proc. § 581.

2. Libel and slander ⟹129—Defendant in action for slander need not file general appearance, to entitle him to attorney's fee on dismissal.

It is not necessary that defendant in action for slander file a general appearance in the action to entitle him to an attorney's fee on dismissal of the action, where it appears that he has employed an attorney to defend such action.

3. Libel and slander ⟹129—Each of several defendants in action for slander, on dismissal, were entitled to recover $100 attorney's fee (Deering's Gen. Laws 1923, Act 4317).

Several defendants, each employing counsel in action for slander, on dismissal thereof, are each entitled to recover $100 attorney's fee, in accordance with Deering's Gen. Laws 1923, Act 4317 (St. 1871–72, p. 533); the manifest object of the provision being to reimburse a defendant for expenditure he has been put to by employment of an attorney, and the result being the same, whether he is jointly or severally sued, and it being immaterial that defendants were represented by the same attorneys.

★Rehearing denied.

4. Constitutional law 🔑70(1)—Courts cannot strictly construe law, so as to defeat obvious intention of Legislature to allow counsel fees to defendant in slander action (Deering's Gen. Laws 1923, Act 4317).

Though provision in Deering's Gen. Laws 1923, Act 4317 (St. 1871–72, p. 533), allowing defendant in slander action, on dismissal thereof, counsel fees may be in the nature of a penalty requiring a strict construction, courts are not at liberty to so strictly construe it as to defeat obvious intention of Legislature.

Appeal from Superior Court, Santa Clara County; F. G. Brown, Judge.

Action by Benjamin W. Hills against A. D. Shaffer and others. From a judgment awarding defendants costs and attorney's fees, plaintiff appeals. Affirmed.

Jones & Boalt, of San Jose, and Joseph Slyc, of San Francisco, for appellant.

A. D. Shaffer and Anthony Podesta, both of San Francisco, for respondents.

TYLER, P. J. Appeal from a judgment awarding defendants' costs and attorney's fees in an action for slander. The proceeding was commenced on January 28, 1927. No bond was filed as required by statute in cases of this character, nor was any summons ever issued.

[1-4] On February 4, 1927, defendant A. D. Shaffer, who is an attorney at law, served upon plaintiff written notice of appearance on behalf of himself alone. At the same time Shaffer served notice upon plaintiff for the taking of a deposition. This notice was signed, "A. D. Shaffer and Anthony Podesta, Attorneys for A. D. Shaffer." On February 7th following, and before any of the other defendants appeared, the action was dismissed by plaintiff. Thereafter Shaffer and Podesta filed a cost bill, including $100 as attorney's fees for each of the defendants, amounting in all to the sum of $602.50. This claim was verified by Podesta as attorney for the defendants. It recited that the disbursements were necessarily incurred in the action. It appeared at the hearing that Podesta was employed by Shaffer to assist him and the other defendants in the action, that a material witness was about to depart from the state, and the appearance made by Shaffer was for the purpose of taking his deposition for the benefit of all the defendants. Podesta testified as to the employment of himself and Shaffer by the other defendants, and of the steps taken by them in the preparation for trial. The court thereupon allowed each of the defendants the statutory fee of $100. This appeal is taken from such judgment.

In support thereof, appellant contends that, as the appearance of defendant Shaffer was a voluntary and general one, his failure to insist upon the filing of the statutory undertaking constitute a waiver of his right to demand such undertaking, and he thereby estopped himself from claiming the benefit of the provisions of the statute relating to attorneys' fees. As to the other defendants, it is claimed that they are not entitled to such, as no appearance was ever made by them in the action, either in or out of court. The allowance made by the court was based upon our statute upon the subject, which provides in part that in an action for libel or slander, the clerk shall, before issuing the summons, require a written undertaking on the part of the plaintiff in the sum of $500 to the effect that, if the action is dismissed, or the defendant recover judgment, the sureties shall pay such costs and charges as may be awarded against the plaintiff by the judgment, and in addition thereto the sum of $100 as attorney's fees. Deering, Gen. Laws 1923, pt. 1, p. 1620; Stats. 1871–72, p. 533.

In cases of this character it is not necessary, in order to entitle a defendant to an attorney's fee, that he move for a dismissal of the action on account of the failure on the part of plaintiff to file the bond provided for by the statute. The dismissal referred to therein applies to dismissals generally, as provided for under section 581 of the Code of Civil Procedure. Mere failure, therefore, to insist upon the filing of the bond does not constitute a waiver. Nor is it necessary for a defendant to file a general appearance in the action to entitle him to an attorney's fee, where it appears that he has employed an attorney to defend such action. Caffey v. Mann, 3 Cal. App. 124, 84 P. 424; 15 C. J. p. 69. Under these circumstances, upon the dismissal by the plaintiff, defendants were entitled to counsel fees as a matter of course.

Nor is there any merit in the further claim, that, inasmuch as the action was against several defendants "conjointly guilty of one offense," only one attorney's fee of $100 can be allowed. As above pointed out, it appeared that each of the defendants had, upon the filing of the action, employed counsel to represent him. The mere fact that several defendants had been joined in one action in no manner affects the situation as each one is, nevertheless, a *defendant*. Had the statute provided the attorney's fee should be allowed *in the action* a different situation would be presented. The manifest object of the provision is to reimburse a defendant for the expenditure he has been put to in the employment of an attorney to defend the action. The result is the same whether he is jointly or severally sued, where expense is incurred. Nor does the fact that defendants were represented by the same attorneys alter the situation. Wittler-Corbin Machinery Co. v. Martin, 47 Wash. 123, 91 P. 629. While the provision in the statute allowing a defendant counsel fees may be in the nature of a penalty, requiring a strict construction, courts are not at liberty to so strictly construe it so as to defeat the obvious intention of the Legislature. This intention is to be collected from the words employed. Where there is no ambiguity in such words there is no room for construction. The statute, in providing, as it does, that a defendant shall be allowed an attorney's fee, means just what it says.

The judgment is affirmed.

We concur: KNIGHT, J.; CASHIN, J.

96 Cal. App. 396

BRANDENBURGER v. HANNER et al.
(Civ. 3695.)

District Court of Appeal, Third District, California. Jan. 23, 1929.

1. Appeal and error ⚷1071(1)—In action to recover bankrupt's assets, defendant, whom court found owned 26 animals, held not injured by finding that plaintiff was entitled to 65 "or more."

In bankruptcy trustee's action to recover bankrupt's assets, consisting of herd of cattle, in which court found that one defendant owned 26 animals particularly described, said defendant was not injured by finding, that plaintiff was entitled to 65 "or more" animals, where plaintiff consented to the striking out of words "or more," and there was no claim that evidence was insufficient to support finding that said defendant owned only 26 head of cattle.

2. Damages ⚷69—Unless greater damages are shown, plaintiff is entitled to recover amount equal to interest on value of property detained (Code Civ. Proc. § 667).

Under Code Civ. Proc. § 667, allowing a successful plaintiff to recover damages for detention of personal property, plaintiff, unless greater damages are shown, and in absence of special damages, is entitled to be compensated by recovering amount equal to interest on the value of property from time of taking or from time of demand for a return thereof to date of verdict.

Appeal from Superior Court, Sacramento County; John F. Pullen, Judge.

Action by W. A. Brandenburger, as trustee of the Hanner Company, a partnership, and as trustee of the individual members, John W. Hanner and another, bankrupts, against Edith M. Hanner and husband. From the judgment, named defendant appeals. Affirmed as modified.

Huston, Huston & Huston, of Sacramento, for appellant.

Chauncey H. Dunn and Ralph H. Lewis, both of Sacramento, for respondent.

PLUMMER, J. This action was brought by a trustee in bankruptcy to recover the assets of a bankrupt estate, consisting of a herd of cattle alleged to number 85 Ayrshire cows and heifers and 1 bull. The court found that of the cattle claimed plaintiff was entitled to 65 or more, and also that the defendant Edith M. Hanner owned 26 animals which were described by name, ear tag numberings and body markings. The cause is before us upon a statement on appeal or bill of exceptions by the defendant, on her appeal from the judgment of the trial court, awarding the plaintiff 65 head of cows and heifers, or more, and 1 bull, and also finding that the defendant was the owner of only 26 head of cattle.

The specifications of error are two in number and read as follows:

"I. There is no evidence to justify and to support finding number 4 in so far as it finds that the bankrupts were the owners of, or in possession of any greater number of cattle than 65 head of cows and heifers and one bull.

"II. There is no evidence to justify or support finding number 10 in so far as it finds that plaintiff has been, and now is damaged in the sum of $345.00, by the wrongful detention of the cattle."

Notwithstanding the fact that specification of error No. 1 is limited to the lack of testimony to support the words "or more," appellant has proceeded in her brief to argue that finding No. 4 is uncertain and not sufficient to support the judgment. A number of cases are cited to the effect that the findings should be clear and definite; should not be contradictory; must support the judgment; must respond to the material issues; and that there must be a finding upon all the material issues. It would serve no useful purpose to review these cases, for the simple reason that the only valid objection to finding No. 4 rests upon the appearance of the words "or more," in referring to 65 head of cows and heifers, to which the plaintiff was found to be entitled. The respondent has, as we understand the record, consented that the words "or more," be stricken from the findings, from the conclusions of law, and from the judgment. The complaint sets forth in its first count that a certain band of cattle belonging to the bankrupts, consisting of 85 head of Ayrshire cows, 1 heifer and 1 bull, were in the possession of the said bankrupts and the said Edith M. Hanner. The second count sets forth that said cattle are wrongfully withheld from the plaintiff, to the plaintiff's damage, etc., in an amount alleged. The third count in the complaint alleges that a transfer was made, by the said bankrupts to the said Edith M. Hanner, of the cattle mentioned in the complaint as security, within four months of the adjudication of the bankruptcy of the partnership of John W. Hanner and Elmer R. Hanner, and the individual members thereof; that the transfer was void, as being an attempt to give a preference by said bankrupts to the said Edith M. Hanner.

[1] The findings of fact are to the effect that Edith M. Hanner is entitled to and owns certain cows and heifers to the number of 26, and particularly described said cattle by name, tag numbers and body markings, and that the remainder of the herd of cattle, consisting of 65, or more, cows and heifers and 1 bull, belonged to the bankrupts, and constituted a portion of the estate of said bankrupts. Also, the court found the various facts showing that the plaintiff was entitled to the estate of said bankrupts. It was further found that the defendant Edith M. Hanner wrongfully withheld the possession of said cattle from the plaintiff, to the damage of the plaintiff in the sum of $345. The court further found that the value of the cattle was of the aggregate sum of $5,375, being the sum of $500 for the 1 bull and $75 for each of the cows and heifers. The court found, as just stated, that plaintiff was damaged by the detention of said cattle, in the sum of $345. The sum of $345 is the equivalent of 7 per cent. of the value of the cattle, for the period that the same were withheld from the possession of the plaintiff.

There is no claim whatever that the evidence is insufficient to support the finding of the court that the defendant Edith M. Hanner was the owner of only 26 head of said band of cattle. The answer of the defendant Edith M. Hanner laid claim to all of said cattle, by reason of the transfer herein referred to, but was found by the court to be the owner of only 26 head thereof, and, as just stated, no question is made as to the sufficiency of the evidence to support such finding. This of itself would be sufficient to sustain the judgment, on the theory that the appellant is uninjured by the finding of the court, other than that appellant might be held liable for more than 65 head of cattle, the possession of which she has withheld from the plaintiff, by reason of the use of the words "or more," but, with the striking out of these words from the judgment, the appellant stands before this court, so far as the record is concerned, absolutely uninjured.

[2] We find no merit in appellant's second specification of error. Section 667 of the Code of Civil Procedure allows a successful plaintiff to recover damages for the detention of personal property. The law appears to be well settled that, unless greater damages are shown, the plaintiff, without proof of any special damages, is entitled to be compensated by recovering an amount equal to interest on the value of the property from the time of the taking or from the time of the demand for a return thereof to the date of the verdict. Schmidt v. Nunan, 63 Cal. 371; Black v. Vermont Marble Co., 137 Cal. 683, 70 P. 776; Kelly v. McKibben, 54 Cal. 192; Collins v. Warner, 141 Wash. 162, 251 P. 288.

Section 667, Code of Civil Procedure, also provides that a judgment for the recovery of personal property may be an alternative. See, also, Claudius v. Aguirre, 89 Cal. 501, 26 P. 1077; Erreca v. Meyer, 142 Cal. 308, 75 P. 826. The reasoning of both of these cases support the entry of a judgment in the alternative. We find nothing in the case of Lowe v. Ozmun, 137 Cal. 257, 70 P. 87, cited by appellant, which limits a judgment in an action for recovery of personal property to one or the other of the alternatives mentioned in section 667, Code of Civil Procedure.

While no tangible injury has been shown to appellant by the use of the words "or more," in the judgment in this case, yet, as respondent has consented to the elimination of said words, and has not sought to show that the evidence warranting the use of such words was sufficient to support their appearance in the findings, it is ordered that the judgment be modified by striking therefrom the words "or more" wherever said words appear in the judgment. It is further ordered that in all other respects the judgment be, and the same is hereby affirmed. It is further ordered that the respondent have and recover his costs incurred upon this appeal.

I concur: FINCH, P. J.

96 Cal. App. 564

MAND v. ROSE et al. (Civ. 5877.) ★

District Court of Appeal, First District, Division 2, California. Feb. 1, 1929.

Rehearing Denied March 1, 1929. Hearing Denied by Supreme Court April 1, 1929.

1. Master and servant ⚷300—Defendant, who was sole owner of business or joint venturer therein, was liable for negligence of minor employé within employment.

Defendant, who was either sole owner of business or a joint venturer therein with codefendant, who assumed entire management of enterprise and employed minor in furtherance of its general objects and business, was liable for injuries resulting from negligent acts of said minor committed while acting within general scope of his employment.

2. Master and servant ⚷332(2)—Court may determine whether servant was about master's business, where evidence conclusively shows very slight or very great deviation; other cases present fact question for jury.

Where evidence conclusively shows that a servant deviated from general scope of his authority either in but slight and not unusual manner, or in great or unusual manner, court may determine as matter of law whether servant was acting within scope of his employment, and cases falling between these extremes will be regarded as involving merely a question of fact for jury to determine.

3. Automobiles ⚷245(30)—Whether automobile auction company's employé, driving automobile which struck deceased, was acting within authority, held jury question.

Where employé of company selling secondhand automobiles at public auction, who was employed to assist in preparing for auctions, took automobile, which he had been directed to wash and polish, for purpose of getting the polish, though he was not a licensed driver, and on such trip negligently ran into and fatally injured plaintiff's intestate, whether he was acting within scope of his authority *held* question of fact for the jury.

Appeal from Superior Court, Fresno County; C. E. Beaumont, Judge.

Action by Marie Mand, as administratrix of the estate of F. G. Mand, deceased, against Harry Rose and others. From an adverse judgment, named defendant appeals. Affirmed.

Horace W. B. Smith and James Davis, both of San Francisco, for appellant.

Everts, Ewing, Wild & Everts, L. W. Young, and Dan F. Conway, all of Fresno, for respondents.

LUCAS, Justice pro tem. [1] Appealing from the judgment on a verdict for damages resulting from the negligence of a minor, Harry Rose, one of the defendants and the sole appellant herein, contends that the evidence is insufficient to support the verdict. Two arguments are advanced: First, that the said minor was not an employé of the appellant; and, second, that if it be held he was an employé, he was not acting within the scope of his employment at the time of the injury complained of. Appellant has not urged the first point with any great degree of earnestness, and indeed there is little merit in it. The record shows that appellant was either the sole owner of the Valley Auction Company or a joint venturer therein with defendant J. Boust, who assumed the entire management of the enterprise and employed the said minor in furtherance of its general objects and business. In either event appellant would be liable for injuries resulting from the negligent acts of the employé committed while acting within the general scope of his employment.

The business of the so-called Valley Auction Company was that of selling secondhand automobiles at public auction. To assist in preparing for the auctions the Valley Auction Company, through the said Boust, auctioneer, employed the said minor, Frank Rogers. Rogers was employed the day prior to the first auction, and his first duties consisted in distributing around town circulars in reference to the auction the following day. After the circulars were handed out, Rogers informed Boust that he knew how to wash cars. Upon orders of Boust, Rogers washed Boust's Ford car. Boust, apparently being satisfied with the work, called up Rose and asked him if he wanted to sell his car at auction, saying, "You better bring it down and let us wash it up." Rose told Boust to come down and get the car. Boust and Rogers drove down to appellant's place of business in Boust's Ford. Rogers, who had no driver's license, acting under orders from Boust, returned to the lot of the Valley Auction Company with Boust's Ford, and Boust returned to the lot with appellant's Dodge car. Boust told Rogers to wash and polish appellant's car as he wanted to offer it for sale at Saturday's auction. Rogers testified that prior to washing the car he drove it onto the lot occupied by the Valley Auction Company, and was seen so to do by Boust, who made no objections.

According to Boust's testimony, the following conversation took place prior to Rogers' washing the car:

Boust: "I drove it (Rose's car) down on the lot, drove the car on the washrack and told Rogers to go ahead and wash it up. He went inside and I told him, I said, 'I will be gone about an hour and a half.' I said, 'Answer the phone calls,' like that. He said, 'There is no polish here.' I said, 'There is some simonizing in the car.' I said, 'That is good enough,' like that."

Rogers testified:

"After it (the car) dried, I looked in the car to see if there was any polish in there and there was no polish but just the cleaner polish, so he (referring to Boust) wasn't there

---

★Rehearing denied. Hearing denied by Supreme Court.

and I thought I would go down where I lived down there near the filling station and get some oil polish.

"Q. Mr. Rogers, when you proceeded to go out to get the polish, did you have any business whatsoever, of your own, that you went out there on? I mean by that, did you go out there merely for the purpose of getting the polish? A. Yes, sir.

"Q. And you had no business of your own out there? A. No, sir."

In reference to conditioning autos for sale, Boust testified:

"Q. In other words, you try to make your stock look as nice as possible? A. Yes, at an auction, understand, we sell to the highest dealer.

"Q. But in order to get the high dealer you have to have your goods looking in good shape. A. Naturally you do."

Rogers drove appellant's car out for the purpose of getting the proper oil polish and on this trip carelessly and negligently ran into and injured F. G. Mand, who some two months later died. Whether or not the accident was the proximate cause of his death is immaterial, as the validity of the judgment in so far as the amount thereof is concerned is not attacked.

The sole question for the court's determination herein is whether or not in the circumstances above outlined it can be held that the said Rogers was acting within the scope of his employment at the time of the injury to plaintiff's intestate.

[2] The general rule, as heretofore stated by this court in the case of Wagnitz v. Scharetg (Cal. App.) 265 P. page 318, is: "Where the evidence conclusively shows that a servant deviated from the general scope of his authority in but a slight and not unusual manner, the court may as a matter of law determine that the servant was about his master's business. If the deviation is great and unusual, the court may likewise as a matter of law determine that the servant was not about his master's business, but his own. Cases falling between these extremes will be regarded as involving merely a question of fact to be left to the jury"—citing Berry, The Law of Automobiles (4th Ed.) pp. 1078, 1079, and cases cited; also, Kruse et al. v. White Bros. et al., 81 Cal. App. at page 86, 253 P. 178.

[3] We are of the opinion that the facts in this case do not warrant the court in saying as a matter of law that the said Rogers either was or was not about his master's business at the time of the accident. We believe the case presents purely a question of fact for the jury to decide, particularly in view of the rule laid down in 18 R. C. L. p. 796: "Where a servant steps aside from the master's business and does an act not connected with the business, which is hurtful to another, manifestly the master is not liable for such act, for the reason that having left his employer's business, the relation of master and servant did not exist as to the wrongful act; but if the servant continues about the business of the employer, adopts methods which he deems necessary, expedient or convenient, and the methods adopted prove hurtful to others, the employer is liable.'"

The supporting authority for the last part of the rule is even stronger than the rule itself. See Pittsburgh, Cincinnati & St. Louis Ry. Co. v. Kirk, 102 Ind. 399, 402, 1 N. E. 849, 852, 52 Am. Rep. page 675, at page 677: "Where a servant is engaged in accomplishing an end which is within the scope of his employment, and while so engaged adopts means reasonably intended and directed to the end which result in injury to another, the master is answerable for the consequences, regardless of the motives which induced the adoption of the means; and this too, even though the means employed were outside his authority, and against the express orders of the master." 2 Thomp. Neg. 889, § 6; Wood, Mast. and Serv. 593, 594.

The jury having passed upon the question of fact, and the evidence being, in the opinion of the court, sufficient to support the verdict, the judgment appealed from is affirmed.

We concur: KOFORD, P. J.; STURTEVANT, J.

---

96 Cal. App. 503

PEOPLE v. BELL. (Cr. 1747.)

District Court of Appeal, Second District, Division 2, California. Jan. 30, 1929.

1. Witnesses ⟹268(4)—Refusal to permit cross-examination of statutory rape prosecutrix as to when she started to become unconscious held not unduly to restrict cross-examination.

In prosecution for statutory rape, in which prosecutrix testified that when offense was committed she was not at first aware thereof, explaining that at the time she was in a "sort of stupor," refusal to permit defendant's counsel to cross-examine her as to when she started to become unconscious *held* not unduly to restrict cross-examination.

2. Witnesses ⟹340(3)—Refusal to permit cross-examination of prosecutrix in statutory rape case respecting previous chastity held not to unduly restrict cross-examination to test credibility.

In prosecution for statutory rape, in which neither the reputation nor character of prosecuting witness for chastity was involved, refusal to permit cross-examination of said witness as to matters relating to such issues *held* not unduly to restrict cross-examination for purpose of attacking her credibility as a witness.

⟹For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

3. Criminal law 🔑1035(3), 1129(1)—Trial court's alleged misconduct will not be considered, without assignment of error, and after failure to call trial judge's attention thereto.

Alleged misconduct of trial court, prejudicing defendant in minds of jury, will not be considered by reviewing court, in absence of assignment of error, and after failure to call trial judge's attention to alleged improper statements, so that he might correct the harm, if any.

4. Criminal law 🔑1166½(12)—Trial court's statement as to effect of testimony of prosecuting witness in statutory rape case, which was in accord with record, held not prejudicial.

In prosecution for statutory rape, in which prosecuting witness had testified that when offense was committed she was at first not aware of it and was in partial stupor, trial court's statement, on sustaining objection to cross-examination as to when she started to become unconscious, that she did not mean she was unconscious mentally, *held* not prejudicial, where remark was in accord with record.

5. Criminal law 🔑814(3)—Instruction in statutory rape case, permitting jury to consider other improper conduct, held error, in absence of evidence thereof.

In statutory rape prosecution, giving of instruction that evidence of other improper familiarity between defendant and prosecutrix, both before and after time charged in information, was received in evidence to prove defendant's adulterous disposition, and as having a tendency to render it probable that offense charged was committed, and for no other purpose, *held* error, where there was no evidence of such other acts, nor corroboration of prosecutrix's testimony in respect thereto, except testimony as to admission by defendant that he had sexual intercourse with her and had contracted venereal disease from her.

6. Criminal law 🔑1035(3), 1171(5)—District attorney's argument in rape prosecution that there had been no "denial" of facts held not so prejudicial as to require reversal without objection.

In prosecution for statutory rape, statements of district attorney during his argument that there had been no denial of any facts in case, and that defendant had a right to keep his mouth shut, and that it was up to state to prove that he was guilty, which state had done, *held* not so prejudicial as to require reversal, though no objection thereto was made at the time; such statement not calling attention to defendant's refusal to testify, though word "denial" connotes a disavowal by defendant himself.

[Ed. Note.—For other definitions, see Words and Phrases, First, Second, and Third Series, Denial.]

7. Criminal law 🔑1186(4)—Erroneous instruction in statutory rape case permitting jury to consider other improper conduct held not to require reversal (Const. art. 6, § 4½).

Error in instruction in statutory rape case, permitting jury to consider other improper conduct between prosecutrix and defendant, as tending to prove commission of offense charged, *held* not to require reversal, under Const. art. 6, § 4½, in view of prosecutrix's uncontradicted testimony, corroborated by testimony of other witnesses respecting defendant's admission that he had had sexual intercourse with her and had contracted venereal disease from her.

Appeal from Superior Court, Orange County; James L. Allen, Judge.

Wilfred Bell was convicted of statutory rape, and he appeals. Affirmed.

Charles D. Swanner, of Santa Ana, for appellant.

U. S. Webb, Atty. Gen., and John L. Flynn and Warner I. Praul, Deputy Attys. Gen., for the People.

THOMPSON, J. The defendant was charged by information filed by the district attorney of Orange county with the crime of statutory rape. The jury returned a verdict of guilty, and defendant appeals from the judgment and from the order denying his motion for a new trial.

The appellant assigns four reasons for reversal as follows: (1) That the court erred in restricting the cross-examination of the complaining witness, and of her father. (2) That the trial judge was guilty of misconduct. (3) That the court gave an erroneous instruction. (4) That the district attorney was guilty of misconduct.

[1] We shall dispose of the arguments in the foregoing order and turn our attention to the claim that appellant was not permitted to cross-examine the complaining witness or her father on pertinent questions. The record discloses that the prosecutrix, a girl of 16 years, testified to the following situation:

On the evening of May 26, 1928, she and appellant attended a party on board a boat called the Vision, lying in Newport Harbor. They went aboard between 8 and 9 p. m., went down below with the others, of whom there were about six, and talked and drank whisky. Some time before 12 o'clock, the complaining witness became sick, and went on deck. About five minutes later the appellant followed her. They sat and talked for a while. Appellant then went and got some blankets, so that she could lie down. He then crawled in under the blankets with her, and there accomplished the act of intercourse. During the direct examination of this witness she testified that, just before the act, "I was sick, and I didn't know at first, but afterwards I was aware of it." On cross-examination she answered in response to queries as follows:

"Q. And you say, when he first started to having intercourse with you, that you were unconscious? A. Partly.

"Q. You didn't know what he was doing? A. Not at first."

Later, on cross-examination, counsel asked the question: "When did you start to become unconscious?" The district attorney objected, on the ground that counsel was assuming facts not in evidence, whereupon the court stated: "She testified that she didn't realize the fact of the act, but not meaning that she was unconscious mentally." In response to further queries the witness explained that she knew what was happening, but that she was in "a sort of stupor." There can be no doubt, under this state of the record, that the court was correct in his statement and in his ruling. While counsel had led her into the use of the term "unconscious" once on cross-examination, the trial judge was manifestly stating her testimony on direct examination, and was eminently fair, inclining, if anything, to defendant's interpretation of her language.

[2] The next occurrence of which appellant complains took place when he asked the witness if she had not run away from home on one occasion. An objection was interposed, and to the argument of defendant's counsel that he was to cross-examine the prosecutrix upon all angles the court interposed: "That is true as to the crime, but I don't think it is necessary to go into any other part of her life. I take it it doesn't make any difference what her past life has been." Before the objection was sustained, counsel further stated that the witness had said that "this" (referring to the date of May 26th) "was the only time she left home, in May." We here parenthetically insert that the record does not bear out counsel's statement. Her testimony was that, when she left her father's house earlier in May, it was the first time she had left "to work." A similar objection was sustained to the query: "Is it not a fact that your father ordered you from home on May 15th?"

The last instance is so nearly akin and so aptly illustrates the purposes of the other interrogatories that we also set it down here. The question was asked of the father of the girl as follows: "Isn't it a fact, Mr. Johnston, that you told her she would have to leave home if she didn't quit running around with a certain girl in Balboa?" Counsel argues that in this character of action he should have been allowed the widest latitude compatible with the technical rules of evidence, for the purpose of testing the credibility of the prosecuting witness. This statement is in apparent accord with the authorities (see People v. Baldwin, 117 Cal. 244, 49 P. 186), even in those cases where the female is under the age of consent. But neither the reputation nor the character of the witness for chastity was involved in this action. The proper method to have attacked her credibility was to have directed questions to her, or her father, which had some bearing upon her reputation or character for truth, honesty, and integrity. We do not perceive how her past conduct and home life could have a tendency to disprove her statements concerning the events of May 26th. A similar ruling was announced in People v. Casanova, 54 Cal. App. 439, 202 P. 45. See, also, 27 Cal. Jur. 131.

[3, 4] We have already noted the remarks of the court which appellant says constitute misconduct, and prejudiced the defendant in the minds of the jury. It is to be observed in the first instance that no assignment of misconduct was made by appellant, nor was the judge's attention called to the statements, so that he might correct the harm, if any was done. In the second place, we do not put the same construction upon the remarks of the court as does the appellant. As we have already pointed out, the trial judge was in accord with the record when he said that the witness had not testified that she was unconscious, and he was stating the law substantially when he said: "I don't think it is necessary to go into any other part of her life. I take it it doesn't make any difference what her past life has been."

[5] Appellant's next attack upon the judgment is on the ground that the court erred in giving the following instruction: "You are further instructed that evidence of other acts of sexual intercourse between the defendant and the prosecutrix, and of improper familiarity on the part of the defendant towards and with the prosecutrix, both before and after the time charged in the information, is received and admitted in evidence to prove the adulterous disposition of the defendant, and as having a tendency to render it more probable that the act of sexual intercourse charged and relied on in the information was committed, and for no other purpose."

Our attention is directed to the case of People v. Haugh (Cal. App.) 265 P. 891, where the giving of almost the identical instruction was held erroneous for the reason that there was no testimony of any acts of sexual intercourse after the one complained of and the testimony of the prosecutrix was not substantiated by any other evidence, hence her statement of other acts of intercourse did not have a tendency to render more credible her own testimony. So here we have no testimony concerning acts of intercourse prior to the one complained of and no corroboration of her testimony of subsequent occurrences, except the testimony of several witnesses to the admission made by appellant that he had sexual intercourse with her and had contracted a venereal disease from her. This admission is not sufficiently broad to cover more than the one act, hence we fail to see how the testimony of the prosecutrix to the acts after May 26th could strengthen her statements concerning the affair of that date or tend to establish more firmly the possession of an adulterous disposition by the appellant.

[6] During the argument of the district attorney, after reciting his version of the facts happening on the boat, he said: "There has been no denial of any of the facts in this

case; not a denial of a thing all the way down the case. The witnesses who came on the witness stand all were to tell you that at some time or another the girl said she was 19 years of age, instead of 16; and the girl herself told you that she told the boys she was 17." Again, he argued: "* * * There is not one scintilla of evidence here which shows to you, or shows to me, or shows to any one else, that he did not have sexual intercourse with that girl." Lastly he asserted: "And yet that is the story which has been presented, and there is not one scintilla of evidence—and by a 'scintilla' I mean there is not one bit of evidence—which contradicts that story. Not a bit of it. The defendant has a right to keep his mouth shut, and it is up to us to prove that he is guilty; and ladies and gentlemen, in this case we have proven absolutely that he is guilty in this case. You must take the evidence as it is received."

The appellant asserts that the first and last of these statements of the district attorney constitute misconduct of such a serious nature that it was not necessary for him to object at the time or assign them as misconduct and thus give to the court and counsel an opportunity to rectify the damage, if any was done. We cannot agree with this contention. The argument was short and concise. We have quoted the second statement of the district attorney, for the purpose of more faithfully portraying the general tenor of his remarks. The thought which he endeavored to impress upon the jury was that there was no contradiction in the evidence of the story of the prosecutrix relating to any of the circumstances of May 26, 1928, and that the admission of the defendant corroborated her in that particular. His argument, as it appears to us from the record, was free of rancor or any attempt to take undue advantage of the defendant. It cannot be classed with those of the over-zealous prosecutor. And while, strictly speaking, the word "denial," used by him in the first quoted statement, connotes a disavowal by the defendant himself, we do not believe that the jury understood that the attorney was directly or indirectly calling attention to the refusal of the appellant to testify. He was directing attention to that fact in the last statement, but it was an express declaration that such was his right. We fail to appreciate how the appellant could have been prejudiced by the assertion of that which was his right. At least, it is apparent from the entire argument that no prejudice was suffered which could not easily have been cured, and the evil eradicated, by timely objection.

[7] We must now determine whether the error found to have been committed in the giving of the instruction already discussed, requires a reversal of the judgment. We have already observed that no testimony was introduced by the appellant to contradict any of the circumstances related by her on the evening in question, but that in fact he admitted before several persons the commission of the act. The jury were instructed that the crime charged is one "easy to charge and difficult to disprove," and that they should view with great caution "the testimony of a child of tender years." With this instruction before them, it is difficult to believe that the jury gave any more credence to the testimony of the prosecutrix, by reason of her statement that there were two or three other acts of sexual intercourse. It is much more reasonable to believe that they were guided in their determination by her uncontradicted story, corroborated by an admission, and, in particular, that part of the admission wherein appellant charged her with having transmitted to him a venereal disease. Under all the circumstances, we cannot say under section 4½ of article 6 of the Constitution that a miscarriage of justice has occurred.

Judgment and order affirmed.

We concur: WORKS, P. J.; CRAIG, J.

---

96 Cal. App. 510

Ex parte FLANNERY. (Cr. 1755.)

District Court of Appeal, Second District, Division 2, California. Jan. 30, 1929.

1. Habeas corpus ⚷90—Deputy of county probation department's referee, not appointed as such by court, could not act as referee in investigating question of children's custody, but was mere volunteer.

Where question of custody of minor children was referred to referee of county probation department for investigation and report, when order, requiring mother to show cause why custody of children should not be given to father, came on for hearing, referee's deputy had no authority to act as referee on request of referee appointed by the court, but in doing so was a mere volunteer.

2. Habeas corpus ⚷85(1)—Court must presumee that witnesses interviewed by deputy of county probation referee, investigating question of children's custody, were not sworn (Code Civ. Proc. § 642).

Where mother appeared in response to order to show cause why custody of children should not be given to father, and, without objection, court referred matter to referee of county probation department, who requested one of her deputies to investigate case, *held* that court must presume that none of witnesses interviewed by deputy were sworn, since, under Code Civ. Proc. § 642, she had no authority to administrater oaths, because referee derives authority only from order of court.

3. Habeas corpus ⚷29—Investigation, without swearing witnesses and notice to attorneys, deprived mother of right to show cause why children's custody should be denied father.

Where mother appeared in response to order to show cause why custody of children should not be given to father, and question was referred, without objection, to referee of county probation department, whose deputy examined witnesses without notifying attorneys of proceedings, *held* that mother was thereby prevented from showing cause and from having hearing, and was entitled to habeas corpus to secure release of minor children from custody of probation department, notwithstanding affidavits on her behalf were submitted to court.

Application of Jeffie Harris Flannery for a writ of habeas corpus to be directed to the probation department of Los Angeles county to secure the release from its custody of petitioner's minor children. Writ granted.

Griffith Jones, of Los Angeles, for petitioner.
Marion P. Betty, of Los Angeles, for respondents.

THOMPSON, J. The petitioner, the mother of two minor children, Charles Harris Flannery and Martha A. Flannery, presented a petition for the writ of habeas corpus, for the purpose of testing the legality of the detention of the children mentioned. Petitioner appeared before the superior court on October 16, 1928, in response to an order to show cause why the custody of the children should not be given to the father. At that time, without objection on the part of counsel for petitioner, the court made an order as follows: "The matter will be referred to Mrs. Maxwell, the referee, for her investigation and report." The Mrs. Maxwell mentioned is Mary Maxwell, the referee of the probation department of Los Angeles county. When the matter came to her attention, she was unable to handle it herself, and asked Mrs. Kara Root, one of her deputies, to make an investigation of the case. Mrs. Root asked the petitioner and her witnesses to come to her office, and at a different time requested the father and his witnesses to appear before her. The parties and their witnesses were interviewed independently of each other. Mrs. Maxwell was present when Mrs. Root examined some of the witnesses, but to her knowledge the witnesses were not sworn or the attorneys notified of the proceedings. A report was made by Mrs. Root, and, at the time of the hearing of the report, counsel for petitioner asked leave to have witnesses sworn and examined for the purpose of refuting the report. The motion was denied, but the court read the entire report of Mrs. Root, and made an order giving the custody of the children to the probation department of the county of Los Angeles, with instructions to find for them a suitable home. At the conclusion of the hearing before us we made an order giving the custody of the children to the petitioner until the cause was disposed of.

[1-3] It is obvious that the petitioner was never permitted to show cause why she should not be deprived of the custody of her children. Mrs. Root was not the referee appointed by the court, and had no authority to act as such. She was a mere volunteer. We must not only presume that none of the witnesses interviewed by her were sworn, because Mrs. Maxwell testifies that, although she was present when some were examined, they were not, to her knowledge, but also from the fact that she had no authority to administer oaths, for the reason that a referee derives authority only from the order of the court. Solomon v. Maguire, 29 Cal. 227; section 642, Code Civ. Proc. It is not enough that affidavits on behalf of plaintiff were submitted to the court, for the reason we have already indicated, that no opportunity was given the petitioner to show cause, and no hearing was had.

Charles Harris Flannery and Martha A. Flannery are released from the custody of the probation department of the county of Los Angeles.

We concur: WORKS, P. J.; CRAIG, J.

---

96 Cal. App. 443

WICKHAM v. BECKER, Chief of Police, et al.★
(Civ. 6384.)

District Court of Appeal. First District, Division 1, California. Jan. 28, 1929.

Rehearing Denied Feb. 27, 1929. Hearing Denied by Supreme Court March 28, 1929.

1. Municipal corporations ⚷601—Ordinance regulating location of industries, apartment houses, etc., pursuant to general, comprehensive, and reasonably necessary zoning plan, reasonably related to public health, safety, etc., is valid.

Generally, municipality's enactment of ordinance regulating, restricting, and segregating location of industries, businesses, trades, or callings, apartment houses, etc., pursuant to general, comprehensive, and reasonably necessary zoning plan, reasonably related to public health, safety, morals, or general welfare, and applied fairly and impartially, is a valid exercise of police power.

2. Municipal corporations ⚷601—Municipality cannot grant monopoly to existing business establishments in unrestricted districts under guise of regulating and segregating business.

Municipality cannot, under guise of regulating business and segregating it in particular district, grant a monopoly to business establishments and enterprises already situated in unrestricted districts, though it is not necessary for zoning purposes that existing uses be removed.

★Rehearing denied. Hearing denied by Supreme Court.

3. Municipal corporations ⚷601—Ordinance creating small business district, with only one vacant lot, held void, as granting monopoly to existing business enterprises therein.

Zoning ordinance, creating business district of two distinct areas, containing together less than one acre of land, in which there was only one 50x70-foot vacant lot available for apartment houses, theaters, and other business enterprises permitted by ordinance in such district, *held* void, as granting business monopoly to enterprises already established therein.

4. Municipal corporations ⚷63(1)—Judgment decreeing that certain property is business property in business district, as well as nullifying ordinance excluding it, held beyond court's authority (St. 1923, p. 1564, § 41).

Judgment, not only nullifying zoning ordinance of city of Piedmont, granting business monopoly to enterprises already established in business district, so far as affecting plaintiff's property just outside such district, but decreeing that her property is business property in business district, permitting her to build stores thereon, and enjoining city from interfering, *held* erroneous, as exceeding court's authority; municipality having power under its charter (St. 1923, p. 1564, § 41) to revise zoning scheme or adopt new one, eliminating such objectionable feature, without necessarily including plaintiff's property in business district.

5. Constitutional law ⚷70(3)—Courts are loath to substitute their judgment for legislative judgment as to necessity for particular enactment in exercise of police power.

Courts are loath to substitute their judgment for legislative judgment as to necessity for particular enactment, justified in exercise of police power by considerations of public health, safety, morals, or general welfare, though differing with legislative branch as to wisdom and propriety of enactment as means of accomplishing particular end.

Appeal from Superior Court, Alameda County; J. D. Murphey, Judge.

Action by Jessie E. Wickham against B. F. Becker, as Chief of Police of the City of Piedmont, and such city. Judgment for plaintiff, and defendants appeal. Modified, and affirmed, as modified.

George M. Naus, of San Francisco, and Girard N. Richardson, of Oakland, for appellants.

Lovett K. Fraser and Cleveland R. Wright, both of San Francisco, for respondent.

PER CURIAM. Plaintiff is the owner of certain premises situate on the northerly corner of Grand and Linda avenues, in the city of Piedmont, which heretofore have been utilized for residential purposes. Shortly prior to the commencement of this suit she concluded to convert the same into business property, and to that end made arrangements to construct two stores thereon. The city's officers threatened that, if she proceeded with such construction, she would be arrested for the alleged violation of a zoning ordinance enacted by said city on May 21, 1925; and thereupon she commenced this suit, to have said ordinance declared void and to enjoin the city and its chief of police from enforcing its terms. Upon trial a decree was granted in her favor, from which defendants have appealed.

The city is operated under a freeholders' charter approved by the Legislature in 1923 (St. 1923, p. 1564), and the territory embraced within its corporate limits contains 1,151 acres. It is contiguous to and entirely surrounded by the city of Oakland, and at the time of trial Piedmont's population was approximately 9,000 people. Section 41 of the charter is entitled "Zoning System," and reads as follows: "The city of Piedmont is hereby declared to be primarily a residential city and the council shall have power to establish such zoning systems within the city as may in its judgment be most beneficial and in such zoning systems may prohibit the erection or maintenance of any class or classes of buildings within certain areas and may classify and reclassify the zones established. * * *"

Proceeding under the authority thus granted, the legislative body of the city enacted the zoning ordinance in question, which purports to divide the city into three zones. Section 3 of the ordinance relates to zone A and provides that the area included therein shall be occupied by none other than single family dwellings, schools, and churches, together with the usual accessories, including private garages for the accommodation of not more than four automobiles. Section 4, dealing with zone B, restricts its occupation to similar uses and also to the use of any "public institution of an educational or philanthropic nature, Masonic or other fraternal building, and the usual accessories located on the same lot. * * *" Section 5 reads as follows: "No building, structure or improvement shall be erected, constructed, established, altered or enlarged in zone C, which is designated, arranged or intended to be occupied or used for any purpose other than those specified in sections 3 and 4 thereof, and that of apartment houses, flats, stores or shops for the conduct of a retail business, theaters, offices of dentists and physicians, studios or any retail business or office not prohibited by law or ordinance now in force or which may be hereafter enacted."

[1] The law upon the subject of municipal zoning is fully discussed and apparently definitely settled by a number of recent decisions of the Supreme Court, notably Miller v. Board of Public Works, 195 Cal. 477, 234 P. 381, 38 A. L. R. 1479; Zahn v. Board of Public Works, 195 Cal. 497, 234 P. 388; In re White, 195 Cal. 516, 234 P. 396, and Pacific

Palisades Ass'n v. City of Huntington Beach, 196 Cal. 211, 237 P. 538, 40 A. L. R. 782; and it is held generally that the enactment by a municipality of an ordinance pursuant to a general comprehensive zoning plan, based upon considerations of public health, safety, morals, or the general welfare, applied fairly and impartially, which ordinance regulates, restricts and segregates the location of the industries, the several classes of business, trade or calling, and the location of apartment or tenement houses, club houses, club residences, and the several classes of public and semipublic buildings, is a valid exercise of the police power, and is not in contravention of the fundamental law of the state.

[2] However, as indicated, such zoning must be reasonably related to the health, safety, morals, and general welfare of the community, and it must be reasonably necessary; and in this regard one of the limitations placed upon such power is that the "municipality is not permitted, under the guise of regulating business and segregating it to a particular district, to grant a monopoly to business establishments and enterprises already situated in unrestricted districts." Pacific Palisades Ass'n v. City of Huntington Beach, supra; In re White, supra. The latter case involved the zoning ordinance of the town of Atherton, San Mateo county, and, in declaring the entire ordinance void, the court said:

"It appears in the instant case that the board of trustees undertook to zone the town into two districts, one of which was devoted to residential uses and the other to business uses. This was in effect a legislative finding that the maintenance of both such districts was necessary to the public welfare. It was the duty, therefore, of the board of trustees when zoning the town to make adequate provision for both such uses. That adequate provision for the business district was not made is at once apparent. It is true that some provision was made for business; that is to say, one and one-tenth acres out of 2500 acres was designated as an 'unrestricted district' in which buildings to be 'devoted to any lawful use' might be constructed. But it is apparent from the fact that the 'unrestricted district' was already fully occupied by a gasoline station and a restaurant to the exclusion of new business uses, that the board of trustees was limiting the 'unrestricted district' to business enterprises already established and to the exclusion of any future business development. The ordinance in effect grants a monopoly to the business establishments already situate in the one and one-tenth acres of the 'unrestricted district.' In other words, under the guise of regulating business and segregating it to a particular district, the ordinance in fact prohibits all business save and except that of the favored two already established."

[3] The situation presented here, with respect to the creation of a business monopoly, is to all intents and purposes the same as the one existing there. Here, too, the legislative body of the city adopted a zoning ordinance creating both residential and business districts, which, as there stated, was in effect a determination that both such districts were necessary to the public welfare. Consequently, as there held, it was the duty of the legislative body to make adequate provision for both such uses. This it failed to do; but, on the contrary, as was done in the Atherton Case, the municipality limited the unrestricted district to business enterprises already established, to the practical exclusion of any further business development. With respect thereto the record reveals that, in creating the so-called business district, the city selected two distinct areas, situate in different sections of the city. Together they contain less than one acre of land. One parcel, the smaller one, is situate on the southerly corner of Grand and Linda avenues, directly opposite plaintiff's property. It has a frontage of only 75 feet on Grand avenue and 125 feet on Linda avenue, and at the time of the enactment of the ordinance was completely occupied by two stores—a general market and a drug store—leaving no available space whatever for the development of future business. The other or larger area includes both sides of a portion of Highland avenue at its junction with Magnolia avenue. However, the entire westerly side of Highland avenue, within said area, is owned by the city, and consequently cannot be utilized for private business purposes; and the entire easterly side, within said area, with the exception of a single lot, having a frontage of 50 feet and a depth of 70 feet, was entirely occupied at the time the ordinance was passed by four established places of business, namely, a grocery store, a drug store, a candy store, and a gasoline station, the vacant lot lying between the gasoline station and one of the stores, and which at the time of trial, so the trial court found, was being held by the owners thereof for speculation at an exorbitant price. Obviously, therefore, at the time of the adoption of the ordinance, there was no available ground left within either area for future business development, except said vacant lot; and from the dimensions thereof (50×70 feet) it cannot be reasonably said to constitute "adequate provision" for the building of apartment houses, flats, theaters, and the other various kinds of business enterprises which the zoning ordinance purports to permit. The plain effect of the ordinance is, therefore, to prevent all business within the city, except and save that of the favored places already established, and to grant to such places a business monopoly; and upon that ground the trial court was correct, in our opinion, in declaring said ordi-

nance void in so far as it affected plaintiff's property. In re White, supra; Pacific Palisades Ass'n v. City of Huntington Beach, supra. As held in Zahn v. Board of Public Works, supra, for the purposes of zoning, it is not necessary that existing uses shall be removed. See, also, Spector v. Building Inspector, 250 Mass. 63, 145 N. E. 265; City of Aurora v. Burns, 319 Ill. 84, 149 N. E. 784. But evidently such exemption may be accomplished without creating a monopoly.

[4] The judgment entered in the action, besides nullifying said ordinance in so far as it affected plaintiff's property, decreed as matter of law in paragraphs 1, 2, and 4 thereof that plaintiff's property is "business property in a business district, and may be used for business purposes"; also that "she is hereby permitted to build stores on her property * * * according to the plans and specifications on file"; and that the city and its officers be enjoined from "interfering in any way or from preventing plaintiff or her agents from constructing stores on her property * * * in conformity with the building laws of the city of Piedmont or in conformity witth her plans and specifications on file." In this respect the judgment, in our opinion, goes too far, for the reason that, the ordinance being nullified, the municipality doubtless has the power under its charter provision to revise its zoning scheme entirely, or to adopt a new one, in such manner as to eliminate the objectionable feature of a business monopoly; and that being so, it was beyond the authority of the court in our opinion to indicate the nature or extent of the zoning scheme the municipality should thereafter adopt, or to say where the lines of the different zones should be drawn, or what particular property should or should not be included therein, or otherwise to interfere with the lawful exercise of the municipal legislative power. Such, in our opinion, is the effect of paragraphs 1, 2, and 4 of the judgment, as we construe them.

[5] As said in Miller v. Board of Public Works, supra, "It is scarcely necessary to reiterate here the well-recognized principle that courts are loath to substitute their judgment as to the necessity for a particular enactment for the legislative judgment as to the need of such enactment with reference to the exercise of the police power. A large discretion is vested in the legislative branch of the government with reference to the exercise of the police power. * * * The courts may differ with the Legislature as to the wisdom and propriety of a particular enactment as a means of accomplishing a particular end; but as long as there are considerations of public health, safety, morals, or general welfare which the legislative body may have had in mind, which have justified the regulation, it must be assumed by the court that the legislative body had those considerations in mind and that those considerations did justify the regulation. State ex rel. Civello v. City of New Orleans [154 La. 271, 97 So. 440, 33 A. L. R. 260], supra. In Ex parte Hadacheck [165 Cal. 416, 132 P. 584, L. R. A. 1916B, 1248], supra, the court held in effect that, when the necessity or propriety of an enactment was a question upon which reasonable minds might differ, the propriety and necessity of such enactment was a matter of legislative determination."

Apparently said provisions were inserted in the judgment because of certain affirmative findings made by the trial court upon allegations contained in the complaint to the effect that plaintiff's property, on account of its location on a main thoroughfare of the city and its proximity to the municipal boundary of the city of Oakland, the presence of the two stores immediately across the street from her premises, the great volume of vehicular traffic passing in front and along the side of her property, the noise caused thereby, and by the presence of an electric substation in the same block, and the depreciated value of the property, caused by its restricted use for residential purposes, was no longer suitable for residential purposes. But in this regard it may be stated that, if the ordinance were free from creating the evil of a business monopoly, it may be seriously questioned as to whether or not any or all of the factors above mentioned, assuming them to exist, would be legally sufficient, in and of themselves, to render said ordinance void. See the recent case of Feraut v. City of Sacramento (Cal. Sup.) 269 P. 537, wherein most of the elements above mentioned are discussed, and many of the authorities relating thereto are summarized and applied. In any event, the factors above mentioned tended to serve only as several of the many grounds upon which plaintiff sought to have the ordinance declared invalid and consequently unenforceable against her property: and since the trial court by its judgment has so decreed, and correctly so, we believe, we think it had not the power to go beyond such adjudication, and in effect decree that, in whatever zoning ordinance the city might thereafter adopt, plaintiff's property should be included within the business zone.

For the reasons stated, it ordered that paragraphs 1, 2, and 4 of the judgment be stricken therefrom, and, as thus modified, the judgment is affirmed; respondent to recover costs.

96 Cal. App. 381

PEOPLE v. LAMBERT. (Cr. 1743.)

District Court of Appeal, Second District, Division 1, California. Jan. 22, 1929.

Criminal law ⚷1069(6)—Ignorance of appellant of court rule replacing repealed statute held insufficient excuse for delay in filing application stating grounds of appeal (Pen. Code, § 1247; Supreme Court and District Court of Appeal Rules, § 7).

Failure to file application to trial court stating grounds of appeal within time required by section 7 of Rules of Supreme Court and District Court of Appeal, *held* not excused by appellant's reliance on fact that Pen. Code, § 1247, making similar provisions, had been repealed, and that he did not know rule had taken its place.

Appeal from Superior Court, San Diego County; S. M. Marsh, Judge.

Proceedings by the People against Frank Lambert. From the judgment, defendant appeals. Appeal dismissed.

Edward J. Kelly, of San Diego, for appellant.

U. S. Webb, Atty. Gen., and L. G. Campbell, Deputy Atty. Gen., for the People.

HOUSER, J. This is a motion to dismiss an appeal on the ground that it was not perfected as required by section 7 of the Rules of the Supreme Court and the District Court of Appeal.

So far as is here material, the rule to which reference has been had provides that: "Upon an appeal by the defendant from a judgment of conviction, * * * the appellant must, within five days after giving notice of the appeal, file with the clerk and present an application to the trial court, stating in general terms the grounds of the appeal and the points upon which the appellant relies. * * * If such application is not filed within said time the appeal shall be dismissed. * * *"

It appears that, after giving notice of appeal herein, appellant failed to comply with the requirement of such rule to the effect that, within five days thereafter, he must file with the clerk a statement containing the grounds of the appeal and the points upon which he relies for reversal of the judgment. However, it was shown that he did file such statement on the seventh day following his notice of appeal.

On oral argument of the motion, the only reason assigned by appellant for his dereliction in the matter was that, although he knew that, prior to the adoption of the rule, in language nearly identical therewith, section 1247 of the Penal Code provided for the necessary procedure, together with a penalty for its violation, he relied on the fact that the statute had been repealed, and did not know that by statutory provision the rule had taken or would take the place of the repealed statute.

Although it appears that the failure of appellant to comply with the provisions of the rule was wholly unintentional on his part, and that in some respects the delay may be said to be inconsequential, it is manifest that, if the rule is to be effective, it must be generally enforced and its infraction excused in exceptional circumstances only. In matters of the nature of that here under consideration, it is a well-established principle that mere lack of knowledge of a provision of a law or rule of court will not suffice as an excuse for noncompliance with its requirements.

The motion to dismiss the appeal is granted.

We concur: CONREY, P. J.; YORK, J.

---

96 Cal. App. 568

MERCANTILE TRUST CO. v. REAY et al. (Civ. 6549.)

District Court of Appeal, First District, Division 1, California. Feb. 1, 1929.

1. Appeal and error ⚷1012(1)—Weight of evidence was primarily for trial court.

Weight of evidence was primarily for the trial court.

2. Gifts ⚷15, 18(1), 24—To make valid "gift" there must be intent on donor's part to make gift, a delivery, and acceptance by donee.

To make a valid "gift" there must be an intent on part of donor to make gift, a delivery of thing given, and an acceptance on part of donee.

[Ed. Note.—For other definitions, see Words and Phrases, First, Second, and Third Series, Gift.]

3. Gifts ⚷49(5)—Evidence held to support finding that deceased made gift to her son of sum transferred to his bank account.

Evidence *held* sufficient to sustain court's finding that deceased made gift to son during her lifetime of sum transferred to son's bank account.

4. Gifts ⚷30(1)—Son's writing agreeing to pay mother interest did not invalidate gift of sum transferred to son's bank account.

Writing in which son agreed to give mother interest on deposit did not invalidate gift of sum transferred to son's bank account, since such act on part of son was susceptible of construction that it was return gift by son to his mother.

5. Appeal and error ⚷1056(1)—Excluding letter written at mother's request complaining about son claiming sum mother had transferred to his bank account was gift, if error, held harmless.

Excluding letter, written by attorney at request of mother about 13 months prior to al-

---

⚷For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

leged gift, in which mother complained of certain acts of son who was claiming in suit that sum mother had transferred to his bank account was a gift, if error, *held* harmless.

6. Gifts ⚷47(1), 49(1)—**Burden of proving gift is upon donee, and every element must be sustained by explicit and convincing evidence.**

Burden of proving a gift is upon donee, and every element necessary to constitute a gift must be sustained by explicit and convincing evidence.

Appeal from Superior Court, City and County of San Francisco; Daniel C. Deasy, Judge.

Action of interpleader to determine title to bank deposit by the Mercantile Trust Company of California against Charles G. Reay, Wallace R. Reay, and others, in which certain defendants filed cross-complaints. From the judgment, Dacia B. Reay, as administratrix with the will annexed of the estate of Wallace R. Reay, deceased, who was substituted for Wallace R. Reay, appeals. Affirmed.

Dunne, Dunne & Cook, of San Francisco, for appellant.

Marshall Nuckolls, of San Francisco (Monroe B. Kulberg, of San Francisco, of counsel), for respondent.

NEEDHAM, Justice pro tem. Christiana G. Reay died in 1925, intestate, leaving three sons—Joseph W., Jr., Wallace, and Charles. At the time of her death there was on deposit in the Mercantile Trust Company of California, in the name of Joseph W. Reay, Jr., approximately $16,000. A claim to this deposit having been made to the bank by one of the heirs, that the same was property belonging to the estate of Christiana G. Reay, the bank brought a suit, making Joseph W. Reay, Jr., Wallace Reay, and Charles Reay defendants, and requiring them to interplead. An interlocutory decree was granted, and the three defendants just named filed cross-complaints and answers. Charles subsequently disclaimed all right to the said sum; Wallace Reay having died during the pendency of the action, his administratrix appeared through Dacia Reay, and it was stipulated at the trial that Dacia Reay might be considered as representing the estate of Christiana G. Reay, inasmuch as the defendant Joseph W. Reay, Jr., was the administrator thereof and made claim to the money in controversy in his individual right. It was admitted that the $16,000 in controversy was what remained of a sum of $25,000 originally deposited in the savings account of Joseph W. Reay, Jr., on June 27, 1921, and was claimed by him to be a gift from his mother, Christiana.

The court found that Joseph W. Reay, Jr., had on deposit in the American Trust Company, the successor of the Mercantile Trust Company of California, the plaintiff, a sum of money amounting to $16,000 with accrued interest, and that the other defendants had made claim to said money; that Joseph W. Reay, Jr., was the owner and entitled to all of said money, together with the interest thereon; and that the defendants other than Joseph W. Reay, Jr., are without any right or claim thereto whatsoever.

The pivotal issue at the trial was whether Joseph W. Reay, Jr., had established his asserted gift to him of the deposit of June 27, 1921, which is the claim in derogation of his mother's title.

The appellant by this appeal contends that the findings in favor of the gift to the respondent of the deposit in question are against the law and the evidence, and, further, that prejudicial error was committed during the trial in rulings upon the admissibility of evidence.

The appellant in her opening brief, after making a brief statement of the facts, consisting of less than three pages, then submits what she denominated an argument consisting of two pages, nearly one-half of which argument or opening brief is occupied with lines containing citations of authorities. As a sample of appellant's argument in her opening brief we quote the following:

"He himself has characterized the transfer —not a gift but a mere deposit; and a deposit, the entire interest on which was payable to his mother as it should accrue." (Supp. pp. 45–47.) Then citing certain authorities.

"That such must have been the case appears from respondent's sworn admissions on the stand. It is likewise demonstrated by the testimony of his own witnesses, called and examined by him." (Supp. pp. 47-55.) Then citing certain authorities, and again: "Refusal in evidence of appellant's Exhibit 'A' for identification constituted prejudicial error." (Supp. pp. 56–62.) Then citing certain authorities.

The above quotations constitute practically all of the opening brief of appellant. There was added as a supplement the pleadings, findings, judgment, and excerpts from the reporter's transcript.

The respondent in his brief in criticism of the opening brief of the appellant states: "We must, therefore, make her points for her; argue her case for her, in effect—and present our answer thereto; or in the alternative, present only our own case, irrespective of appellant's arguments, and go without the privilege of answering appellant's arguments, which, undoubtedly, would be brought forth in a vicious and defenseless attack in appellant's closing brief."

Respondent cites the cases of Duncan v. Ramish, 142 Cal. 686, at pages 689, 690, 76 P. 661; Florence v. Helms, 136 Cal. 612, 69 P. 429; and Kyle v. Craig, 125 Cal. 107, at page

116, 57 P. 791, in which cases our Supreme Court, where appellant's brief was similar to this, refused to consider the points made.

However, as the evidence in the case is quite brief and the appellant urges only three grounds for a reversal—(1) that the findings of the court in favor of a gift are unsupported by the evidence; (2) respondent is bound by his contemporaneous written agreement concerning the deposit; and (3) the refusal in evidence of Appellant's Exhibit A—we will proceed to consider the same.

[1-3] The evidence shows that in March, 1921, Christiana Reay, mother of respondent, informed him in the presence of his wife that if he would start a savings account she would give him some money. The wife of Joseph borrowed $10, which was deposited in the bank the same month by the respondent, and which is corroborated by respondent's passbook. Later the mother asked respondent if he had started a bank account, and he said he had, and she went with him to the bank. The bank records showed a savings account in the name of Joseph W. Reay, Jr., opened March 14, 1921, the initial deposit being the sum of $10. This account was No. 303566 in the bank records. The witness H. L. Fleming, who had charge of the savings department of the Mercantile Trust Company, the predecessor of the American Trust Company, identified, and there was also admitted in evidence, savings account No. 52965, being the account of Christiana G. Reay, respondent's mother, which was opened July 1, 1916, with $75,962.14 in the account, and on February 28, 1921, had grown to the sum of $108,549.02. There was also admitted in evidence savings account No. 303344 in the name of "Mrs. Christiana G. Reay or Joseph W. Reay, Jr. (son)," and which had an entry: "Feb. 28, 1921 Transfer from No. 52965, $25,000.00." This last account shows that the mother had opened account No. 303344 in the name of herself and son, the respondent, and placed therein $25,000, and that amount was in their joint account when she accompanied her son to the bank. This last-numbered account (No. 303344) also has the following entry: "June 27, 1921 Transfer to 303566—$25,000.00." Now account No. 303566, as will be observed, is the account of respondent opened March 14, 1921, with the initial deposit of $10. So it will be observed that the bank records fully and completely corroborate the respondent's testimony.

The respondent testified that when the transfer of the $25,000 was made to his account by the bank employés as directed by his mother, she said to him, "This is for you, Joe, now don't take it and squander that money, try and keep that $25,000 if you can.". Also, "You know how hard money is to get nowadays, it will be kind of nest egg for your old age." The testimony of respondent was also corroborated by the witness Temple, who said he knew Mrs. Christiana Reay about 40 years and she visited him and his wife frequently, and she told him "that she gave Joe $25,000 and had him down to the bank and give him the $25,000 there to be his account." Mrs. Temple also testified that Christiana said to her: "Joe was asking for money, * * * Wallace was having so much * * * that she might as well give Joe some, and she told me she had give Joe the $25,000 he went down to the bank with her." The appellant contends that the evidence of Temple and wife should be disregarded. But the weight of this evidence was primarily for the trial court, and a careful consideration of it leads us to the conclusion that there was no error in that regard.

The gift sought to be upheld here is not a gift causa mortis, but a gift inter vivos, because it occurred June 27, 1921, and the donor did not die until February, 1925. Many of the cases cited by appellant relate to gifts causa mortis, wherein the facts involved are easily distinguished from the case here under discussion.

To make a valid gift there must be an intent on the part of the donor to make the gift, a delivery of the thing given, and an acceptance on the part of the donee. 13 Cal. Jur. 36.

We think, after a careful consideration of all the evidence given before the trial court, that all the findings of the trial court find ample support in the evidence. The evidence shows that, at the time the transfer was made, the account of the donor had in it a sum of over $108,000. It shows that prior to her direction that the sum of $25,000 be transferred to the separate account of her son Joseph W. Reay, Jr., that she had transferred some time theretofore to the joint account of herself and son this identical sum. These actions by the donor furnish ample evidence of the intent of the donor to give to her son this amount of money. It would seem that there is nothing unnatural that a mother having a sum of in excess of $108,000 on deposit should desire to give to a son the sum of $25,000 under such circumstances.

[4] The appellant argues that a certain writing signed by the respondent and apparently given right after the deposit was transferred to his account invalidates the gift. This writing or memorandum was produced by respondent himself and reads as follows: "I hereby give to my mother Christiana G. Reay the interest on $25,000.00 deposited in my name in the Mercantile Trust Bank, Grant Avenue, & O'Farrel Sts. interest to be paid semi-annual, Jan. 1, and July 1st. Joseph W. Reay 235–4th Ave. S. F."

Respondent testified that this written memorandum was written by him at the bank after the transfer of the money was made to his account, and was given by him voluntarily to his mother. It is dated, however, June

29th, two days after the alleged gift, but the date is in ink other than the body of the memorandum. The appellant argues that as the respondent refers to the $25,000 "deposited in my name," and furthermore uses the words "I hereby agree to give my mother * * * the interest on $25,000.00," that this money was a "deposit" and not a "gift." The trial court evidently gave little consideration to this argument. It would seem that when the donor transferred the sum in question to the separate account of the donee, the mere fact that the donee agreed to pay interest upon the sum so transferred would not in any way mitigate against the holding of the trial court that it was intended as a gift. In volume 28, Corpus Juris, on page 647, it states: "Thus a donor may make a valid gift of property, reserving to himself a life interest in, or a life income from, the property given, or dividends, or interest for life on a sum given." See, also, the case of Calkins v. Equitable Building & Loan Association, 126 Cal. 531, on page 535, 59 P. 30, 31, where the court says: "The fact that the donor reserved to himself the right to the dividends during his life did not affect the validity of the gift." This was a case involving a gift by transfer of stock of a corporation, and the court goes on to say: "The donees became the owners of the stock and might have conveyed it away to a third party in the lifetime of the donor, subject to the reservation contained in the written assignment. Of course, the donor did not give away or pass title to the dividends which he had expressly reserved, but every other interest and right in the certificates and in the stock represented thereby passed to the donees."

The testimony here, however, shows, and it was the construction of the trial court as we read the findings, that the promise of the donee to give to the donor the interest on the sum was voluntarily made by the donee. Nowhere does it appear in the evidence that this promise was exacted by the donor. The evidence of Joseph upon this subject was: "I told my mother I would give her the interest on the money that was in the bank, she said all right." It would seem that this act on the part of the donee was susceptible of the construction that it was a return gift by Joseph to his mother, and it is quite evident that this finds support in the evidence.

The case at bar is not analogous to the cases of Paddock v. Fonner (Cal. App.) 258 P. 423, or Knight v. Tripp, 121 Cal. 674, 54 P. 267, cited by appellant. In the instant case there was no agency as there was in the two cases last cited. Here there is no evidence of any instruction given by the donor to the donee as to what should be done with the money given.

[5] The appellant contends that the court erred in refusing to receive in evidence Appellant's Exhibit A. This was a letter written by Norman Hurd, an attorney, dated May 19, 1920, and supposedly written at the request of the donor and complaining that Joseph had been annoying her, and also quite bitterly upbraiding the respondent for certain acts of his, which evidently met with her strong disapproval. This letter was excluded by the court on the grounds that it was too remote, and it will be seen that the letter was written some thirteen months prior to the alleged gift. It was offered as rebuttal evidence to the gift. The letter itself is set forth in full in the record. We think there was no error in the refusal to admit this letter, as it related more to the weight of the evidence rather than to its admissibility. Conceding that the letter should have been admitted, for the sake of argument, we cannot say that a mother's irritation or disapproval of her son's acts would necessarily continue for over a year. Moreover, this assigned error, if any there was, in rejecting the evidence, cannot be held to be prejudicial. It is hardly necessary to cite authorities in support of this view.

There are no other grounds requiring consideration. To sum up: The evidence shows that a mother with over $108,000 on deposit in a bank transferred at the bank to the account of her son the sum of $25,000. She lived some four years after the gift in question was made, during which period the donee had full and complete control of the money so given, and during which time the donee exercised complete dominion over the said sum, checking from the said account over $9,000. We are led irresistibly to the conclusion that the findings of the trial court are amply supported by the evidence.

[6] We have not overlooked the decisions of our higher courts, wherein it is held that "the burden of proving a gift is upon the donee," and that "every element necessary to constitute a gift must be sustained by explicit and convincing evidence." See Sullivan v. Shea, 32 Cal. App. 371, 162 P. 925, and cases cited. We think the donee sustained this burden and furnished the elements necessary to constitute a valid gift. Therefore, this judgment should be and it is hereby affirmed.

We concur: TYLER, P. J.; CASHIN, J.

HUGHES v. DE MUND. (Civ. 3650.)★

District Court of Appeal, Third District, California. Jan. 21, 1929.

Rehearing Denied Feb. 18, 1929. Hearing Denied by Supreme Court March 21, 1929.

1. Appeal and error 🔑80(4)—Interlocutory decree, directing dissolution of partnership and accounting, is not final determination of parties' rights.

An interlocutory decree, dissolving a partnership and decreeing that accounting be had, is not a final determination of the rights of the parties with respect to any of the matters embraced therein.

2. Trial 🔑377(1)—Without consent or waiver, judge erred in making findings on material issues on evidence introduced before another judge who entered interlocutory decree.

Where, after trial before a judge without a jury in suit for dissolution of partnership and for an accounting, court entered interlocutory decree dissolving partnership and decreeing accounting before a referee, *held* that, in absence of consent or waiver, it was error for another judge, on motions to confirm referee's report and to set it aside, to make findings and decide material issues from evidence introduced before judge who rendered interlocutory decree.

3. Trial 🔑377(1)—That plaintiff, after his objection to consideration of evidence before another judge who made interlocutory decree, relied on parts of transcript, did not waive objection.

Where plaintiff, suing for dissolution of partnership and for accounting, persistently objected to admission, and consideration by trial judge of evidence given before another judge, who entered interlocutory decree dissolving partnership and directing accounting, fact that, after his objection was overruled and court had read from transcript, plaintiff may have read from and relied on parts thereof, did not constitute a waiver of objection.

Appeal from Superior Court, Los Angeles County; J. O. Moncur and Frank C. Collier, Judges.

Action by Thomas A. Hughes against Mary C. De Mund. From an adverse judgment, plaintiff appeals. Reversed.

Alfred W. Hare and Charles E. Hobart, both of Los Angeles, for appellant.

A. I. McCormick and Hewitt, Ford, McCormick & Crump, all of Los Angeles, for respondent.

FINCH, P. J. The complaint alleges that the parties are partners in the business of buying and selling real estate; that the partnership property consisted of twenty-one lots described in the complaint; and that the defendant has misapplied and refused to account for moneys belonging to the partnership. The prayer is for a dissolution of the partnership, an accounting, and other relief. The answer denies the allegations of the complaint.

A trial was had before Judge Moncur, judge of the superior court of Plumas county, sitting in the superior court of Los Angeles county. The transcript of the oral testimony introduced at such trial covers 991 pages, and the exhibits cover nearly 200 pages additional. At the end of the hearing, on conflicting evidence, the court found the existence of the partnership and its ownership of the twenty-one lots, as alleged in the complaint, and "that plaintiff is entitled to an interlocutory judgment dissolving said partnership and decreeing that an accounting of the said partnership business be had between plaintiff and defendant, and that upon such accounting being had a final judgment in this action be entered in accordance with the facts found upon such accounting."

An interlocutory decree was thereupon entered, adjudging that the partnership is the owner of the lots described in the complaint, dissolving the partnership and ordering an accounting. Thereafter, on stipulation of the parties, the presiding judge of the superior court of Los Angeles county appointed a referee "to take and state and report to this court the accounting provided for and ordered in the findings and interlocutory decree heretofore entered in this action." The defendant and her witnesses appeared before the referee, and gave testimony showing receipts and disbursements of the parties, but neither the plaintiff nor his counsel participated in the hearing. The referee reported his findings to the court, and thereafter the plaintiff moved the court to set such findings aside, and the defendant moved that the report be confirmed and judgment entered in accordance with the findings of the referee. Both motions came on for hearing before Judge Collier, a judge of the superior court of Los Angeles county. At this hearing the defendant gave oral testimony in relation to the accounts between the parties, and Judge Collier read the testimony taken before Judge Moncur and that given before the referee. At the conclusion of the hearing, the referee's report was by the court "set aside so far as it found the facts and applied the law, and the court, thereupon, itself, took up and considered all of the evidence in said cause," and found that the plaintiff and the defendant are not partners, that none of the lots described in the complaint were "ever at any time, the property of any partnership between plaintiff and defendant"; that the parties, "as a joint adventure purchased" seven of the said lots, and that the plaintiff has no interest in the remainder thereof. In the accounting the court did not take into consideration any of the receipts and disbursements in connection with the fourteen lots found to belong to

---

★Rehearing denied. Hearing denied by Supreme Court.

the defendant. The seven lots found to have been purchased as a joint adventure were ordered to be sold and the proceeds applied in accordance with the rights of the parties as determined by the court on the accounting.

[1] Appellant contends that, "though the interlocutory decree was not final, the findings of fact of Judge Moncur were final on issues therein." If such findings upon any issues are final, then the interlocutory decree must be final upon the same issues, because contradictory conclusions cannot be drawn from a single set of ultimate facts. An interlocutory decree, in a case such as this, "is not to be construed as a final determination of the rights of the parties with respect to any of the matters embraced therein." Doudell v. Shoo, 159 Cal. 448, 454, 114 P. 579, 582; Pomper v. Superior Court, 191 Cal. 494, 496, 216 P. 577; Clement v. Duncan, 191 Cal. 209, 215, 215 P. 1025; Thompson v. White, 76 Cal. 381, 383, 18 P. 399; Gianelli v. Briscoe, 40 Cal. App. 532, 536, 181 P. 105. The defendant gave notice of appeal from the interlocutory decree in this case, and the attempted appeal was dismissed on the ground that such decree is not final and, therefore, not appealable. Hughes v. De Mund, 70 Cal. App. 265, 267, 233 P. 93. In Welch v. Alcott, 185 Cal. 731, 761, 198 P. 626, it was held that, in a suit for the dissolution of a partnership, it is not necessary even to make findings of fact prior to the taking of an account.

[2] In the absence of consent or waiver, it was error for Judge Collier to make findings and decide material issues from the evidence introduced before Judge Moncur. "A party litigant is entitled to a decision upon the facts of his case from the judge who hears the evidence, where the matter is tried without a jury." Guardianship of Sullivan, 143 Cal. 462, 467, 77 P. 153, 155. "Where a case is tried by the judge, and the issues remain undetermined by him, his successor cannot decide, or make findings in the case, without a trial de novo, and consequently he cannot, in such a case, render a valid judgment or decree in the cause, notwithstanding the testimony may have been written down and preserved." 33 C. J. 973. In the case of In re Williams, 52 Cal. App. 566, 568, 199 P. 347, 348, in an opinion written by Mr. Justice Richards, it is said: "While it is true that preliminary examinations of persons accused of crime * * * are usually less formal in matters of procedure than would be required upon the trial of the cause, it cannot be held that the essential principles of procedure and of evidence may be departed from by committing magistrates in the conduct of such examinations. * * * The magistrate who is to make the order either discharging the defendant or holding him to answer upon the charge must base that order upon evidence which he has admitted and upon testimony which he has heard in the usual way in which such evidence is presented and such testimony taken. He has no right to predicate his said order upon something which has not occurred before him; upon evidence the admissibility of which he has not passed upon, and upon testimony the weight and value of which he has not measured by the appearance, the narration and the manner of testifying of the witnesses present in person before him."

[3] The final findings, signed by Judge Collier, recite: "Both plaintiff and defendant were present in court during said final hearing and the conduct of each of said parties was observed by said court." The defendant gave testimony at the final hearing, but the plaintiff did not. Four witnesses other than the parties testified before Judge Moncur; the testimony of at least one of them being important upon the issue of whether the parties were partners. A mere view of a witness would be a poor substitute for the observation of the attitude and demeanor of the witness while under examination and his manner of testifying.

The findings also recite: "Both of said transcripts of evidence," the evidence taken before Judge Moncur and that given before the referee, "were offered, read from and relied upon by both plaintiff and defendant." The transcript of the proceedings at the final hearing show that the plaintiff persistently objected to the admission and consideration by Judge Collier of the evidence given before Judge Moncur as a basis of final findings. That the objection was understood is apparent from a reference by the court, during argument of the objection, to the practice, "on motion for a new trial, for one judge who did not hear the evidence at all, to pass on those motions" and "on the sufficiency or insufficiency of the evidence." The plaintiff's objection was finally overruled, and the court announced that the evidence taken before Judge Moncur would be considered, together with that given before the referee and at the final hearing and findings made therefrom. Thereupon the parties stipulated that Judge Collier might "take the transcript and read it, rather than read it in open court." The record fails to show that the plaintiff "offered" any part of the transcript of the evidence given before Judge Moncur, and the fact that, after his objection thereto was overruled and the court had read the transcript, the plaintiff may have "read from and relied upon" parts thereof, does not constitute a waiver of the objection.

It is true, as suggested by the trial court, that a judge who has not presided at the trial of an action may hear and determine a motion for a new trial, made on the ground of insufficiency of the evidence, and, in doing so, may weigh the evidence and decide according to the preponderance thereof. If the motion is denied, however, an appeal may be taken from the original judgment, rendered by a judge who heard the evidence. If a new trial is granted, the case will be decided again by a judge who hears the evidence. But in this case the judgment was rendered by a judge who did not hear the greater and more important part of the evidence.

No useful purpose would be served by passing on the questions arising out of the accounting which was had, because there can be no proper accounting until it has first been determined whether a partnership exists between the parties and what properly belongs to the partnership.

The judgment is reversed.

We concur: SHIELDS, Justice pro tem.; PLUMMER, J.

96 Cal. App. 345

SPORE v. WASHINGTON. (Civ. 6524.)★

District Court of Appeal, First District, Division 1, California. Jan. 21, 1929.

Rehearing Denied Feb. 20, 1929. Hearing Denied by Supreme Court March 21, 1929.

1. Landlord and tenant 🔑169(3)—Complaint, in action against owner of building, for injuries to coal company employee, by reason of defective walk, stated cause of action against general demurrer.

Complaint, in action against owner of building, to recover for injuries to coal company employee, by reason of defective walk along building, *held* to sufficiently allege defendant's ownership and possession of premises to state a cause of action as against general demurrer.

2. Landlord and tenant 🔑167(1)—Landlord, leasing building to individual tenants, has duty of using ordinary care to avoid injuries to those visiting premises.

Where building is let in flats or offices or otherwise leased to individual tenants, the landlord owes duty to those visiting premises and entering passageways to visit a tenant, or at his invitation, express or implied, to use ordinary care to avoid injuring them, as they are invitees of both landlord and tenant.

3. Landlord and tenant 🔑167(1)—Landlord, letting portions of building to separate tenants, must use reasonable care to see that portions retained under his control are safe.

Landlord, letting portions of building to separate tenants, and retaining other portions under his control, is under responsibility of general owner of real estate who holds out general invitation to others to enter upon and use his property, and is bound to see that reasonable care is exercised to have portion retained by him reasonably safe and fit for uses which he has invited others to make of it.

4. Pleading 🔑12—Less particularity is required in complaint stating facts as to which defendant has full information.

Less particularity is required in allegations of complaint, where the facts stated therein are such that defendant has full information concerning their nature and relation to them.

5. Pleading 🔑34(7)—Court need not discard every meaning of words or phrases, but one that would render allegation ineffectual (Const. art. 6, § 4½).

Where words or phrases of complaint are susceptible of different meanings, court will not discard every meaning, but one that would render ineffectual the allegation, in that rule, that pleadings are to be construed most strongly against pleader, must yield to basic rule found, in substance, in Const. art. 6, § 4½.

6. Landlord and tenant 🔑169(11)—Owner's negligence, in maintaining walk along building, held, as respected injury to coal company employee, for jury.

In action against owner of premises, to recover for injuries to coal company employee, by reason of defective walk along building, evidence, relative to owner's negligence in maintaining walk, *held* sufficient for submission to jury.

7. Negligence 🔑1—"Negligence" imparts lack of care.

"Negligence" in its last analysis imparts a lack of care.

[Ed. Note.—For other definitions, see Words and Phrases, First, Second, and Third Series, Negligence.]

8. Landlord and tenant 🔑167(1)—Owner of building with control of walk had duty of using reasonable means to make walk safe for any one lawfully using it.

Owner of building, having control of board walk along building, had duty of using all reasonable means to make walk safe for any one lawfully using the same at invitation, express or implied, of owner.

9. Evidence 🔑8—It is common knowledge that boards exposed to weather react to climatic conditions and changes.

It is a matter of common knowledge that all boards exposed to the weather react to climatic conditions and changes.

10. Landlord and tenant 🔑167(3)—Owner of building is chargeable with only ordinary care in maintaining walk.

Owner of building is chargeable with only ordinary care in maintaining board walk along side of building.

11. Landlord and tenant 🔑169(11)—Whether owner of building has exercised ordinary care in maintaining walk is for jury.

Question, as to whether owner of building has exercised ordinary care in maintaining board walk along side of building, is one for the jury.

Appeal from Superior Court, Alameda County; Warren V. Tryon, Judge.

Action by Ernest Spore against Alice B. Washington and others. Judgment for plaintiff against defendant named, and such defendant appeals. Affirmed.

★Rehearing denied. Hearing denied by Supreme Court.

Thornton Wilson, of Oakland (P. R. Lund, of San Francisco, of counsel), for appellant.

Skinner & Friedman, of Oakland, for respondent.

PER CURIAM. The action was instituted by plaintiff to recover damages resultant from personal injuries sustained by him.

At the outset the action was against appellant and others. At the trial a judgment of nonsuit was ordered as to the remaining defendants, and the case proceeded, and judgment was entered against appellant alone. The case was tried by a jury. In setting forth such of the facts as may be necessary, we will avoid all reference to any of the original defendants and treat the case throughout as against the appealing defendant.

Appellant was the owner of a certain building in the city of Oakland. This building was of more than one story. The upper stories were leased for apartment house purposes and such business actually carried on therein.

The ground floor was leased to different tenants, each of whom was engaged in separate and individual business. Running along the back of the building was a board walk, which walk extended from the front to the rear of the apartment house. Several of the rooms or stores on the main floor had back doors leading to the board walk, and the tenants used these doors, and the walk was used by all of these tenants. The board walk consisted of two joists or stringers, running parallel with the rear of the building, upon which joists or stringers boards about 4 inches wide were nailed at right angles. The walk was 3 feet wide, and the boards were laid approximately ½ inch apart. At the end of this walk was a coalroom or coal bin for the storage of fuel.

On the day in question here the plaintiff was employed by a wood and coal company, and the nature of his employment was the delivery of coal. When a customer ordered coal, the same was delivered by a truck accompanied by men to unload. On the occasion, coal was ordered by the tenants occupying the apartment house, being the upper stories of the building owned by appellant. The amount ordered was 15 tons and came in 100-pound sacks. Plaintiff was one of the men accompanying the truck, and his work was to carry in the coal to the bin described, pursuant to the directions of the keeper of the apartment house.

In reaching this bin it was necessary for plaintiff to use the board walk described. He had carried in a number of sacks, the testimony showing that approximately two-thirds of the load had been delivered when the accident occurred; in the work he was assisted by three other men. According to the testimony, the accident happened in the manner now described. After many trips over the walk, nothing unusual happening, or no defect in the walk observed or observable, plaintiff was carrying on his back another sack. In walking along he placed his foot down upon a loose board. According to plaintiff's testimony, uncontradicted, one foot landed just on the edge of the loose board, causing the board to tilt up almost vertical, and continuing his step the other foot tripped over the board, throwing plaintiff to the ground, with the sack of coal coming down on him in the fall, thereby sustaining the injuries complained of. There is no question raised as to the damage, the only question going to the liability of defendant.

[1] The appellant, from the commencement of the action, has contended, and now contends, that the complaint does not state a cause of action against her. She has stoutly maintained this position throughout, urging it at every stage of the proceedings. Therefore, we will first take up the question. The complaint alleges that defendant Alice B. Washington, at all times herein mentioned was the owner, and that certain other defendants named were the tenants in possession, managers, and occupants of the land and building described. Then, continuous in the same paragraph, the complaint sets forth the particular portion of the building in the possession of each tenant.

It is there alleged substantially as follows, omitting formal clauses and epitomizing the facts: That at all of the times herein mentioned defendants, and each of them, caused to be constructed and maintained upon said land a board walk about 50 feet long, and constructed and made of a series of boards, each of which was about 6 inches wide and 42 inches long; that said board walk was so constructed and maintained by defendant for the purpose of ingress and egress to and from the rear of said apartment house and said store for the use of tradesmen and persons delivering goods, wares, merchandise, fuel, and provisions to said building, and, at all of the times herein mentioned, tradesmen and persons delivering goods, fuel, etc., to said building were invited and requested by defendants to use, traverse, walk upon said board walk.

That at all times mentioned defendants held and represented to tradesmen and persons delivering goods, fuel, etc., to said building that said board walk was, and constituted, a fit, proper, and safe place to use, walk upon, and walk over as a means of ingress and egress to and from the rear of the said building.

That on the 25th day of September, 1925, and for some time prior thereto, defendants carelessly and negligently maintained said board walk and permitted said board walk to remain, exist, and be in a dangerous, improper and unfit state and condition to use, traverse, walk upon, and walk over, by reason of the fact that one of the boards or planks of said board walk was loose and not nailed down to the runners or beams underneath the boards of said board walk, and said board would slip and fall and become dislodged from its place if stepped upon, and that said loose board was on September 25, 1925, in its proper place in said walk, and apparently nailed down and secure, and that there was no sign or warning in or about said board walk or said land or building on the premises thereof to warn persons of the said board walk.

The remaining portions of the complaint set forth the occurrence of the accident and the injuries sustained and damage suffered, and it is not necessary that these be dealt with here. The demurrer was general.

The argument of appellant is that the complaint does not allege that Alice B. Washington owned the premises at the time they were constructed, or at the time they were leased, and there is no allegation that she was in possession of any part of the premises at the time of the accident, either exclusively or jointly with her tenants or otherwise, nor is there any allegation that she was under any contractual duty to keep the premises repaired.

To our minds there is little merit in the contention. True, the complaint states that the tenants named were in possession of the land and buildings, but immediately thereafter, and in unbroken sequence, are the allegations showing the extent of the tenants' possession and the particular portion of the premises so possessed. The complaint alleged in sufficiently plain language that the defendant owner constructed and maintained the board walk, and pointed out that, by permitting the unsafe condition alleged, the construction and maintenance was negligent and careless and so characterized. The complaint further alleged that the walk was at all times maintained by defendant owner and the tenants for purposes common to all the tenants, namely, ingress and egress for tradesmen and delivery agents or employees. Appellant cites many cases unnecessary to review here. The general rule as stated, and upon which both appellant and respondent agree, in the main, may be stated.

[2] Where a building is let in flats or offices, or otherwise leased to individual tenants between whom no privity exists, the hallways, entrances, stairways, or other fixtures not being demised to the tenants or any particular tenant, but used in common by all, the landlord owes a duty to those visiting the premises and entering such passageways to visit a tenant, or at his invitation, express or implied, to use ordinary care to avoid injuring them, as they are invitees of both landlord and tenant. 15 Cal. Jur. 741.

[3, 4] A landlord letting portions of a building to separate tenants, retaining other portions under his control, is under the responsibility of a general owner of real estate who holds out a general invitation to others to enter upon and use his property, and is bound to see that reasonable care is exercised to have the portion thus retained by him reasonably safe and fit for the uses which he has invited others to make of them. 10 Ruling Case Law, 1037, and Supplement vol. 7; 43 A. L. R. 1273. In Siggins v. McGill, 72 N. J. Law, 263, 62 A. 411, 3 L. R. A. (N. S.) 316, 111 Am. St. Rep. 666, Justice Pitney describes the possession of the landlord in these instances as a legal possession, which aptly characterizes the same. Tested by the rule, we think the complaint stated a cause of action. It might be that isolated phrases, here or there, to an extent negatived other specific allegations, or that specific allegation would have more clearly pointed out the liability contended for. As against a general demurrer, the complaint was sufficient. Less particularity is required in the allegations of a complaint where, as here, the facts in it stated are such that the defendant, their nature and her relation to them, has full information concerning them. Goldstein v. Healy, 187 Cal. 212, 201 P. 462.

The record before us shows that issue was joined by answer, and a trial on the merits followed. It was shown and admitted that none of the tenants had exclusive possession of this board walk, and that the walk was not demised to any tenant, but remained under the control of the defendant owner appurtenant to the entire holding, and used as a common walk. The issue before the jury was defendant's knowledge or lack of knowledge of the condition of the walk and her exercise of ordinary care in the premises, under the law as given to the jury by the court. Not one single complaint is made of any instruction, and we, therefore, assume that the jury were fully and fairly instructed as to the law applicable to the issues submitted to them. Not a single objection or exception is urged as to the trial court's rulings on the admission or rejection of evidence.

[5] Under all of these conditions we do not feel that even a semblance of justice may be maintained in going back to the complaint in a willful endeavor to try and find some possible construction that might force a holding that no cause of action was stated. Where words or phrases are susceptible of different meanings, we are not to discard every meaning but the one that would render ineffectual the allegation. The oft-quoted rule, that pleadings are to be construed most strongly against the pleader, must yield to the basic rule underlying all cases and as, in substance, found in the constitutional provision, article 6, § 4½, state Constitution.

[6] Appellant next urges that the evidence is insufficient to sustain the judgment. This contention is presented in many ways; in a motion for nonsuit and in a motion for judgment notwithstanding the verdict, and also in a motion for a directed verdict.

In whatever form presented, it comes back to the same question, the sufficiency of the evidence. As stated, there is no issue on the ownership of the building. The evidence sufficiently shows, with no substantial conflict, that the walk in question was not demised to any particular tenant, but was a common walk or passageway, as the term is used in the rule previously announced. Without further recital of the testimony, we may take up the specification of appellant as to wherein the evidence is insufficient.

Quoting from appellant's briefs: "Where stairways, passages, walks, etc., are reserved upon premises for the use of two or more tenants and not demised to either or any of them, and in the absence of any special agreement to the contrary, the law presumes them to be in the possession and under the control of the landlord. We make no contention to the contrary, and it is also freely admitted that responsibility for accidents to persons lawfully upon such portions of the premises is placed upon the landlord, provided, however, that such accidents are proximately caused through the negligence that is want of ordinary care of the landlord."

And so her argument, as it is presented to us, reads: "In the absence of knowledge either actual or constructive, no negligence on the part of appellant has been shown upon which a recovery can be based."

Then we are brought to the only issue presented in this branch of the case, the negligence of appellant.

The appellant had owned the premises since a time preceding 1922. She had never been in the premises to inspect the same between 1922 and the date of the accident. It was her testimony that one of the tenants was recommended to her as a handy man, who would keep the premises in repair and in good condition. The record discloses no contract in this respect, nor any compensation received. As a matter of fact the owner did not know anything about the walk or its condition or state of repair. She had an agent named Ray to whom had been intrusted the duty of inspection and report. As far as the record discloses, no person, tenant, agent, or owner knew of the defect in the walk, nor did plaintiff perceive the defect until after many trips had been made by himself and his colaborer. In fact, no one discovered or had actual knowledge of the defect until after the accident. No contributory or other negligence is shown on the part of the plaintiff. The jury had before them a photograph of the premises showing the walk. This was admitted, for the reason that it portrayed the exact condition of the walk, and to all intents and purposes was the equivalent of an examination of the premises. The agent Ray testified that he was the manager of the property since 1923, and was frequently upon the premises, sometimes four or five times a month, and sometimes not in two months, depending upon circumstances. During the months preceding the accident he was there about once a month, and about the 10th of the month of the accident, which occurred September 25, 1925. He never heard of the accident until some eight months after. He never saw any defect in the walk, and, as far as his observation went, the boards were always in position. There is no evidence of any inspection by him or under his direction, nor is there evidence of his deputing this duty of inspection.

[7, 8] The appellant in urging the lack of showing of any negligence points with great confidence to the fact that the board walk had been used for many years without disclosing defect or causing injury. This is rather a weak subject. There are many things which do not improve with age, but, on the contrary, deteriorate and weaken; amongst these are wooden sidewalks, and the fact, that a walk of this character had been for many years almost on the ground, exposed to the rotting dampness below and the elements on the surface, would not be a guaranty of its strength or fitness. Negligence in its last analysis imparts a lack of care, and both care and negligence are relative to duty. As stated in the rule, those using the common walk were invitees of the owner. The owner would be liable to the invitee for her mere failure to use ordinary care for his safety. Brown v. Pepperdine, 53 Cal. App. 336, 200 P. 36. It was the duty of the owner, having control of the board walk, to use all reasonable means to make that walk safe for any one lawfully using the same at the invitation, express or implied, of the owner. Foley v. Hornung, 35 Cal. App. 312, 169 P. 705. This duty was either performed or it was not. Appellant contends that the duty was fulfilled by simply letting the walk remain without any effort to ascertain its true condition, on the novel theory, perhaps, that it is presumed that a board walk is sound and safe up to the time one of the boards breaks forth in mutiny and injures one passing over it. We are familiar with the rule applied to the case of one haboring a vicious dog, which rule has been announced as, "every dog is entitled to one bite." We see no analogy so striking as to cause the rule to be adapted in different phraseology to meet the situation here.

[9] The walk itself in its entire length was visible to any one. It contained comparatively few boards; no part of it was concealed so as to make inspection difficult or dangerous. The boards lay practically on the ground, though presumably nailed to the joists or stringers. It is a matter of common knowledge that all boards exposed to the weather react to climatic conditions and changes. Any person of ordinary intelligence realizes that wood expands and shrinks, and that, likewise, nails or other metals also react to the laws of heat and cold. The expansion and contraction of wood and metal are not compensatory, resulting in loose nails in boards. These loose nails will work out and often do, leaving the board in just such a condition as we find the one here. These are matters of such ordinary knowledge that it cannot be held that one upon whom devolves the duty of maintaining and keeping safe an exposed

board walk has performed that duty by neglecting the walk entirely.

In 36 Corpus Juris, p. 220, we find: "Actual knowledge of a defection is not necessary but it is sufficient that the landlord could have learned of the same by the exercise of reasonable care." In Capwell v. Blake, 9 Cal. App. 111, 98 P. 51, the rule is announced that, where the landlord or owner has control of a portion of the premises by implication, he undertakes to exercise that control as to inflict no injury upon his tenants. If he does not exercise common care and prudence in the management and oversight of that portion of the premises which belongs to his care, and damages are sustained by a tenant, he becomes liable to him. This rule has its full application to the invitee of the tenant. Harkin v. Crumbie, 14 Misc. Rep. 439, 35 N. Y. S. 1027; 1 Tiffany on Landlord and Tenant, p. 628. In Davis v. Pacific Power Co., 107 Cal. 574, 40 P. 952, 48 Am. St. Rep. 156, it is said: "Where the landlord retains or has control of a portion of leased premises the responsibility rests with him to see that no injury results to those having rights there by reason of the manner in which such portion of the premises is occupied or used; and, if he puts dangerous machinery thereon, it is his duty to fence it, or use other proper means to protect those rightly in its vicinity."

The principle is the same in the instant case. We have before us, as a part of the record, the photographs of the board walk in question. It is apparent that this walk is weather-beaten and worn. The boards show signs of great deterioration and disintegration, and a view of the board walk as thus depicted would support a strong presumption that it was being permitted to rot along with a general decay.

[10, 11] We are not holding that the owner was an insurer, as no such question arises. We affirm the general doctrine that he is chargeable with only ordinary care. But we do hold that the question, as to whether or not he has exercised ordinary care, is one for the jury.

From the facts adduced, the jury might easily have concluded that the slightest inspection would have disclosed the conditions actually existing. And, finding no discovery, they might, and obviously did, find no inspection. We are at a loss to determine how an owner can assert care and circumspection by proof only of a total failure to act at all, particularly where an affirmative duty is fastened upon him. In Wile v. Los Angeles Co., 2 Cal. App. 190, 83 P. 271, it is aptly said: "The fact that this manager did not know who placed these boards there might have led the jury to infer that he did not want to know." While the facts in that case need not be detailed, the same thought may have been with the jury in this trial. Finally, it may properly be here stated that the owner of premises, inducing tenants to aid and further his investment, is distinctly benefited by reserving to himself the control of common walks and passageways. Thereby he affords convenience to his property, which enhances the rental value, and retains himself the power of preventing one tenant from depriving another of equal facilities for use of the demised premises.

By securing this right, he accepts the burdens that go with it, and, if he chooses to let the property look after itself, trusting to good fortune to protect those who use the premises, he must be prepared to accept the results when this good fortune abates or takes a turn for the worse.

There was some evidence of a circumstantial nature to show that some third person might have loosened the board without the knowledge of the owner. The sum total of the evidence thus adduced amounted to nothing more than the establishment of a probability, and its probative force was for the jury.

Judgment affirmed.

96 Cal. App. 400

TRACY-WALDRON FRUIT CO. v. SOUTHERN PAC. CO. (Civ. 6539.) ★

District Court of Appeal, First District, Division 1, California. Jan. 24, 1929.

Rehearing Denied Feb. 23, 1929. Hearing Denied by Supreme Court March 25, 1929.

Appeal and error 🔑1008(1)—Court's conclusion from contracts between parties that carrier's payments for disputed negligent delivery of perishables should settle shipper's claims must be upheld (Interstate Commerce Act, § 20, as amended; 49 USCA § 20(11).

Trial court's conclusion from negotiations, oral and written, between shipper and carrier that payments by carrier for disputed negligent delivery of grape and vegetable shipments, of less than value of goods as prohibited by Interstate Commerce Act, § 20, as amended by Act June 29, 1906, Act March 4, 1915, Act Aug. 9, 1916 (49 USCA § 20(11), should settle and compromise shipper's claims therefor, must be upheld, in absence of evidence otherwise.

Appeal from Superior Court, City and County of San Francisco; Walter Perry Johnson, Judge.

Action by the Tracy-Waldron Fruit Company against the Southern Pacific Company. Judgment adverse to plaintiff, and it appeals. Affirmed.

H. A. Frank, of Oakland, R. F. Gaines, of Butte, Mont., and J. A. Tracy, of San Francisco, for appellant.

Guy V. Shoup and Henly C. Booth, both of San Francisco, for respondent.

PER CURIAM. The plaintiff, a shipper of perishable fruits and vegetables, brought this

---

★Rehearing denied. Hearing denied by Supreme Court.

action against defendant carrier to recover for damage to fifteen separate shipments; each shipment being a carload of grapes or vegetables, and the damage to each carload constituting a separate cause of action.

The shipments originated between October 1 and December 1, 1922, on the railroad line of defendant in California, and each was billed and transported to a point upon some connecting carrier in another state. The defendant with its connecting carriers maintained schedules for the transportation to its destination of freight such as that contained in said shipments; these being reasonable for the time required therefor under ordinary conditions. The shipments were delivered to the defendant in good condition, and for each was issued to the plaintiff a bill of lading. These the plaintiff held until surrendered to the defendant with its written claims for the damage caused by delays in transit beyond the scheduled time and due to which the plaintiff received from the sale of the freight shipped less than it would had the shipments been moved according to schedule. Each bill of lading contained the following clause: "Except in case of negligence of the carrier or party in possession (and the burden to prove freedom from such negligence shall be on the carrier or party in possession) the carrier or party in possession shall not be liable for loss, damage or delay while the property is stopped and held in transit upon the request of the shipper, owner or party entitled to make such request, or resulting from a defect or vice in the property, or for country damage to cotton, or from riots or strikes."

The defendant claimed that the delays were not due to negligence but to a strike of its employees and those of connecting carriers, and that the losses claimed by the plaintiff were therefore not actionable because of the strike clause in the bills of lading; that it and its connecting carriers at all times insisted in good faith upon the validity and merits of their defense under the above clause, but that nevertheless, after the claims here involved were presented, offered to settle these and all claims of shippers of perishable fruits and vegetables during the strike for 50 per cent. of the loss due to the delay; and that the plaintiff with other shippers accepted the offer, settled their claims accordingly, and gave to the defendant receipts in full therefor.

The complaint in each of its causes of action sought to recover the difference between the amount paid by the defendant and the amount claimed as the damage due to the delay.

The findings made by the trial court are voluminous and need not be quoted in full; the portions material here being as follows:

"IX. On the 1st day of July, 1922, a general strike was instituted by the employees employed in the railroad shops of the defendant and of all carriers over whose railroad lines said shipments or any of them moved, and of all other railroad carriers in the United States, and on said 1st day of July, 1922, more than one-half of said employees voluntarily quit and did not resume their employment. That said strike caused impairment of the efficiency of the locomotives used by said carriers and of the efficiency of their shop forces and caused congestion at their principal terminals and a general slowing down of their transportation service. That said strike was accompanied by violence and intimidation by strikers and their sympathizers. That said strike and the said conditions resulting therefrom lasted from said July 1, 1922, until after the movement and delivery of the shipments made by plaintiff. That said strike was a matter of general notoriety and public comment. That many thousands of claims for damages due to delay of perishable shipments that moved during the last six months of the year 1922 over the railroads of the defendant and the railroad carriers over whose railroad lines plaintiff's shipments moved were made by the owners of said shipments against defendant and the railroads over whose lines plaintiff's shipments moved, and that defendant and said railroads in good faith claimed and asserted to said claimants, including the plaintiff, that all of the delay and delay coupled with improper protective service that occurred to the shipments embraced in said claims, including plaintiff's claims during the last six months of 1922, was due and attributable to said strike, and not to any negligence or failure of duty by any railroad carrier, and also claimed that therefore, pursuant to said bill of lading provision that carriers should not be liable for loss, damage or delay resulting from strikes, said carriers were not liable for all or any portion of any damages sustained by delay of perishable shipments, including plaintiff's perishable shipments over said normal schedules of said carriers during the last six months of the year 1922, or for any damages caused by such delay coupled with improper protective service.

"That said claims of defendant and said other carriers respecting the effect of said strike were disputed by plaintiff and the validity of said claims by said railroad carriers respecting said strike was a matter in dispute between plaintiff and defendant at all times during the negotiations between them that preceded the settlements hereinafter found to have been made.

"That the evidence does not show that any car shipped as aforesaid by plaintiff was actually delayed in transit by violence or intimidation accompanying said strike or that the locomotive engine or engines that hauled such car were in unfit or deteriorated condition because of said strike, nor does the evidence identify any car shipped by plaintiff as having been actually delayed by said strike.

"X. That the defendant and its connecting carriers, including the carriers over whose railroad lines plaintiff's shipments moved, and other carriers affected by said strike endeavored to arrive at an agreement among themselves as to the basis upon which they would make offers of settlement of claims on shipments of fresh fruit and fresh vegetables moving between July 1, 1922, and December 31, 1922, over their respective lines of railroad during the period when it was claimed by them that any delay in the movement of such shipments was attributable to said strike and was excused by the bill of lading provision relieving carriers from liability for loss, damage or delay caused by strikes.

"That said carriers on the 23rd day of March, 1923, reached an agreement among themselves as to such basis, which agreement was in writing and was as follows:

" 'Chicago, March 23rd, 1923.

" 'Basis for disposition of claims on shipments of fresh fruit and fresh vegetables only, moving between July 1st, 1922, and December 31st, 1922, inclusive, agreed to by the railroads listed below:

" 'First: Claims for loss or damage resulting directly from acts of violence or intimidation, causing interruption of traffic, when such facts can be conclusively proven, shall be disallowed.

" 'Second: Claims for verified loss and damage, other than for delay, due solely to carriers' negligence, shall be disposed of as heretofore.

" 'Third: Loss and damage claims (not covered by paragraphs 1 and 2) on shipments moving between July 1st, 1922, and December 31, 1922, inclusive, where the only factors to be considered are those of delay in transit, or delay combining with improper protective service, will be settled on the basis of not to exceed fifty (50%) per cent of the proven loss of damage, where the delay caused the missing of the first market after the market for which intended, under participating carriers' normal schedules.'

"The said terms of said agreement of March 23, 1923, were thereupon communicated in writing by defendant to plaintiff, and defendant offered to settle and compromise with plaintiff all claims plaintiff had or might have on account of shipments of the character and during the period described in said agreement where defendant was the originating carrier, which claims embraced the claims described in the tabulation set forth in Finding III hereof.

"Defendant did not at any time admit that any delay to any of said shipments was caused otherwise than by said strike or was caused by the negligence or want of care of defendant or any of the railroads over whose lines said shipments moved, and at all times asserted that it and all carriers over whose lines said shipments moved had a good and valid defense to said delay and to any claim on account thereof or arising therefrom, directly or indirectly, and that said defense was based on said strike clause in said bill of lading and on the actual existence of said strike conditions and the consequent effect thereof.

"XI. Following the communication of said written basis of settlement by said defendant to said plaintiff, duly authorized representatives of said plaintiff and said defendant met and considered and discussed each of said claims described in the foregoing tabulation, and at the end of said discussion arrived at an amount which said plaintiff was willing to accept and receive in such compromise and settlement in full and on account of the claim as to which said amount was at any time due. The arrival at said amount was in strict accordance with the bases of settlement described in said agreement of March 23, 1923, set forth in Finding X hereof. * * * On said date on which each of said amounts was so arrived at there was endorsed on each claim a written statement that it was amended to the amount so arrived at, and the plaintiff executed such endorsement.

"XII. * * * In each case the defendant delivered to the plaintiff on said date of payment a written instrument signed by defendant's duly authorized officials.

"The instrument representing the claim sued upon in plaintiff's first cause of action was in words and figures as follows:

" 'Expense voucher payable. Standard form 219.

" 'Southern Pacific Company Pacific System
" 'Dept. No. 16052

" 'San Francisco, California, June 27, 1923.

" 'Registered in June 1923.

" 'To Tracy-Waldron Fruit Company, 510 Battery street, San Francisco, Calif., Dr.

" 'For all loss and damage on shipments Claim Agent.

" 'The above account has been examined, of deciduous fruit (grapes) 10/7/22.

" 'S. P. claim No. 578602-52-E. $966.97

" 'Clm'ts bill dated 1/23/23. No. 1874-18. Amended 6/22/23.

" 'I hereby certify that the above account is correct. E. M. Bridgman, for Freight found correct and registered.—E. V. Randol, for Auditor Misc. Accounts.

" 'Approved—E. W. Clapp, for Freight Traffic Manager.

" 'Approved for payment—W. H. Dick, for the Auditor.

" 'When signed by the Assistant-Treasurer or his duly authorized representative and properly endorsed by payee this voucher becomes a *sight draft* for nine hundred sixty-six and 97/100 dollars, $966.97, in full settlement of above account and is payable at the office of Assistant-Treasurer Southern Pacific Company—Pacific System, San Francisco.

" 'H. G. Bligh, for Assistant Treasurer.

" 'San Francisco, Calif.'

"On the back of the instrument was printed the following:

" 'Endorse here. This voucher is endorsed as an acknowledgment of the receipt of payment in full on account as stated within.

" '————, Payee.'

"And the plaintiff endorsed the instrument: 'Tracy-Waldron Fruit Company, by J. R. Bordeaux.'

"The instruments delivered by defendant to plaintiff for each of the other accounts * * * were identical in form with the instrument hereinbefore set forth, and in substance each of them described the claim of which it was in payment. * * * The plaintiff endorsed each of said instruments in the manner in which it, as aforesaid, endorsed the instrument hereinbefore set forth at length, and the plaintiff did on or about the date of each of said instruments receive from the defendant in cash the amount therein specified * * * and did retain said amount and has never returned the same or any part thereof, or offered to return the same or any part thereof, to defendant, and did not until the institution of this action question the force and effect of any of said vouchers.

"XIII. That said amounts were not nor was any of them paid to plaintiff by defendant on account of the claim described in the voucher by which such amount was paid, but said amounts were, and each of them was, paid to plaintiff by defendant and accepted by defendant as and for a full payment and settlement of plaintiff's claim, as stated in such voucher. That defendant has not wrongfully or at all retained from plaintiff the sum specified in each of plaintiff's separately stated causes of action, or any sum whatever, and that plaintiff is not entitled to recover interest from any date on any amount or at any rate."

The court further found that the sums so paid by defendant to plaintiff were accepted by the latter in full satisfaction and discharge of its claims, and that said claims would and should be settled and compromised by such payments.

Appellant bases its right to recover upon section 20 of the Interstate Commerce Act, as amended June 29, 1906, March 4, 1915, and August 9, 1916 (49 USCA § 20 [11]), which, so far as material, provides:

"(11) That any common carrier, railroad, or transportation company subject to the provisions of this act receiving property for transportation from a point in one state or territory or the District of Columbia to a point in another state, territory, District of Columbia, or from any point in the United States to a point in an adjacent foreign country shall issue a receipt or bill of lading therefor, and shall be liable to the lawful holder thereof for any loss, damage, or injury to such property, caused by it or by any common carrier, railroad, or transportation company to which such property may be delivered or over whose line or lines such property may pass within the United States or within an adjacent foreign country when transported on a through bill of lading, and no contract, receipt, rule, regulation, or other limitation of any character whatsoever, shall exempt such common carrier, railroad, or transportation company from the liability hereby imposed; and any such common carrier, railroad, or transportation company so receiving property for transportation from a point in one state, territory, or the District of Columbia to a point in another state or territory, or from a point in a state or territory to a point in the District of Columbia, or from any point in the United States to a point in an adjacent foreign country, or for transportation wholly within a territory shall be liable to the lawful holder of said receipt, or bill of lading or to any party entitled to recover thereon, whether such receipt or bill of lading has been issued or not, for the full actual loss, damage, or injury to such property caused by it or by any such common carrier, railroad, or transportation company to which such property may be delivered or over whose line or lines such property may pass within the United States or within an adjacent foreign country when transported on a through bill of lading, notwithstanding any limitation of liability or limitation of the amount of recovery or representation or agreement as to value in any such receipt or bill of lading, or in any contract, rule, regulation, or in any tariff filed with the Interstate Commerce Commission; and any such limitation, without respect to the manner or form in which it is sought to be made is declared to be unlawful and void. * * *"

It is not appellant's contention that the strike clause in the bill of lading was invalid, or that the act renders illegal attempts to compromise claims for damage to interstate shipments based upon the alleged negligence of the carrier where such negligence is denied and the facts would otherwise constitute as between the parties a valid accord and satisfaction; nor, in our opinion, would the language of the act reasonably support such an interpretation. It is claimed, however, that negligence was in effect admitted by the agreement between the carriers set out in finding X above, but notwithstanding it declared its intention to pay and paid but 50 per cent. of the loss caused thereby, and that payment of less than the full actual loss or injury to the property shipped was by the Interstate Commerce Act forbidden.

Whatever the effect of the payments, had the same been made as claimed, such was not the conclusion which the trial court drew from the negotiations, oral and written, between the parties, and we cannot say that it erred in this respect. Under such circumstances the construction given thereto by the trial court must be upheld.

Euless v. Westphal, 71 Cal. App. 611, 235 P. 742; Manley v. Pacific Mill & Timber Co., 79 Cal. App. 641, 250 P. 710; Slama Tire, etc., Co. v. Ritchie, 31 Cal. App. 555, 161 P. 25. Moreover, the above findings are supported by direct testimony, which the court believed, that the alleged negligence and liability of the carrier was at all times in dispute between the parties, and that the payments were made and received as a compromise and settlement of the claims.

The findings of the court are fully supported by the evidence, and the judgment is accordingly affirmed.

---

96 Cal. App. 269

COAST COUNTIES REAL ESTATE & INVESTMENT CO. v. MONTEREY COUNTY WATER WORKS. (Civ. 6525.)★

District Court of Appeal, First District, Division 1, California. Jan. 14, 1929.

Rehearing Denied Feb. 13, 1929. Hearing Denied by Supreme Court March 14, 1929.

1. Waters and water courses 🔑188(2)—Company furnishing water to certain localities of county was quasi public corporation (Const. art. 14, § 1).

Water company, engaged in business of furnishing water to certain localities in county, was performing public service, under Const. art. 14, § 1, and therefore occupied position of quasi public corporation.

2. Waters and water courses 🔑194—Company supplying water is under duty to extend service only on reasonable demand, where extension can be reasonably made (Const. art. 14, § 1).

Water company, engaged in business of furnishing water for inhabitants of community, under Const. art. 14, § 1, is not obliged to supply any number of inhabitants of municipality on demand, but is charged with public duty of furnishing water, where there is a reasonable demand for it and reasonable extension of service can be made to meet the demand, such that water company will be compensated for its expenditure.

3. Waters and water courses 🔑193—Company furnishing water under gravity system was required to supply customers located above gravity line by installing new high pressure system, on filing of bond or deposit for its protection (Const. art. 14, § 1).

Water company, engaged in furnishing water to certain localities in county by means of gravity system, was not required, under Const. art. 14, § 1, to use its own funds to adopt high pressure system in order to satisfy demands of residents of land located above gravity line, where expenditure was not warranted on account of expense and lack of customers, but water company was under duty to provide water for upper lands, where compensation to water company was sufficiently assured by way of bond or deposit.

4. Waters and water courses 🔑201—Realty company, under contract guaranteeing water company against loss in installing new system for supplying subdivision, held entitled to return of deposit on proof new system had become paying investment (Const. art. 14, § 1; Civ. Code, §§ 1647, 1650, 1653).

Under contract between realty company, having lands located above gravity line, and water company, operating on gravity system, by which water company was to adopt high pressure system to supply customers in the subdivision, and realty company deposited money "in lieu of surety bonds guaranteeing * * * cost of operating said water system until * * * it shall become a paying investment," realty company was entitled to recover amount deposited on proof that investment was profitable under Const. art. 14, § 1, and Civ. Code, §§ 1647, 1650, 1653, though contract also provided that water company might return such portions of deposit as it saw fit in full satisfaction of claims or demands of realty company.

5. Contracts 🔑162—Apparent conflicts in contract should, if possible, be harmonized.

Elementary rule of construction of contracts is that apparent conflicts therein should be harmonized, if possible.

6. Contracts 🔑170(1)—Construction placed on contract by parties may be considered.

In determining the true construction of a contract, the construction placed thereon by the parties themselves may be considered.

7. Limitation of actions 🔑103(2)—Limitation on trustee's liability under express continuing trust does not run until trustee repudiates trust.

Possession of trustee is deemed to be that of beneficiary, and statute of limitation on trustee's liability does not run against beneficiary in case of an express and continuing trust, until the trustee repudiates the trust and clearly and unequivocally brings home the fact to the beneficiary.

8. Limitation of actions 🔑102(2)—Action to recover money deposited 15 years previously to protect water company in operation of new system held not barred, where plaintiff, two years before, learned system was paying investment, and return of deposit was then refused; company being trustee (Code Civ. Proc. § 337, subd. 1, and § 343).

Action against water company to recover deposit made with it to guarantee it against loss in operation of new water system until system should become a paying investment *held* not barred by lapse of 15 years since payment and advances under contract under Code Civ. Proc. § 337, subd. 1, and section 343, where complaint alleged that two years previously plaintiff learned that the water system was a paying investment, and at that time made demand for return of money deposited, which was refused, since money remained property of plaintiff, and defendant's possession was that of trustee or mere depositary.

★Rehearing denied. Hearing denied by Supreme Court.

9. Waters and water courses ⚷201—Whether water company's new system became paying investment, entitling plaintiff to return of deposit guaranteeing cost, was not determinable solely by considering return on investment.

In action by realty company against water company to recover deposit made to guarantee water company against loss from operation of new system until system should become paying investment, issue whether system was profitable was not determinable solely by considering return on investment, after deducting expense, maintenance, depreciation, and interest charges thereon, since it is presumed that Railroad Commission fixes rates and revenue to afford fair return.

10. Waters and water courses ⚷201—Finding that new system had become paying investment, entitling plaintiff to return of deposit made to guarantee water company against loss, held sustained.

In action by realty company against water company to recover amount of deposit paid water company to secure it against loss by reason of installing new system for supplying subdivision with water, which guaranty was to continue until system became paying investment, finding of trial court that system was a paying investment *held* sustained by evidence.

Appeal from Superior Court, Monterey County; Fred A. Treat, Judge.

Action by the Coast Counties Real Estate & Investment Company against the Monterey County Water Works. Judgment for plaintiff, and defendant appeals. Affirmed.

James F. Peck and Alan C. Van Fleet, both of San Francisco, for appellant.

Woolf & Thompson and John Thompson, all of Monterey, and C. F. Lacey, of Salinas, for respondent.

PARKER, Justice pro tem. This is an appeal from a judgment in favor of plaintiff and against defendant, and comes to this court upon a bill of exceptions. The facts of the case follow:

In the year 1907 plaintiff, referred to hereinafter as the Realty Company, had bought a tract of land in Monterey county. The purpose of the Realty Company was to subdivide the land and offer it for sale to the public. The area embraced some 1,600 lots. As a necessity, water was required, and there was none available to the tract. A corporation, predecessor of defendant, was then operating in Monterey county and engaged in the business of furnishing water to certain localities in said county. As there is no question presented on the distinction between the rights, duties, or liabilities of defendant and its predecessor, we will drop all mention of the predecessor and proceed as though the present corporation defendant has been the actual party contracting from the inception of the transaction. The defendant throughout will be styled Water Company. In 1907 the Water Company, in furnishing water to the localities served, employed wholly a gravity system. In other words, the point of supply was above the points of distribution. The land of the Realty Company was situated above the gravity line of the Water Company and therefore could not be served thereby. The investment of the Realty Company was a total loss without water, and therefore it began intensive negotiations with the Water Company. Propositions and counter propositions were made, and finally a contract was entered into between the Realty Company and the Water Company, being the contract out of which arises the present controversy. The contract represents the only proposition the Water Company would make or consider at the time, and was agreed to by the Realty Company only with strenuous objection.

The contract may be thus summarized: It recites the fact that the Water Company had never undertaken to deliver water above its gravity line and that the lands of the Realty Company were above the said line. In consideration of the sum of $9,000 paid to the Water Company, it agreed to construct (as far as the sum of $9,000 would go to pay therefor) a water system, including fire mains, distributing pipes, hydrants, electric motors, or such other power plant as may be deemed most advisable by the Water Company, pumps, tanks, and suitable buildings to contain the plant to supply water for the lands of the Realty Company. The mains and distributing pipes were to be laid subject to the direction of the Realty Company with reference to the particular portions of the lands to be reached and benefited thereby. As soon as the work was completed (so far as the $9,000 would go toward completing the same) the Water Company agreed to operate the water system and pumping plant, and to supply water to consumers upon the land of the Realty Company reached thereby, at the same rates as to consumers below the gravity line, then being supplied by the Water Company. Thereafter, as fast as the Realty Company should deposit with the Water Company the sum or sums necessary to defray the expenses of establishing and constructing additional water mains to extend said water system, and as requested by the Realty Company on lands owned by said Realty Company, the Water Company would proceed forthwith to establish and construct such water mains as in the first instance, and thereafter operate the same and supply water to consumers upon land reached by such extensions at the same rates as in the first instance: Provided, that at least the full cost of such extension must be deposited as aforesaid before any work of extension shall be begun.

It is covenanted and agreed between the respective parties hereto that, in lieu of surety bonds guaranteeing to said Water Company

---

the cost of operating said water system until such time as it shall become a paying investment, the entire sum of money deposited hereunder by the Realty Company with the Water Company, and such other sum or sums as may hereafter be deposited by the Realty Company with the Water Company for securing extensions, shall be held by the Water Company as a guarantee to secure said Water Company against any possible loss in the operating of said water system, and the return of such money shall be at the discretion of the Water Company, and any portions which it may see fit to return to the said Realty Company will be, by the Realty Company, received as satisfaction in full of all claims or demands which it may have against the Water Company for the return of said money: Provided only that said Water Company shall have faithfully kept and performed all the obligations on its part to be kept and performed. In addition the Realty Company was to deed to the Water Company four lots for buildings and rights of way for pipe lines and fire mains. It was especially understood that all covenants as to water rates in any lands situate within the corporate limits of the town of Monterey are subject to the ordinances of said town regulating water rights therein. This agreement was dated March 6, 1907.

The Realty Company, in addition to the $9,000 paid at the time of the execution of the contract, advanced the sum of $3,750 for extensions, making a total of $12,750 received by the Water Company. There is no claim that the Water Company did not in all respects perform the obligations assumed by it, with reference to construction of works and distribution of water to the lands as contemplated in the contract. The controversy arises over the moneys paid or deposited. The Realty Company alleges that in 1919 the water system thus installed became and still is a paying investment, and that under the contract the moneys paid are to be returned to the Realty Company, for which moneys the action is brought.

The Water Company contends that the contract imposes no obligation on it under any circumstances to return the money paid it by the Realty Company. Incident to this the Water Company further contends that, if it were liable for the return of any portion of the money, then under the contract it had the option to return the whole or any part thereof, which option it exercised. On the matter of the exercise of the claimed option it is found by the court, upon admission, that the Water Company offered to the Realty Company the sum of $10 as a full discharge of the money obligation, which offer was not accepted.

The issue thus presented brings us to a construction of the contract. All of the evidence as to prior negotiations and surrounding circumstances at the time of the execution of the contract have been recited. Neither party offered any other evidence to explain doubtful provisions of the contract or to illustrate just what the parties executing the contract had in mind. The secretary of the Realty Company, the officer of the said company who executed the contract in its behalf, was called as a witness. No one testified in behalf of the Water Company as to the circumstances surrounding the execution of the contract. We have therefore no extraneous aids to construction, other than heretofore noted. In the early case of Walsh v. Hill, 38 Cal. 481, the court says: "The only rule of much value—one which is frequently shadowed forth, but seldom, if ever, expressly stated in the books—is to place ourselves as near as possible in the seats which were occupied by the parties at the time the instrument was executed; then, taking it by its four corners, read it."

In Eastman v. Piper, 68 Cal. App. 554, 229 P. 1002, it is said: "The intention is to be gathered from the four corners of the instrument. But the rule that the intention of the parties is to be ascertained from the writing alone, where the contract is reduced to writing, is subject to other rules of law for the interpretation of contracts. One of these is that 'a contract may be explained by reference to the circumstances under which it was made and the matter to which it relates.' Section 1647. Another rule is that the contract should be read in the light of the general intent of the parties and the object sought to be attained by them, and if any particular phrase or clause be repugnant to or inconsistent with what appears to be such underlying purpose and main intention, as gathered from a consideration of all the provisions of the contract and the circumstances under which it was made, it should be rejected. This rule is stated by the code thus: 'Particular clauses of a contract are subordinate to its general intent.' Civ. Code, § 1650. Again: 'Words in a contract which are wholly inconsistent with * * * the main intention of the parties, are to be rejected.' Section 1653."

[1] With these rules in mind, we may proceed to a discussion of the contract here, with a view of determining the proper construction to be placed upon the instrument as a whole. At the time of the execution of the contract the Water Company was already formed and operating and in its operation was performing a public service. Const., art. 14, § 1. The opening recital of the contract states as much. Throughout the record before us all parties concede this. Being so engaged, we consider the Water Company as a quasi public corporation. City of South Pasadena v. Pasadena Water Co., 152 Cal. 579, 93 P. 490. There is a lack of facts to establish exactly the nature of the Water Company's holdings or the character of its water appropriations. However, from the en-

tire record, and from the further fact that there is no claim to the contrary, we assume throughout that the company does not claim to be or to have been other than a public service corporation formed for the purpose of appropriating and distributing water to the area within which its appropriations were made and operating pursuant to the laws then in force. Indeed, if the water appropriated were claimed for such a use, then the right of the appropriator depended upon the user and the quantity that it could hold and claim would be dependent, then as now, upon the present and reasonably anticipated necessity. The land of the Realty Company was located within an area susceptible of service, though not by means of the distributing system then in use.

[2] The duty of the Water Company to furnish water to the land of the Realty Company was not unqualified. On the other hand, its right to refuse service was not absolute. The fact that a water company has undertaken to serve the entire municipality and that it would be of advantage to an inhabitant thereof, or a number of them, to have the water system extended to supply them would not of itself be sufficient to require or compel the company to make the extension. The duty which the water company has undertaken is of a public nature and to meet a public necessity for the supplying of water to the community. The obligation of the company is not to supply each or any number of inhabitants of the municipality in demand, as an absolute right on their part, but it has only assumed and become charged with the public duty of furnishing it where there is a reasonable demand for it and a reasonable extension of the service can be made to meet the demand. It would hardly be claimed that the obligation of a water company, exercising a public service franchise, would require it in the demand of an inhabitant of a city, or even a number of them, residing at a long distance from a point in the city to which its mains are already extended, to further excavate the streets of the municipality at its own expense and extend its mains to them, where the rates to be charged for the water to be delivered would but to a slight extent compensate the company for the expenditures entailed in doing so—in fact without any certainty that there would be a continuous consumption of water or a continuous payment of rates even after it was brought to them. Lukrawka v. Spring Valley Co., 169 Cal. 318, 146 P. 640, Ann. Cas. 1916D, 277. The law applicable is extensively reviewed in the cited case, which was a proceeding to compel the water company to furnish water to certain parties plaintiff.

[3] Applying the principles as therein enunciated to the situation existing at the time of the contract, the Water Company, under then existing conditions, could not have been compelled to furnish any water to the Realty Company lands inasmuch as this would have and did necessitate a complete new system of distribution. However, had the Realty Company land been then subdivided and occupied by a population sufficient to warrant the expense of the change in the Water Company's system and to assure return on the necessary investment, then the demand for service made upon the Water Company could have been enforced. Therefore the only valid reason that would justify the Water Company's refusal to serve water to the Realty Company lands, taking the fact to be that there was a sufficient supply, was the condition existing that by reason of expense of construction and lack of customers the expenditure incident to service was not warranted. With this reason removed there remained no other. Therefore, when sufficient assurance, by way of bond or deposit, was forthcoming, the duty of the Water Company to provide water for the Realty Company lands was enforceable.

[4] This then, it is apparent, was the purpose of the written contract and its main purpose, namely, to secure water for the Realty Company lands and to insure the Water Company against a losing or unreasonable venture. The manner of securing against this loss ordinarily might have been by sufficient undertaking or deposit of money. The Realty Company did advance the money and the contract specifically states, to repeat, as follows: "It is covenanted and agreed between the parties that *in lieu of surety bonds* guaranteeing to said Water Company the cost of operating said water system until such time as it shall become a paying investment, the entire sum of money deposited hereunder by the Realty Company, and such other sum or sums as may hereafter be deposited by the said Realty Company with the Water Company for securing extensions, shall be held by the Water Company as a *guarantee* to secure the Water Company against any possible loss in the operating of said water system."

This provision leaves little room for doubt and requires no construction beyond the plain words thereof. The term "in lieu of surety bonds" simply means that instead of offering and delivering an acceptable bond or undertaking conditioned that upon the investment becoming a paying venture the obligation of the bond would be discharged, a cash deposit, upon the same condition, should be made. Throughout the provision the idea is further illustrated by use of the term "deposit" with reference to the sums advanced. The word "deposit" in itself conveys the idea of the conditional delivery and is universally so understood. If the provision just quoted constituted all that the contract contained on the subject of the money, there would be need for no further comment thereon. Immediately following the language quoted, and as a continuation thereof, without paragraphing or other constructional division, the contract reads, "and the return of such money shall be at the discretion of the Water Company, and any portion which it may see fit at any time to return to the said Realty Company will be by the latter received as satisfaction in full of all claims or demands which it may have against the Water Company, *provided only* that said Water Company shall have faithfully kept and performed all the obligations on its part to be kept and performed herein contained." Without question there is a conflict apparent in the two parts quoted.

[5] An elementary rule of construction is that apparent conflicts should, if possible, be harmonized. Proceeding, with this in view, we find no difficulty in the phrase "at the discretion of the water company." The term "discretion" is to be construed as meaning an exercise of honest judgment, rather than an arbitrary determination. This is the holding of our courts in Nave v. Taugher, 49 Cal. App. 311, 193 P. 508; Security Trust Co. v. Claussen, 44 Cal. App. 734, 187 P. 142; Foster v. Young, 172 Cal. 317, 156 P. 476. Continuing this effort to harmonize, we read the remaining portion as though it were written thus: "and any portion of the money that the Water Company shall fairly determine to be returned shall be accepted as a full satisfaction of all demands." Thus harmonized, or to the extent harmonized, this construction supports the claim of the Realty Company here that the money was and is a deposit, to be returned to it whenever the investment became a paying one.

[6] It is likewise a rule of construction, requiring no citation, that the construction placed upon a contract by the parties thereto may be considered in determining the true construction. There is evidence in the record before us that the moneys in question, advanced by the Realty Company under the contract, were carried upon the books of the Water Company in its general ledger, as a liability, namely, a deposit, consumer's deposit for the tract service. As a choice against the construction we adopt, we have the alternative of holding the moneys to be advanced as a mere donation or gift to the Water Company for the doing of that which the law implies is the purpose of its organization. Title Guarantee & Trust Co. v. R. R. Commission, 168 Cal. 295, 142 P. 878, Ann. Cas. 1916A, 738; Nourse v. Los Angeles, 25 Cal. App. 384, 143 P. 801; section 549, Civ. Code; Munn v. Illinois, 94 U. S. 113, 24 L. Ed. 77. In passing, we refer to the defendant's motion for a nonsuit at the termination of plaintiff's case, wherein the sole ground stated was that the evidence offered by plaintiff failed to show that the system established for the land of the Realty Company had become a paying investment. It seems that the usual contact between law and justice will remain unbroken by a construction that places no unfair burdens on either party and harmonizes the words with the intent to the end that fairness and equality result. Should the harmonious corelation of the various conflicts fail, then in accord with the rules announced and in conformance to a well-established canon of construction, where the general intent is manifest from the language of the contract, we may and do disregard entirely the conflicting portions which are repugnant to the intent as shown.

[7, 8] Appellant next contends that the court erred in overruling its demurrer to the amended complaint of plaintiff, which demurrer raised the question of the statute of limitations. The action was instituted on April 21, 1924. The amended complaint alleged the execution of the contract, set forth in hæc verba, in March, 1907; alleged the payment and advances, the last being in 1909. Then follows the allegation that on or about February 1, 1922, plaintiff learned, and alleges the fact to be, that said water system is a paying investment, and has, at all times since the execution of the agreement, been a paying investment. That plaintiff on February 14, 1922, made demand for the return of the money deposited, which moneys the defendant has failed, refused, and neglected to return, etc. The ground of demurrer was that the action was barred under the provisions of section 337, subdivision 1, and section 343, Code of Civil Procedure. The cause of action set forth in the amended complaint may be thus summarized, for the purposes of this branch of the discussion. Plaintiff alleges that in 1907 it deposited with defendant a sum of money to be held by defendant as a guarantee that a certain venture, to wit, a water system operated by defendant, would become a paying investment, and upon the happening of such event the money was to be repaid; that in 1922 plaintiff learned that the investment had been a paying venture from the commencement and demanded the return of the fund, which demand was refused. Action commenced in 1924. Under the contract as pleaded the money was held by defendant purely by way of bond or guaranty, and at no time became the property of defendant free from claim of plaintiff. At all times it remained the money of plaintiff and the possession of defendant was as a trustee for plaintiff, or else as a mere depositary. It must have been and was a voluntary trust. Against such a trust the statute does not run until the trustee repudiates it. Arnold v. Loomis, 170 Cal. 95, 148 P. 518; Norton v. Bassett, 154 Cal. 415, 97 P. 894, 129 Am. St. Rep. 162. The possession of a trustee is deemed to be that of the beneficiary, and the statute does not run as against the cestui que trust in the case of an express and continuing trust so long as the trustee holds according to the understanding and does not repudiate the relationship. The statute does not begin to run until the trustee repudiates the trust and clearly and unequivocally brings home the fact to the beneficiary. 16 Cal. Jur. 427, and cases therein cited.

We think that the amended complaint on its face did not show the action barred, and that the allegations of the pleading were sufficient as against the demurrer. The statute was not pleaded in the answer, or otherwise, by way of defense.

[9, 10] The remaining question presented is whether or not the water system provided for in the contract ever became a paying investment. The trial court found that on January 1, 1919, the said system became a paying investment, and ever since has continued to be a paying investment, but that prior to said date the Water Company sustained a loss in the operation of the system, amounting to $50. The judgment, following the findings, deducted this $50 from the amount deposited as not being returnable.

By far the greater portion of the evidence offered was on the question of the return on the investment to determine its character as a paying investment under the terms of the contract. Indeed, it cannot be denied that this was deemed by all parties as the main issue in the trial court.

Let us review that evidence. The lands of the Realty Company were referred to on the books of the Water Company as the Withers tract, and all of the evidence on the question now under review so designated the lands. When, under the contract, the Water Company undertook to install a high pressure system, as distinguished from the theretofore used gravity system, many changes were necessary. At that time the Water Company determined, in view of the prospective growth and increasing population of Monterey county, that the necessity for a high pressure system was apparent as a part of its general scheme of distribution; that is to say, it was determined, as a matter of good business policy, that, if a high pressure system was to be installed, it would be unwise to confine its capacity to the needs, actual or anticipated, of the Withers tract alone. Therefore, when the high pressure system was installed, a much greater expense was incurred than the money advanced by the Realty Company; in fact about double that amount. Where small water mains would have sufficed even the anticipated needs of the tract, larger ones were installed, and the whole scheme or plan embraced and intended what is now admitted to be the case, namely that the installation became and is an integral part of the entire distributing system of the Water Company, which serves with water some 60,000 people, and a total investment of over $1,000,000. In addition to the main plant there was also installed what is called a stand-by plant, intended to secure the service against breakdown or other interruption of service in the main plant; also, the record discloses that in the Withers tract are some 1,600 lots, all in private ownership and all homesite lots.

Both appellant and respondent presented much evidence on the question of what constituted a paying investment, and particularly applying the testimony to the investment under discussion. As is not unusual, the conflicting conclusions arise from practically the same facts. Both sides used the books and records of the Water Company as the basis of computation, and many elaborately prepared diagrams and schedules were prepared and submitted for the court's consideration. Should we take up these various and varying schedules and analysis charts, and attempt to classify each item therein, it would serve no useful purpose. As both sides concede, figures may be made to perform strange antics. For instance, on a yearly basis of pro ratio, figuring the cost of upkeep proportionate to the Withers tract uses a certain figure was set. The books over a period of seventeen years, demonstrated that the estimate was 50 per cent. correct. Likewise, in computing the burden of expense to be borne by the Withers tract, as a unit in the distribution of water, taxes were computed which item taxes included the income taxes from the system as a whole. Without further dissection of the various charts, we conclude from a study of all of the evidence submitted that there was sufficient competent testimony adduced to support the conclusion of the trial court that the investment did pay.

Much of the argument is advanced on the theory that, to constitute a paying investment it must be shown that there will be realized by the Water Company a return of at least 6 per cent. on the sum invested, after allowing all of the items of chargeable expense, including maintenance, depreciation and fixed interest charges on the depreciation amount found. While all of this argument might properly be addressed to a rate-fixing body or commission, we do not hold it to be our sole guide. The record discloses that the Water Company is operating as a public utility under the control and supervision of the Railroad Commission. In its reports to said commission, it has presented the investment as a whole and in its several units, as well as including all sums chargeable to maintenance, depreciation, etc. We presume that, in fixing rates and revenue, a fair return, under the law, has been determined by that body, However, we are not restricted in our inquiry to a return of any fixed per centum. It is obvious, from the record, that the Water Company, at no time, would have nor would it now, in the exercise of a prudent business plan, abandon the high pressure unit or the Withers tract service for a return of the amount invested. Should the owners of the Withers tract determine upon a local or mutual service and seek to condemn that much of the water system devoted to their use, the same figure would undoubtedly show a return on investment and a loss through severance, that would establish a value far above the deposit amount.

To repeat, if we should set forth in detail all of the items contained in the many schedules and determine the exact accounting placement of each, with reference to proper charge as against the particular unit involved, we would end just where we began, and as all of the witnesses agree, in an approximation. We accept the conclusion of the trial court, finding ample evidence to sustain it on this issue.

Judgment affirmed.

We concur: KNIGHT, Acting P. J.; CASHIN, J.

96 Cal. App. 558

JULIEN v. WEST et al. (Civ. 6039.)

District Court of Appeal, Second District, Division 2, California. Feb. 1, 1929.

Judgment 🔑443(2), 444—Plaintiff could not set aside judgment as fraudulently obtained under allegations that his attorneys misconducted trial and that written evidence was forged.

Party against whom judgment was recovered *held* not entitled to equitable relief in suit to have judgment set aside as fraudulently obtained, by virtue of alleged corrupt practices upon part of his own attorneys in misconducting the case so as to lose it, or on ground of claim that principal item of evidence introduced by opponent at the former trial was a forgery, where it was not alleged that opponent at the former trial was guilty of corrupt conduct; there being no charge of extrinsic fraud.

Appeal from Superior Court, Los Angeles County; Leon R. Yankwich, Judge.

Suit by Russell C. Julien against Marie West and the Security Trust & Savings Bank, administrators of the estate of Amelia Appleby, deceased. From a judgment of dismissal, plaintiff appeals. Affirmed.

Laird L. Neal and Burke, Catlin & Burke, all of Los Angeles, for appellant.

Thomas S. Bunn, of Los Angeles, for respondents.

STEPHENS, Justice pro tem. Plaintiff and appellant herein was a defendant in the municipal court of the city of Los Angeles, the cause being entitled Amelia Appleby v. Russell Julien, for damages. Judgment was entered against him. Thereafter he brought suit in the superior court asking that the equity powers of that tribunal be used to vacate and set aside such judgment on the ground that it had been fraudulently obtained. The superior court sustained a general demurrer to the complaint without leave to amend. Thereafter a judgment of dismissal, with prejudice as to said referred to action, was duly ordered and entered. This appeal is from such judgment. The title of the cause has been changed for the reason that the defendant has died, and the administrator of her estate is substituted as the party defendant.

The determination of the appeal needs no extended statement of facts or lengthy opinion. Appellant in his complaint alleges that in divers and various ways his own attorneys in such trial purposely and for their own advantage so conducted the case as to lose it, and that by reason of such corrupt practices there was no "adversary trial," and that thereafter they advised him in such manner as to deprive him of his right of motion for new trial and appeal. There is no allegation connecting the plaintiff in the municipal court or his attorneys with this corrupt conduct. Appellant (plaintiff in the superior court) also alleges in the complaint that a writing, a principal item of evidence and introduced by the plaintiff at the municipal court trial, was a forgery, and that appellant did not ascertain that fact until after the trial. Here again is presented the old subject of extrinsic fraud. Upon the reasoning and authority of Pico v. Cohn, 91 Cal. 129, 25 P. 970, 27 P. 537, 13 L. R. A. 336, 25 Am. St. Rep. 159, and United States v. Throckmorton, 98 U. S. 61, 25 L. Ed. 93, the two beacon lights on this subject, we find no extrinsic fraud alleged in the complaint. Therefore, there was no cause of action stated, and as the allegations are full and purport to relate the whole of and all of plaintiff's cause of complaint, the ruling of the trial court and the judgment entered thereupon were proper.

Judgment affirmed.

We concur: WORKS, P. J.; CRAIG, J.

96 Cal. App. 356

WEHRLE v. D. E. McDANELD, Inc. (Civ. 5550.)

District Court of Appeal, Second District, Division 1, California. Jan. 21, 1929.

1. Automobiles 🔑19—Sale of automobile held not "completed," where registration certificate was not obtained, and automobile was returned, entitling purchaser to return of money paid (Vehicle Act 1915).

Where husband, assuming to act for wife, who was legal owner of automobile, traded automobile to defendant in part payment for new car, and defendant delivered automobile to agent on consignment, with authority to sell automobile, and agent sold automobile to plaintiff's assignor, promising to deliver certificate of registration, but legal owner refused to surrender certificate, and motor vehicle department refused to issue certificate without surrender of old certificate, and automobile was returned after reasonable time, sale was not "completed," under Vehicle Act 1915 (St. 1915, p. 397), requiring transfer of certificate and filing thereof to complete sale, and hence purchaser was entitled to return of money paid.

[Ed. Note.—For other definitions, see Words and Phrases, First, Second, and Third Series, Complete.]

2. Sales ⚷124—Return of automobile, to place where purchaser obtained it from defendant's agent, with notice to agent, held sufficient return to agent and defendant.

Where defendant delivered automobile into possession of agent on consignment, for purpose of sale, and agent sold car to another, return of automobile by purchaser, on defendant's failure to secure certificate of registration to place where purchaser obtained it from agent with notice to agent, who made no objection to place of delivery, was sufficient return of automobile to agent, though not actually on agent's premises but in repair shop, where agent placed it, and was sufficient return to defendant.

Appeal from Superior Court, Los Angeles County; T. A. Norton, Judge.

Action by M. B. Wehrle against D. E. McDaneld, Inc. Judgment for plaintiff, and defendant appeals. Affirmed.

Page, Nolan, Rohe & Freston, of Los Angeles, for appellant.

Bernard Potter and Lynden Bowring, both of Los Angeles, for respondent.

CONREY, P. J. This action grew out of the sale of an automobile to plaintiff's assignor, Lynden Bowring, followed by failure to transfer title to the purchaser. The defendant appeals from the judgment.

[1, 2] The grounds of appeal, as stated by appellant, are: First, that the evidence is insufficient to prove that one Claubes, through whom the sale was made, was the agent of appellant, and, second, that there was not actually any deficiency of title "attributable to appellant." Legal ownership of the automobile was in the name of Ella E. Merritt. Her husband, assuming to act on her behalf, traded the car to defendant as part payment on a new car purchased from the defendant. This occurred on September 25, 1922. Under the provisions of the Vehicle Act of 1915 (St. 1915, p. 397), as amended and in force at that time, there was required to be only one certificate of registration and ownership. In order to complete a sale, it was necessary that the certificate be properly indorsed by the transferee, and be filed with the motor vehicle department, and a new certificate of registration issued in the name of the purchaser. Parke v. Franciscus, 194 Cal. 284, 294, 228 P. 435. The Merritt car was delivered to defendant without the certificate. Defendant delivered the car into the possession of Claubes "on consignment," for purposes of sale. The evidence is sufficient to prove that Claubes became defendant's agent, with authority to make a sale. Claubes sold the car to Bowring, and delivered it into his hands, at the same time promising to obtain and deliver the certificate. On request of Claubes, defendant endeavored to obtain the certificate, but Mrs. Merritt refused to surrender it. Bowring made several demands for the certificate, and also endeavored to obtain a new certificate of registration and ownership from the motor vehicle department. That department refused to issue a certificate to Bowring without surrender of the Merritt certificate. After waiting at least a reasonable time, Bowring returned the automobile to the place where he had obtained it from Claubes, and notified Claubes of that fact. Claubes made no objection to the place of delivery, which was not actually on his premises, although it was the repair shop where Claubes had placed it.

In our opinion this was a sufficient return of the automobile to Claubes, and therefore was a sufficient return of it to his principal, the defendant. The effect of the facts thus established is that the defendant failed to complete the sale in accordance with its contract, and Bowring became entitled to a return of the money paid by him. It is stipulated that Bowring's claim against defendant was duly assigned to the plaintiff before the commencement of the action.

The judgment is affirmed.

We concur: HOUSER, J.; YORK, J.

96 Cal. App. 536

NOWELL v. OSWALD et al. ★

MATHEWSON, State Commissioner of Bureau of Labor Statistics, v. SAME.

(Civ. 5342, 6031.)

District Court of Appeal, Second District, Division 1, California. Jan. 31, 1929.

Rehearing Denied Feb. 20, 1929. Hearing Denied by Supreme Court April 1, 1929.

1. Principal and agent 🔑3(5)—One directing production of show into which defendant put money was defendant's agent, although called trustee.

Where defendant put $2,000 into show to be staged by another, and profits were to be divided, and C. was to act solely as trustee for defendant and direct production, dictate policies, disburse moneys, and deposit moneys in his name, C., although called trustee, was in fact defendant's agent.

2. Joint adventures 🔑1, 7—Defendant loaning money and receiving half profits held to be joint adventurer with others in production of show and therefore liable to employees for labor (Civ. Code, § 2395).

Where defendant entered into contract with others whereby, in consideration of loan of $2,000 to S., defendant was given an undivided half interest in net proceeds to be derived from show to be staged by S., and no provision was made for return of money except that it was to be paid back from gross proceeds derived from show before a division of the profits, defendant was a joint adventurer with others in production of show, under Civ. Code, § 2395, and therefore was liable to employees for claims for labor.

Houser, Acting P. J., dissenting.

Appeals from Superior Court, Los Angeles County; Victor R. McLucas, Judge.

Actions by Wedgwood Nowell and by Walter G. Mathewson, State Commissioner of the Bureau of Labor Statistics (substituted for Wm. E. Steineck, Deputy Labor Commissioner, etc.), against George H. Oswald and others. From judgments for plaintiffs, defendants appeal. Affirmed.

George L. Greer, of Los Angeles, for appellants.

Duke Stone, of Los Angeles, for respondent Nowell.

Chas. F. Lowy and Isaac Pelton, both of Los Angeles, for respondent Mathewson.

CRAIL, Justice pro tem. The sole question presented on appeal is the correctness of the trial court's decision that appellant Oswald was a joint adventurer with others in the production of a theatrical exhibition and therefore liable to employees for claims for labor. We are satisfied that the ruling of the trial court was correct. Westcott v. Gilman, 170 Cal. 562, 150 P. 777, Ann. Cas. 1916E, 437; Chapman v. Hughes, 104 Cal. 302, 37 P. 1048, 38 P. 109; Leake v. City of Venice, 50 Cal. App. 462, 190 P. 440.

There is an all-important difference in construing relationships of this kind as between the parties themselves upon the one hand and as between the parties themselves and those who have dealt with them upon the other hand. In the instant case the rights of third parties are involved; and, as stated in Westcott v. Gilman, supra: "When, however, the rights of third parties are involved, the basis of the inquiry shifts materially, and the fundamental questions are, what had those third parties the right to believe from the language of the contract and from the conduct of the parties to it as affecting them, and not as affecting each other. Each case, therefore, is adjudicated upon its own facts, and very little value will be found from any extended review of the authorities."

Oswald, Mrs. Small, and Castle entered into a contract, under the terms of which Oswald, in consideration of a loan of $2,000 to Mrs. Small, was given an undivided one-half interest in the net proceeds to be derived from a show to be staged by Mrs. Small, known as "Mlle. Magnificent." No provision was made for the return of the money except that it was to be paid back from the gross proceeds derived from the show before a division of the profits. It was further agreed that in no way was Oswald to be held responsible for any debts incurred in said production. No mention is made of Castle in the contract, except that he also was not to be held responsible for any debts, and that he "is acting solely as trustee" for Oswald. We must go to another contract made at the same time to ascertain how Castle is to "act" as trustee. In this contract, entered into between Mrs. Small and Castle, it is agreed that Castle is to be known at all times as director of the production and is to dictate policies and performances at all times without interference from Mrs. Small; also that he shall act as treasurer and that he shall have sole and exclusive charge of all matters relating to advertising and exploitation. Disbursement of all moneys is to be done only by signature of D. Castle, trustee, and all moneys accruing from the production will be deposited in the name of D. Castle, trustee. The net profits were to be divided as follows: 50 per cent. to Oswald; 15 per cent. to an actor named Ricker for services in lieu of salary; 10 per cent. to publicity; 15 per cent. to Castle; and only 10 per cent. to Mrs. Small. It was stipulated in an agreed statement of facts that each of the defendants Oswald, Mrs. Small, and Castle knew that plaintiff's assigns were rendering the services of actor, pay for which the action is brought, at all times during the said performance. They could only know this fact at all times by being on hand at all times when the services were rendered.

[1] This was not a loan, in the ordinary

★Rehearing denied. Hearing denied by Supreme Court.

sense, for the money was to be paid back, not by Mrs. Small, but from the gross proceeds of the venture. It is apparent also that, while Castle was called "trustee," he was in fact the agent of Oswald. Except as to the moneys which were deposited in the bank, he had none of the attributes of a trustee, but was the general agent of Oswald in putting on the production. Oswald was in charge of the show at all times, through his agent, who was director of production, dictator of policies and performances, as well as sole and exclusive manager of all advertising and exploitation. Furthermore, appellant was given the option for a period of 90 days "to stage the show elsewhere," and, since the terms upon which he was to stage it elsewhere were not stated, it is a fair inference that, in the event he exercised the option, he was to stage it on the same terms as those of the original contract under which he *staged* it at the Mason Opera House.

The cases relied upon by appellant may be readily distinguished from the instant case. The contracts in those cases showed clearly a bona fide effort to lend money without any right whatever to conduct the business. In the instant case the contracts are so peculiar in phraseology and so unusual in their terms that third persons with rights involved manifestly see in them a deliberate attempt by one partner to evade his legal liability for the partnership debts—debts which were incurred during the performances in the personal presence of that partner at all times.

[2] Section 2395 of the Civil Code defines a partnership to be "the association of two or more persons, for the purpose of carrying on business together, and dividing its profits between them." Appellant had power under the arrangement through his agent to make contracts, incur liability, and manage the whole business. He enjoyed for a brief season the pleasures and distinction of being the angel of the show. Now that the show has flopped and 86 members of the cast are pressing for collection their claims for labor, he seeks to hide behind the skirts of the partner who was to receive only 10 per cent. of the net profits. We have said before that we believe the ruling of the trial court was correct.

Judgments affirmed.

I concur: YORK, J.

HOUSER, Acting P. J. (dissenting). It appears that no evidence was introduced on the trial of the case, but it was submitted to the trial court on an agreed statement of facts. It is to such statement only, therefore, that this court must look as a guide to a proper declaration of the law in the premises. In order that no misapprehension may occur as to the *facts* which were before the trial court and upon which the law of the case depends, they are inserted herein in full, as follows:

"First: That the parties mentioned in plaintiff's complaint performed services of the kind and value as set out in the complaint in the production of a show at the Mason Opera House in the City of Los Angeles, California, entitled 'Mlle. Magnificent.'

"Second: That prior to the institution of this action, said parties assigned unto the plaintiff herein the said claims.

"Third: That said production was actually given as a public exhibition at said Mason Opera House in the City of Los Angeles, California.

"Fourth: That prior to the giving of said exhibition or production the defendants, D. Castle and Mrs. Ann Small, entered into an agreement dated June 18, 1924, a copy of which is attached hereto as Exhibit 'A'; and that Ann Small mentioned in said exhibit is one and the same person as Mrs. J. A. Small, the defendant herein.

"Fifth: That prior to said production, to-wit: On June 18, 1924, George H. Oswald, Mrs. Ann Small and D. Castle entered into a contract in writing, a copy of which is hereto attached as Exhibit 'B.'

"Sixth: That each of the defendants knew that the said parties whose claims were assigned to plaintiff herein were rendering the services as actors at all times during said performance, but without admitting the materiality of any of the facts above stated.

"Exhibit 'A'

"Agreement

" 'This agreement, made and entered into this 18th day of June, 1924, by and between D. Castle, party of the first part; Mrs. Ann Small, party of the second part:

" 'Witnesseth:

" 'Whereas the parties of the first and second parts have prepared for public presentation a legitimate production entitled "Mlle. Magnificent," to be staged in the City of Los Angeles, State of California, on or before the 30th day of June, 1924.

" 'The party of the first part is to be known at all times as director of this production and is to dictate at all times policies and performances of said production without interference from party of the second part.

" 'It is understood and agreed by and between both parties that the disbursement of all moneys is to be done only by the signature of D. Castle, Trustee.

" 'It is further understood that all moneys accruing from the production, including gate receipts, advertising, programs or any other source pertaining to said production, will be deposited in the United States National Bank, in the city of Los Angeles, Calif., in the name of D. Castle, Trustee.

" 'It is further agreed by both parties that upon completion of said production and after paying all expenses attendant thereto, an audit will be made of all accounts and books, and the balance of moneys remaining in said account shall be disbursed as follows:

" 'Geo. H. Oswald shall receive the sum equal to fifty per cent. of the net profits of the above mentioned production for moneys advanced; David Swing Ricker shall receive the sum equal to fifteen per cent. of the net profits for services rendered and in lieu of salary; Soldiers' Monument Fund shall receive the sum equal to ten per cent. of the net profits; D. Castle, party of the first part, shall receive the sum equal to fifteen per cent. of the net profits, and the balance of ten per cent. shall go to Mrs. Ann Small, party of the second part.

" 'Party of the first part shall act as treasurer during the entire production; and shall have sole and exclusive charge of all matters relating to the advertising and exploitation of said production.

" 'In Witness Whereof, the parties have set their hands and seals at the City of Los Angeles, State of California, the day herein first above written.

" '[Sgd] D. Castle
" '[Sgd] Mrs. Ann Small.'

"Exhibit 'B'

"Agreement

" 'It is hereby agreed, by and between the parties hereto that Geo. H. Oswald, party of the first part, and Mrs. Ann Small, party of the second part, and D. Castle, party of the third part. That for and in consideration of the loan of the sum of Two Thousand Dollars ($2,000.00) to be made by the party of the first part to the party of the second part, that the party of the first part is hereby given an undivided one half (50%) interest in the net proceeds to be derived from a show to be staged by the party of the second part, known as Mlle. Magnificent, to be shown at the Mason Opera House, in the City of Los Angeles, Calif., beginning June 25th, 1924.

" 'It is further agreed by and between the parties hereto, that this loan above mentioned, is to be paid back to the party of the first part from the gross proceeds derived from this show out of the receipts of the first night's performance. And if the gross receipts of the first night performance do not equal the amount of this loan, then the same procedure to carry on for the balance of the nights said show is shown until this loan is paid in full.

" 'It is further understood and agreed upon that in no way is the party of the first part to be held responsible for any debts incurred by the party of the second part in the production of this show in any way, and the party of the third part, it is agreed, shall also not be held responsible for any debts incurred by the party of the second part, it being further agreed and understood that party of the third part is acting solely as trustee for party of the first part.

" 'It is further agreed by and between the parties hereto that the party of the first part is hereby given an option for a period of ninety (90) days to stage this show elsewhere, if he so desires for the same consideration above mentioned.

" 'It is further agreed that the paying back of this loan as above outlined does in no way affect the undivided one half (50%) interest of the party of the first part in the profits of said show.

" 'This Agreement Made and Entered into this 18th day of June, 1924.

" '[Sgd] Geo. H. Oswald
" '[Sgd] Mrs. Ann Small
" '[Sgd] D. Castle.' "

From Exhibit A, which is the agreement in which *D. Castle and Mrs. Small are the only parties*, it appears that *they* "have prepared for public presentation a legitimate production," of which Castle is to be the "director"; that he is "to dictate at all times policies and performances of said production; * * * have exclusive charge of all matters relating to the advertising and exploitation of production"; receive all moneys accruing therefrom, which will be not only banked, but as well disbursed, in his name, only, as trustee; and that, of the net profits (if any) Oswald shall receive 50 per cent. "*for moneys advanced,*" Castle 15 per cent., Mrs. Small 10 per cent., Ricker 15 per cent., and Soldiers' Monument Fund 10 per cent.

By Exhibit B, which is the agreement in which Oswald is a party, together with Castle and Small, in substance, it is provided that, in consideration of a loan of $2,000 made by Oswald to *Small*, for a possible period of 90 days, Oswald may receive 50 per cent. of the *net profits* of the "show"; that Oswald is to be paid back his $2,000 from the *gross* proceeds derived from the enterprise; and that neither Oswald nor Castle is to be held responsible for any debts incurred by *Small* in the production of the "show"; also, that Castle "is acting solely as trustee" for Oswald.

As a further condensation of the two agreements, it may be said that Small and Castle formed an association for the purpose of producing a "show," to be managed by Castle "without interference" from Small; that of the *gross* proceeds from the production Oswald was to be first paid the $2,000 which he had lent to *Small*, and thereafter any profits which might be derived from the operation of the "show" were to be divided among the several parties to the two agreements, Ricker and Soldiers' Monument Fund.

So far as appears on the face of the instrument, Oswald *was a stranger to the agreement between Castle and Small.* Not having signed that agreement, he was in no way bound by its provisions. Although by the terms of that instrument Oswald was to receive 50 per cent. of the net profits of the production "for moneys advanced," it will be noted that in the agreement in which Oswald's name *does* appear as a party thereto (and which was the only instrument by which he was expressly bound), it is recited that the loan was made not to Castle *and Small*, but that the loan was to be made to *Small* personally. Nor does that agreement contain even the slightest intimation or indication of the purpose of the loan, or the use to which it was to be put. For aught that appears, the money so lent to Small might be used by her, not necessarily in the "legitimate production of Mlle. Magnificent," but might be used by her to buy real estate, or to engage in any other "legitimate" or illegitimate business, dependent solely either upon her best judgment or her caprice. In such circumstances, merely because, in addition thereto, according to the statement of facts of the parties to the litigation, Castle was "acting solely as trustee" for Oswald, and Oswald "knew that the said parties whose claims were assigned to plaintiff herein were rendering the services as actors at all times during the performances," to hold that Oswald was a partner in the business and consequently liable for the debts of the partnership in my opinion is not consonant with the law as announced in authorities to be hereinafter cited. None of the persons whose claims formed the foundation of the action rendered services or furnished materials to the partnership upon any representation made to him by Oswald, or by any other person, that Oswald was a member of the association; nor did any of such persons even believe that Oswald was in any way connected with the business. In other words, credit was not extended on the basis that Oswald was a member of the partnership. Reduced to its lowest terms, the agreement simply shows that Oswald lent money to a woman who was engaged in the "show" business. His money was to be paid back to him in any event from the gross receipts of that business, and, if there were any profits from the management thereof, he was to receive a certain percentage thereof (whether 50 per cent. or one-fourth of 1 per cent. is of no materiality so far as the legal principle involved is concerned). But Oswald's stipulation with the woman was practically that he was not to be liable for any debts that might accrue. Apparently he had nothing to do with the business other than that Castle was to act as "trustee" in the matter of seeing that the business was properly managed and that an accurate accounting was had, first, as to the "*gross proceeds*" from which the $2,000 loaned to Small was to be repaid to Oswald; and, secondly, in determining the amount of interest (if any) to be paid to Oswald by way of "net profits."

By section 2395 of the Civil Code, in order to constitute a partnership between two persons, it is essential that they associate themselves "for the purpose of carrying on business together." Nowhere, even in the *two* agreements herein considered as a whole, much less in the agreement to which Oswald subscribed his name, may the least indication be found that Oswald was associating himself with Castle and Small, or with either of them, "for the purpose of carrying on business together" with either or both of them.

The cases of People's Lumber Co. v. McIntyre & Peters, 179 Cal. 780, 178 P. 954, and Martin v. Sharp & Fellows C. Co., 34 Cal. App. 584, 168 P. 373, are at once illuminating and determinative of the principle here involved. In the former case, although the contract between the parties thereto does not appear in the body of the opinion, from the transcript on appeal, among other things, it appears that one McIntyre, who desired to engage in the general contracting business, especially in the paving of streets, induced a man named Peters to lend him $3,500 with which "to provide the necessary tools and equipment needed to economically do said work, and for other expense; * * * said money to be expended jointly by both said parties in purchasing the said equipment; * * * said equipment is to be bought in the name of and remain the property of said Peters, except as otherwise provided hereinafter." McIntyre was to be paid a stipulated salary, "whether the contracts be proven to be profitable or not." The contract further provided that: "If said Peters does not regard the contracting business as sufficiently profitable to induce him *to continue* therein, or if for any other reason he desires to *discontinue* same, *then the net profits shall be divided in two equal portions, Peters receiving half and McIntyre receiving the other half.* If the net profits, not counting in McIntyre's wages as a part of the expenses, amount to a sufficient amount that his one-half share of net profits is more than his total wages at $150 per month, then in that event McIntyre shall not be entitled to any wages, but the one-half of the net profits shall be his only compensation, but if his one-half share of the net profits amounts to less than his total wages, then he is to receive his total wages only and no share of the profits. *Peters shall receive the entire remainder of the net profits in any event.* * * *" McIntyre was then given the right to purchase the equipment from Peters. The contract further provided that, if Peters should "desire to *continue* the contracting business, *then the profits shall not be divided as above, but the total net profits* (counting in McIntyre's wages as a part of the expenses) *shall be payable to said Peters* on the completion of said contracts, said McIntyre receiving only his wages at $150 per month, as full compensation, together with the other considerations hereinafter named." If a "partnership" should thereafter be formed, "in conducting said business, thereafter, after each contracting job shall have been completed, *the net profits thereon shall be paid to said Peters solely, until he shall have had returned to him an amount equal to one-half of his total investment in said company.*" To put the matter otherwise, as stated in the course of the opinion rendered by the Supreme Court in the case of People's Lumber Co. v. McIntyre & Peters: "It was provided, among other things, that if Peters desired to *continue* in the contract business, *he was to receive the entire net profits until half his investment had been repaid,* whereupon the equipment was to belong to the copartnership. * * *" Thereafter a general contracting business was carried on by McIntyre, sometimes individually and at other times in association with a third party, but always with the understanding *that Peters was to share equally with McIntyre in the net profits.* In the course of business a debt was incurred on account of materials furnished by People's Lumber Company to McIntyre upon which an action was brought against McIntyre and Peters *on the theory that Peters was a partner in the business,* and which action resulted in a judgment against both McIntyre and Peters, from which an appeal was taken. The Supreme Court reversed the judgment, holding that the finding by the lower court that Peters was a partner of McIntyre was not sustained by the evidence. It is most apparent that the facts in that case, compared with those in the instant case, are strikingly similar. As a single illustration, in addition to what hereinbefore has been set forth, as remarked by the Supreme Court at the outset of its opinion: "At the time of the contract between the plaintiff and McIntyre *the plaintiff had never heard of the alleged partnership, and its claim is therefore not based upon the theory of an ostensible partnership, but upon the character of the actual agreement between Peters and McIntyre.*" Considering the effect of the relationship between Peters and McIntyre, in part it was said: "In urging that there was a partnership the *plaintiff* is in no better position than *McIntyre.* The original agreement between the parties is ample explanation for the connection of Peters with McIntyre, and *Peters was entitled to rely upon the fact as to third parties* that he was not being held out as a partner. * * * *As between himself and the public, he had a right to rely upon the fact that he was not being held out as a partner,* and as between McIntyre and himself he had a right to rely upon the fact that he never had elected to become a partner."

The doctrine announced in the case of Martin v. Sharp & Fellows C. Co., 34 Cal. App. 584, 168 P. 373, is equally disastrous so far as respondent's position is concerned. In brief, it there appeared that the person sought to be held as a partner leased certain mules to a general contractor and "agreed to *advance to him such moneys as he might require in the early prosecution of the work* and until he received installments of his contract price, due at intervals upon estimates of work done in the progress thereof, in consideration of which John Mulligan [the lender of the money] *was to have one-half of the net profits derived from the contract.*" Later, the lender of the money to the contractor agreed that "'any balance that may be due after all bills incurred by this contract (so made by plaintiff with defendant) have been liquidated, *is to be divided equally between the parties to this agreement,' and any deficiency 'liquidated equally by the parties hereto.'*" The judgment of the court was to the effect that no partnership existed between the parties. In the course of the opinion it is said: "By section 2395 of the Civil Code, a partnership is defined to be 'the association of two or more persons, for the purpose of carrying on business together and dividing its profits between them.' Under this definition, a mere participation in profit and loss does not necessarily constitute a partnership, for, as said in Dwinel v. Stone, 30 Me. 384, 'there must be such a community of interest as empowers each party to make contracts, incur liabilities, manage the whole business, * * * a right which, upon the dissolution of the partnership by death of one, passes to the survivor, and not to the representatives of the deceased.' To like effect are Coward v. Clanton, 122 Cal. 451 (55 P. 147); Vanderhurst v. De Witt, 95 Cal. 57 (20 L. R. A. 595, 30 P. 94), and Nofsinger v. Goldman, 122 Cal. 609 (55 P. 425), in the former of which it is said that *profit sharing* is not the true test of partnership. The association must be for the purpose of *jointly carrying on the business.* Mulligan was not interested in the conduct of the business, except in so far as it affected the profits, one-half of which he was to receive for the use of the money, not advanced to the partnership but *loaned to Martin.* * * * The doctrine of equitable estoppel, which appellant seeks to invoke, finds no support in the record, which is barren of any evidence of representations or acts on the part of plaintiff calculated to lead defendant to believe that such partnership existed."

In the majority opinion herein certain authorities are cited in support of the judgment. Without reviewing them or attempting to distinguish or to analyze them, I must content myself with the statement that I am unable to perceive their application to the situation here involved. If the principle of law for which respondent contends is sound, a banker who may lend money to a merchant on the condition that the principal and the interest thereon are to be repaid from the gross sales and profits of the business of the merchant, and, as is often the case, where, for the purpose of insuring fair dealing to the banker or proper management of the business, the banker places a representative in the business of the merchant—the banker becomes a partner in the business and is liable as such, notwithstanding the further fact that persons who deal with the merchant and extend credit to him do so without either knowledge or belief as to the banker's connection with the business of the merchant. Relying upon the authorities to which attention has been directed, together with the cases therein cited, I am led to the conclusion that the judgments herein, so far as appellant Oswald is concerned, should be reversed, but that, as to defendant Castle, the judgments should be affirmed.

---

96 Cal. App. 465

LINDSEY v. BUTTE et al. (Civ. 3642.)★

District Court of Appeal, Third District, California. Jan. 29, 1929.

Rehearing Denied Feb. 28, 1929. Hearing Denied by Supreme Court March 28, 1929.

1. Sales ⟹477(6)—Seller's assignee, accepting past-due installment, waived past defaults, precluding forfeiture therefor by subsequent assignee, contrary contract provision referring to future defaults (Civ. Code, § 1442).

Bank accepting payment of past-due purchase-money installment under automobile sale contract assigned to it waived all past defaults, thereby precluding forfeiture on such account by bank's assignees, to whom purchaser tendered full performance as soon as he learned of assignment; contract provision that acceptance of past-due payment shall not constitute waiver of provision making time of essence being reasonably interpreted as referring to waiver of future defaults, in view of Civ. Code, § 1442.

2. Sales ⟹481—Buyer held entitled to judgment only for value of automobile converted, less unpaid purchase money and interest thereon.

Buyer, suing assignees of sale contract for conversion of automobile, *held* not entitled to judgment for full value thereof, but only for such value less amount of unpaid purchase-money installments and interest thereon.

3. Sales ⟹475—Bank assigning sale contract to attachment plaintiffs for unpaid installments and interest held not liable to purchaser for conversion.

Bank assigning automobile sale contract to attachment plaintiffs for amount of unpaid installments and interest thereon after assignment of contract to it *held* not liable to purchaser for conversion, in absence of evidence of any wrongful conduct on its part to purchaser's injury.

Appeal from Superior Court, Los Angeles County; F. C. Valentine, Judge.

Action by John H. Lindsey against William P. Butte and others. Judgment for plaintiff, and defendants appeal. Reversed, with direction in part, and modified, and affirmed as modified in part.

Page, Nolan, Rohe & Freston and Andrew J. Copp, Jr., all of Los Angeles, for appellants.

William A. Barnhill and Lewinson & Barnhill, all of Los Angeles, for respondent.

FINCH, P. J. The plaintiff was given judgment against all the defendants for the sum of $6,000 as damages for the conversion of an automobile and the further sum of $250 as compensation for time and money expended in pursuit of the automobile. There are two appeals from the judgment; one by the defendant Hellman Commercial Trust & Savings Bank, and the other by defendants Butte, Barker, and Pacific Ready-Cut Homes, Inc.

October 19, 1923, the plaintiff and E. L. Butler entered into a conditional sale contract, in the usual form, by the terms of which the former agreed to purchase from the latter a Duesenberg automobile for $5,000, of which sum $2,000 was paid at the execution of the contract and the balance of $3,000 was to be paid in ten equal monthly installments, commencing November 19, 1923. The contract contained the following:

"Time is of the essence of this contract, and acceptance by the seller of any payment after same is due shall not constitute a waiver by him of this provision. * * *

"Said purchaser agrees that he will not and has no right to assign, pledge, mortgage or otherwise dispose of this contract or said automobile, * * * or in any manner relinquish or lose control thereof, * * * without the written consent of said seller. * * *

"If said purchaser defaults in any of the above payments, when due, or breaches any provision of this contract, or if said automobile is attached or levied upon under any writ or process of any court, * * * said seller may, at his option,—First—take possession of said automobile * * * with or without process of law; and all payments theretofore paid hereunder shall thereupon be forfeited to said seller for the use, wear, tear, and depreciation of said automobile, and this contract and the purchaser's rights in and to said automobile shall thereupon cease, * * * or,—Second—said seller may declare the whole of the sums then remaining unpaid to be immediately due and payable and sue therefor."

There is testimony showing the facts enumerated herein. Both parties to the contract were automobile dealers in Los Angeles. The automobile was immediately delivered to the plaintiff. Butler immediately sold and assigned the contract to the defendant bank for the amount of the unpaid installments. The bank mailed notice to the plaintiff of the assignment, but the plaintiff testified: That he did not receive the notice and that he had no knowledge of the bank's ownership of the contract until April 22, 1924. That "Mr. Butler told me he had simply put it in there as

---

★For opinion on rehearing, see 275 P. 525. Hearing denied by Supreme Court.

collateral security for a loan. * * * Mr. Hellman was supposed to be his backer in the automobile business and had financed his money to pay for the automobiles he purchased, and it was understood, I was told by him that it was simply put up as collateral security for the money that Mr. Hellman advanced him." Butler testified: "I think my office made collections from Mr. Lindsey of the payments due under the contract. * * * I paid them to the Hellman bank. * * * During March, 1924, I owed Mr. Lindsey a little money. I think I owed him $400 and some odd." The officer of the defendant bank who had "charge of the automobile department" testified that, when payments were not made promptly on automobile contracts assigned to the bank, "it was customary for us to wait a few days—after which the payment was charged up to the dealer or strenuous efforts were made to collect it from the dealer"; that it "is the custom of the bank to go after the dealer who turned the contract over" to the bank "and tell him to get after the purchaser and get the money in"; that he "expected Mr. Butler to see that the payments from Mr. Lindsey were collected and turned into the bank"; that in this case "two specific payments were as a fact made by Mr. Butler or charged by the bank against his account out of six payments which were made altogether." Only five installment payments were made by the plaintiff, and the first four of them were made to Butler. None of them were made until several days after they respectively became due. The fifth installment, due March 19, was paid directly to the bank by a brother of the plaintiff on April 21, 1924. Plaintiff had some negotiations looking to the sale of the automobile to a man named Law, and during plaintiff's absence the automobile was given into the possession of Law, but the court found, on sufficient evidence, that no sale to Law was ever consummated. If an agreement to sell the automobile to Law was ever executed, it was canceled, and the possession and ownership of the automobile were restored to the plaintiff on or before April 12, 1924. April 15, 1924, in an action commenced by the defendant Pacific Ready-Cut Homes, Inc., against Law, the automobile was taken from the plaintiff's possession by the sheriff under a writ of attachment. Butte and Barker had the management and control of the Pacific Ready-Cut Homes, Inc., and they and their families owned all of its capital stock. The bank knew of the attachment and, on April 22, it "put in a third party claim for the automobile," in which claim it was stated that the bank was the legal owner and the plaintiff the registered owner of the automobile. On April 21, six days after the attachment and two days after the April installment of the purchase price became due, the bank accepted payment of the installment which had become due March 19. April 26, 1924, the bank assigned the Butler contract to Butte and Barker in consideration of the payment by them of the sum of $1,510.50, the amount of the unpaid installments and interest thereon. The plaintiff first heard of the assignment to Butte and Barker on April 28, and at 10 o'clock in the forenoon of that day he tendered the bank payment of the amount of all unpaid installments and interest. Having parted with all interest in the contract, the bank refused to accept the money so tendered. About 10:30 or 11 o'clock in the same forenoon the plaintiff "went to the Pacific Ready-Cut Homes and offered Mr. Barker the money to pay the entire sum due on the contract, plus interest." On the refusal of Barker to accept the money, the plaintiff immediately deposited the amount thereof in the defendant bank, with instructions to pay the same to Butte and Barker upon their assignment to him, within five days, of the Butler contract. On the next day the bank mailed a letter to Butte and Barker, notifying them of the deposit. At 1:15 o'clock in the afternoon of April 28, Butte and Barker deposited in the mail a letter directed to the plaintiff, stating that the installment of $300 payable April 19 had not been paid; that the plaintiff had "executed a contract for the sale of said automobile to L. Lawrence Law, and delivered possession of the automobile" to him; that the automobile had been "levied upon under writ of attachment" in the action referred to herein; that "you were a party to a sale of said automobile by said Law * * * to us"; and that by reason thereof the writers, "as assignees of the Hellman Commercial Trust and Savings Bank, * * * do hereby elect to take possession of said automobile, * * * and do hereby declare and notify you that all payments heretofore paid under said contract are hereby forfeited." This letter, which was registered, was returned "unclaimed." April 28, the plaintiff duly made a third party claim as owner of the automobile. The next day the Pacific Ready-Cut Homes, Inc., delivered to the sheriff an indemnity bond to cover the plaintiff's third party claim. At the same time Butte and Barker filed a third party claim as owners of the automobile, and it was released to them. They thereafter sold it to persons not parties to this action.

[1] The court found that the plaintiff was never in default except in the time of payment, and that such default was waived. The evidence is sufficient to support the findings. Relative to payment of the April installment, the plaintiff testified that, apparently on April 22, 1924, Butler said: "I talked to Mr. Hellman, and he says you are perfectly good for it and they will hold that in abeyance until the suit is settled."

It is clear that the bank waived plaintiff's defaults, if there were any, except that of nonpayment of the installment which fell due April 19. On April 21 the plaintiff was in default in payment of the March and April installments. The bank may have had the right on that day to elect whether to accept payment of the March installment or to declare a forfeiture of the plaintiff's rights under the contract by reason of his defaults, one of which then existing was the nonpayment of the April installment, but it would be a harsh rule which would permit it to do both. It would be contrary to modern principles of justice to hold that, under the circumstances stated, the bank could accept payment of the March installment on the theory that the contract was still in force and then declare a forfeiture on the ground of a default made prior to such payment. It is true the contract provides that "acceptance by the seller of any payment after same is due shall not constitute a waiver by him" of the provision making time of the essence thereof. It has been held that, under a similar provision, by accepting payment of installments when they were past due, the seller "did not * * * waive its right to retake the automobile upon further default." Pacific Finance, etc., Co. v. Pierce, 48 Cal. App. 600, 603, 191 P. 1115, 1116. This is far from a holding that under such circumstances the seller may retake the automobile on the ground of past defaults. "A condition involving a forfeiture must be strictly interpreted against the party for whose benefit it is created." Civ. Code, § 1442. The reasonable interpretation of the provision in question is that the acceptance of overdue payments "shall not constitute a waiver" of future defaults; the evident purpose being to avoid the necessity of giving notice, after such an acceptance, that strict compliance with the terms of the contract will be exacted in the future. By accepting payment of the March installment on April 21, 1924, the bank "waived all past defaults in performance, but it did not alter the terms of the contract with regard to the future." Hoppin v. Munsey, 185 Cal. 678, 683, 198 P. 398, 400. Butte and Barker had no right to declare a forfeiture on account of any default which the bank had waived, and no subsequent default occurred, the plaintiff having tendered them full performance as soon as he learned that the contract had been assigned to them.

[2] The plaintiff, however, was not entitled to judgment for the full value of the automobile, but only for such value less the amount of the unpaid installments and interest thereon. 24 Cal. Jur. 1056; Corey v. Struve, 170 Cal. 170, 173, 149 P. 48; California C. F. Ass'n v. Ainsworth, 134 Cal. 461, 463, 66 P. 586; Conolley v. Power, 70 Cal. App. 70, 76, 232 P. 744.

[3] There is no evidence whatever to warrant the judgment against the bank. It had a perfect legal right to assign the contract to Butte and Barker, and there is no evidence of any wrongful conduct on its part to the injury of the plaintiff.

The judgment in favor of the plaintiff against the defendant Hellman Commercial Trust & Savings Bank is reversed, and the trial court is directed to enter judgment in its favor against the plaintiff.

The judgment in favor of the plaintiff against the defendants William P. Butte, Berne S. Barker, and Pacific Ready-Cut Homes, Inc., a corporation, is modified by striking from the last paragraph thereof the words and figures, "$7,135.60, in lawful money of the United States (being the sum of $6,000)," and inserting therein in lieu thereof, "$3,500, in lawful money of the United States." As so modified, the judgment against said defendants is affirmed; all of the appellants to recover their costs of appeal.

I concur: PLUMMER, J.

96 Cal. App. 530

TUMELTY v. PEERLESS STAGES et al.★
(Civ. 6560, 6561.)

District Court of Appeal, First District, Division 2, California. Jan. 31, 1929.

Rehearing Denied March 1, 1929. Hearing Denied by Supreme Court April 1, 1929.

1. New trial ⇨9—Trial court may order new trial of one issue and refuse it as to others separate and distinct therefrom.

It is within the power of trial court, where there is more than one issue of fact in case and such issues are distinct and separable in their nature, to order a new trial of one issue and refuse it as to the others.

2. Appeal and error ⇨979(2)—New trial ⇨68—Granting new trial for lack of evidence is almost entirely within trial court's discretion and will not be reversed except for abuse of discretion.

The granting of a new trial for want of evidence to support the verdict is usually a matter almost entirely within discretion of trial court, and such an order will not be reversed unless an abuse of discretion appears.

3. New trial ⇨9—Trial court in granting new trial in negligence case has discretion to grant new trial as to issue of damages only.

It cannot be said as matter of law that in every personal injury case the issues of negligence and damage are so inseparably blended that a new trial, if granted at all, must be granted as to all issues and cannot be confined solely to issue of damages; question being one of jurisdiction rather than of discretion.

Appeals from Superior Court, Alameda County; E. C. Robinson, Judge.

★Rehearing denied. Hearing denied by Supreme Court.

Action by Ellen Tumelty against the Peerless Stages and another. From orders granting in part plaintiff's motions for a new trial, defendants appeal. Affirmed.

J. Hampton Hoge and Haswell & Martin, all of San Francisco, for appellants in case No. 6560.

J. Hampton Hoge and Haswell & Martin, all of San Francisco, for appellants in case No. 6561.

Ford, Johnson & Bourquin, of San Francisco, for respondent.

GOODELL, Justice pro tem. These appeals are taken by the defendants from an order granting, in part, plaintiff's motion for a new trial.

The plaintiff sued for damages in the sum of $21,600 alleged to have been suffered through the negligence of both defendants, Peerless Stages and J. H. Asselin. The plaintiff was riding in the automobile of the defendant Asselin, as his guest, with members of his family, when a collision occurred between the Asselin car, proceeding southerly on the highway near Milpitas, and an auto stage of the defendant stage company proceeding northerly. The traffic was heavy on the Sunday afternoon in question, and the stage had turned to its left out of the line of north-bound traffic, the progress of which had become somewhat retarded, and soon after leaving the line the two vehicles collided. The point presented on appeal renders unnecessary a more detailed statement of the occurrence. The jury returned a verdict against both defendants for $1,000. The plaintiff moved for a new trial, which motion was "granted as to the issues of damage only, on the ground of the insufficiency of the evidence to justify the verdict rendered herein."

"The question herein presented," to adopt counsel's own statement of it, "is one solely of law—whether the order of the trial court was within its jurisdiction."

[1] Since the case of San Diego Land & Town Co. v. Neale, 78 Cal. 63, 20 P. 372, 3 L. R. A. 83, it has been settled law in this state (and it seems to be the prevailing rule elsewhere) that: "It is within the power of the trial court, where there is more than one issue of fact in a case and such issues are distinct and separable in their nature, to order a new trial of one issue and refuse it as to the others." Estate of Everts, 163 Cal. 449, 125 P. 1058. See, also, Duff v. Duff, 101 Cal. 1, 35 P. 437; Levin v. Sherwood, 55 Cal. App. 308, 203 P. 404; and Donnatin v. Union, etc., Co., 38 Cal. App. 8, 175 P. 26, 177 P. 845.

The appellants readily and frankly recognize this, but urge that an order granting a limited new trial "is wholly erroneous in this character of case"; the argument being that in an action for personal injuries, where negligence is seriously disputed at the trial, the issues of negligence and damage are so inextricably interwoven that a new trial on the issue of damages alone is legally unauthorized. The case at bar, it is claimed, is within the qualification respecting severability of issues, expressed in Estate of Everts, supra.

The Neale Case itself recognizes that "there may be cases where the issues are so inseparably blended as to render a separation impracticable." The only question for decision, as we see it, is whether it may be said as a matter of law that in any and every personal injury case the issues of negligence and damage are so "inseparably blended" that a new trial, if granted at all, must be granted as to all the issues.

[2] The rule is a familiar one that: "The granting of a new trial for want of evidence to support the verdict is usually a matter almost entirely within the discretion of the trial court. Such order will not be reversed unless an abuse of discretion appears." Estate of Everts, supra.

If therefore trial courts have the undoubted power to grant limited new trials in all cases where the issues are severable, and if it be true that the granting of a new trial for want of evidence to support the verdict is discretionary, the question presents itself whether there is anything peculiar to personal injury cases, as such, that removes them into a class by themselves, and renders them immune from the operation of the rule applicable to new trials generally. The appellants cite no authority in California or from other jurisdictions which goes so far as to so hold. Counsel shows that there is no reported decision in this state where such limited new trial has been granted in a negligence case; but, while there is such absence of authority, counsel for the appellants cite a number of personal injury cases from the New England states and from North Carolina, where, without exception, the rule is found to be the same as that in California. True, in some of these cases the courts determined that the issues of liability and damage were so blended as to render their separation prejudicial (and the cases are, of course, cited for their persuasive effect in that regard); but it is likewise true that in our own state, whenever such issues are found to be so identified, our own courts, trial and appellate, will be just as ready to follow that course. The circumstance that in some instances, because the facts of the particular case compelled it, new trials sought on *some* issues have been ordered as to *all* issues, does not indicate that there should be a special exception in personal injury cases. It is simply an application of the reservation found in San Diego Land & Town Co. v. Neale, supra, "that there may be cases where the issues are so inseparably blended as to render a separation impracticable."

In Jarrett v. High Point Trunk & Bag Co., 144 N. C. 299, 56 S. E. 937, cited by appellants, the court was strongly urged to depart from Benton v. Collins, 125 N. C. 83, 34 S. E. 242, 47 L. R. A. 33 (which sanctions limited new trials in negligence cases), and, addressing itself to that argument, the court says: "As we have awarded a new trial generally, it is not necessary now to determine that question." In Benton v. Collins, 125 N. C. 91, 34 S. E. 242, 47 L. R. A. 33, it was held that the trial court may set aside a verdict as to damages, and award a new trial on that issue alone, though some of the matters involved in the other issues may have tended to mitigate the damages; for whatever evidence was introduced on the first trial on such other issues in mitigation of damages would be admissible on the second trial on the general issues as to damages. The same case holds that the action of the trial court in setting aside a verdict for inadequacy of damages, *being discretionary*, is not reviewable. It is interesting to note that this was an action for damages growing out of an assault and battery, a type of case, certainly, where the facts of the occurrence would seem to lend color to the question of damages. In Doody v. Boston & Maine R. R. Co., 77 N. H. 161, 89 A. 487, 490, Ann. Cas. 1914C, 846, 849, a personal injury case, the general rule is recognized that "so much of the verdict as is not affected by the error" should be preserved and a new trial granted as to the rest. But it was found that the particular circumstances of the case were such that a new trial should be granted in whole. In Pepper v. Lee, 114 A. 10, the Supreme Court of Rhode Island likewise found that "*in this particular case* the testimony bearing upon damages and liability is interwoven" (italics ours) and ordered a new trial in toto. In General Motors, etc., v. Shepard, 47 R. I. 153, 130 A. 593, the same court, in a breach of warranty case, held that a new trial on all issues should be had where there was conflicting evidence upon the question of liability. The rule that it is "within the authority of this court and the superior court to grant new trials upon the question of damages alone" was expressly recognized and Rhode Island authorities cited therefor. The other cases, without discussing them in detail, all recognize the rule as it exists in California, but for reasons peculiar to the particular case, hold that new trials should be granted in whole, and not in part. Resort need not be had to outside jurisdictions in this regard, for in the case of Mountain Gravel Mining Co. v. Bryan, 111 Cal. 36, 43 P. 410, the Supreme Court deemed "it the better course that the whole case shall again be retried" because of uncertainty as to what issues were or were not intended to be settled by the order. And in Power v. Fairbanks, 146 Cal. 611, 80 P. 1075, an action for a timber trespass, the order granting a new trial as to a limited issue, was reversed.

We are satisfied that the question whether or not the issues in the instant case were severable was peculiarly within the trial judge's discretion. Justice Montgomery in the case of Benton v. Collins, supra, says: "Holding, then, as we do, that the superior courts of this state have the power to set aside verdicts for inadequacy of damages, we logically conclude that such power is discretionary with them, and that it is not reviewable by us. The power to correct prejudiced and grossly unfair verdicts must be vested somewhere, and, in our judgment, it is best that such power be confided to the judges who preside over the trials." And so in this case, the trial judge heard all the evidence at first hand, and was in a better position, than is an appellate court, to know whether the issues were or were not severable, that is to say, whether or not anybody would be prejudiced, or subjected to hardship or injustice, if the issue of negligence (determined adversely to the defendants) were removed from further contest. Parts of the record have been printed, but from such excerpts it does not appear that the issues of negligence and damage are at all interwoven. Indeed, the quoted testimony simply shows the way in which the two vehicles came into collision, nothing more.

It should be noted that the motion for new trial was made in the usual way, and not, as in the Neale and Donnatin Cases, supra, for a partial new trial only. It was the court, in other words, who made the severance of issues when the order was made granting the motion in part, and presumably the order would not have been so made unless the judge was satisfied that such severance could be safely and justly made. Had there been any doubt as to this, it is safe to assume that the motion would have been granted as made—in its entirety. There is nothing in the record indicating that there was any abuse of discretion.

It may be that on the retrial of the issue of damages certain testimony respecting the collision itself—testimony already introduced, for that matter, on the issue of negligence—will have to be again put before the jury because relevant to the question of damages, but that is no reason for a complete retrial of the negligence issue. Nor will the introduction of such evidence impinge upon the rule that when a partial retrial is had there remains open for examination "only the issue upon which it is ordered, that the determination of the other issues remain in the record and that they cannot be retried." Estate of Everts, supra; Levin v. Sherwood, supra. It would be admissible only because relevant to the inquiry respecting damages, and would be received for that limited purpose. This very question is discussed in Benton v. Collins, supra, from which we have already quoted.

It is not at all rare or unusual for defendants in negligence cases to concede liability at the outset of a trial and to put before the jury the single question of the extent of plaintiff's damage. On principle there would seem to be no difference between the elimination of the issue of negligence by voluntary act of the defendant, and its elimination by the trial judge after the defendant has had his day in court on such issue, and the trial judge, who has heard all the evidence, has become convinced that nothing could be gained by relitigating that issue, and no prejudice suffered by not relitigating it. As was said in Robinson v. Muir, 151 Cal. 118, 125, 90 P. 521, 524: "* * * It would be imposing a useless burden and expense upon the parties to require the issues affecting these claims, which have once been properly adjudicated, to be again reopened for litigation. (See Emerson v. Yosemite, etc., Co., 149 Cal. 50, 85 P. 122.)"

[3] We are satisfied that the question whether or not a partial new trial may be granted in negligence cases is not a question of jurisdiction, but rather of discretion. In the case at bar there is nothing to indicate that there was any abuse of the court's discretion.

The orders from which the appeals were taken are therefore affirmed in both cases.

We concur: KOFORD, P. J.; NOURSE, J.

---

96 Cal. App. 430

PEOPLE v. BERG. (Cr. 1726.)

District Court of Appeal, Second District, Division 2, California. Jan. 26, 1929.

1. Constitutional law 🔑265—Indictment and information 🔑18—Laws prescribing form of indictments and informations held not unconstitutional, as depriving any one of liberty without due process (Pen. Code, §§ 951, 952, as amended by St. 1927, p. 1043; Const. U. S. Amend. 14).

Pen. Code, §§ 951, 952, as amended by St. 1927, p. 1043, prescribing the form of indictments and informations, and providing that the same are sufficient, if containing in substance a statement that accused has committed some public offense, therein specified in ordinary and concise language, *held* not in violation of Const. U. S. Amend. 14, as depriving any one of his liberty without due process of law.

2. Constitutional law 🔑265—Information charging defendant with killing named person on certain date within named county sufficiently stated offense (Pen. Code, §§ 951, 952, as amended by St. 1927, p. 1043; Const. U. S. Amend. 14).

Information charging, in accordance with requirement of Pen. Code, §§ 951 and 952, as amended by St. 1927, p. 1043, defendant with crime of murder, in that defendant did, on a certain date and within certain county, willfully, unlawfully, and feloniously kill and murder a named person, *held* to have sufficiently charged nature of offense, as required by Const. U. S. Amend. 14, relating to due process of law.

3. Homicide 🔑139—Information held to have charged murder, rather than manslaughter, though failing to allege killing was with malice aforethought (Pen. Code, §§ 951, 952, as amended by St. 1927, p. 1043).

Information charging defendant with having killed a named person on a certain date *held* to have sufficiently charged murder, under Pen. Code, §§ 951, 952, as amended by St. 1927, p. 1043, rather than manslaughter, though it failed to allege that the killing was with malice aforethought.

4. Criminal law 🔑1035(3)—Alleged error in misconduct of prosecuting attorney was not available, in absence of request for admonition to jury relative thereto.

Alleged error, because of misconduct of prosecuting attorney, effect of which could have been removed by admonition to jury, was not available, where appellant requested no admonition, nor even hinted to court that misconduct had been committed.

5. Criminal law 🔑369(3)—Admitting testimony tending to establish that defendant, charged with murder, was operating office for performance of abortions, held erroneous.

In prosecution for murder, based on an abortion claimed to have been practiced by defendant physician, the admission of testimony of defendant's office nurse relative to class of patients, as male or female, *held* erroneous, in that only purpose of questions evidently was to show that defendant was operating his office for performance of abortions, and was designed merely to degrade and prejudice defendant in minds of the jury.

6. Criminal law 🔑1169(5)—Questioning witness as to refusal to testify at preliminary examination, at request of defendant's counsel, held erroneous, notwithstanding instructions.

Permitting prosecuting attorney, in examining witness, to refer to previous statement, to effect that she had refused to testify against defendant at the preliminary examination on the suggestion of his counsel, *held* erroneous, notwithstanding involved instructions given to jury with relation to such testimony.

7. Criminal law 🔑419, 420(4)—Party calling witness cannot, because of failure to testify as expected, prove that witness had elsewhere made desired statements.

In case a witness merely fails to testify as expected, the party calling him is not thereby authorized to prove that witness had elsewhere made desired statements.

8. Criminal law 🔑449(2)—Permitting witness to state that questions and answers in statement made by defendant were free and voluntary was not erroneous.

Permitting witness in murder prosecution to state whether questions and answers in statement made by defendant were free and voluntary was not erroneous, though technically calling for statement of conclusion; the recognized practice, after such question is answered in affirmative, being for defendant to show entire circumstances by cross-examination.

9. Homicide ⚷169(8)—Refusal to admit testimony as to statements of alleged victim of abortion, at time of coming to defendant for treatment, held erroneous.

In prosecution for murder, based on an abortion claimed to have been practiced by defendant, the refusal to admit testimony as to statements made by alleged victim, at time she came to defendant for treatment, was erroneous.

Appeal from Superior Court, Los Angeles County; Fletcher Bowron, Judge.

Arthur O. Berg was convicted of murder in the second degree, and he appeals. Reversed.

John A. Jorgenson, of Los Angeles, for appellant.

U. S. Webb, Atty. Gen., and John L. Flynn, Deputy Atty. Gen., for the People.

WORKS, P. J. Defendant was convicted of murder in the second degree. He appeals from the judgment of conviction, and from an order of the trial court denying his motion for a new trial.

[1, 2] The information charges appellant with "the crime of murder, a felony, committed as follows: That the said Arthur O. Berg on the 13th day of June, 1928, at and in the county of Los Angeles, state of California, did willfully, unlawfully, and feloniously kill and murder one Page Walden, a human being." The charge, thus made, was formulated, with some amplification, in accord with the language of section 951 of the Penal Code as amended in 1927 (St. 1927, p. 1043), which prescribes the form of indictments and informations. This section is a legislative exposition of the meaning of section 952 of the same Code, also as amended in 1927, which provides that a criminal charge "shall be sufficient if it contains in substance a statement that the accused has committed some public offense therein specified," and that the "statement may be made in ordinary and concise language without any technical averments or any allegations of matter not essential to be proved. It may be in the words of the enactment describing the offense or declaring the matter charged to be a public offense, or in any words sufficient to give the accused notice of the offense of which he is charged."

[3] It is contended that sections 951 and 952 are in violation of that portion of the Fourteenth Amendment to the Constitution of the United States to the effect that no one shall be deprived of his liberty without due process of law, but we think it plain that they are not. We think the Constitution of the United States requires no more specific statement of the nature of appellant's alleged offense than that contained in the information. Appellant was given the name of his alleged victim, the day and venue of the commission of the offense were specified, the name of the crime was set down, it was alleged that it was willfully, unlawfully, and feloniously committed, and the alleged victim was stated to have been a human being. The charge was in the exact language of one approved in People v. Witt, 170 Cal. 104, 148 P. 928, under the old statutes, with the exception that in the latter charge the crime was alleged to have been committed "with malice aforethought." It was said in the case cited: "Concededly this describes the offense of murder in the language of our statute, and is in accord with a form approved over and over again by this court." We cannot see how the omission of the words "with malice aforethought" from the information before us can render the pleading amenable to the objection that it does not show due process of law.

It was well settled, under the Code sections as they existed before the amendments of 1927, that the omission of those words from such an information as was before the court in the case last cited changed the charge from murder to manslaughter. People v. Bones, 35 Cal. App. 429, 170 P. 166. The only difference, then, between a charge of murder and a charge of manslaughter, under the former statute, lay in the presence or in the omission of the words "with malice aforethought," as their presence was necessary to a charge of murder. People v. Bonilla, 38 Cal. 699; People v. Schmidt, 64 Cal. 260, 30 P. 814. Through sections 951 and 952 of the Penal Code, as amended in 1927, the Legislature has declared that murder may be charged by an allegation, such as that in the information now before us, to the effect that, with the other averments present, A. B. did "kill and murder" C. D.—section 951 says "murdered C. D."—while manslaughter may be charged in some such form as "did kill and manslaughter C. D." or perhaps "manslaughtered C. D." We can see no such difference, between these new forms of charges and the old ones which had been upheld for so many years, as would render the new ones amenable to the claim that they do not provide due process of law. With the aid of the Code sections defining the difference between murder and manslaughter, which, of course, all are presumed to know and understand, and with the other allegations prescribed by section 951, one charged with either murder or manslaughter in accordance with the Code is fully informed of the offense laid at his door. We have thus dealt with the matter of both of these charges, for the reason that appellant, in addition to the constitutional question he presents, contends that the information charges only manslaughter. We think the constitutional question is untenable, and that the charge made was murder, not manslaughter

[4] The record shows that the crime with which appellant was charged was the result of an abortion claimed to have been practiced by him upon his alleged victim. The prosecution offered as a witness a trained nurse, who had served under appellant on the case from the handling of which the charges arose. After she had given some testimony in response to questions of the district attorney, the following occurred, as shown by the record:

"The District Attorney: You never testified to that [at the preliminary examination], did you? Mr. Jorgenson: Objected to as cross-examination of their own witness. A. No, I did not. The District Attorney: If your honor please, I ask leave to cross-examine this witness on the ground of surprise on a material fact. She has heretofore testified as to all the conversation. Now that she has had time to think it over, she wants to change some of her testimony, and we have a perfect right to cross-examine the witness; we are taken by surprise when she changes her testimony. Mr. Jorgenson: She is not changing her testimony. The District Attorney: I submit that she has, your honor. Mr. Jorgenson: All you said was, she didn't testify that before. A person cannot always remember the whole conversation and everything that was said. The District Attorney: No; but sometimes they can, when their memory is refreshed in the meantime. The Court: I will sustain the objection."

Appellant contends that the district attorney was guilty of misconduct in asserting that the witness had "changed her testimony." Without deciding the particular point, we think the question is not available to appellant. If the officer's remarks were misconduct, we think the offense was not so flagrant that the effect of what he said could not have been removed by an admonition to the jury couched in proper terms. Appellant asked for no admonition, however, nor did he hint to the court that misconduct had been committed.

[5] Because of a somewhat involved chain of events connected with the testimony of another witness offered by the prosecution, it is insisted that the district attorney was guilty of misconduct and that the trial court committed error. This witness was the office nurse of appellant. In passing upon the contentions made, we shall determine as we go along whether, in specific instances, the court erred.

The witness was asked what class of patients appellant had at his office, whether they were male or female, and objection was made and overruled. "A. He had men and ladies. * * * Q. They were mostly young girls, were they not?" An objection was then made and overruled. "A. There weren't very many young people. He had people about 30 or 40 or 50." The court erred in each of the rulings mentioned in this paragraph. The only purpose of the questions, evidently, was to show that appellant was operating his office for the performance of abortions. If we grant, for the sake of argument, what we are far from deciding, that other crimes may be proved in cases of this nature, in order to show system or intent, the questions cannot be justified on that ground, as "it is not competent for the prosecutor to introduce irrelevant evidence falling short of crime, and designed merely to degrade and prejudice the defendant in the minds of the jury." 8 Cal. Jur. 59. The extent to which the rulings of the court were harmful, considering the nature of the answers given to the questions propounded, will be determined later, as will the question of the injury done by other errors which were committed, as shown below.

The record contains the following, with the same witness on the stand: "Q. To your knowledge was Dr. Berg performing any abortions there? Mr. Jorgenson: Object—A. No; I do not. * * * Q. That is, you don't know? A. No. Q. These patients there were mostly women, were they not?" Objection made and overruled. "A. Most of our patients were women." The ruling here exhibited was error.

The next instance: "Q. Most of these women patients that came there were pregnant or in a family way, were they not? Mr. Jorgenson: Objected to as irrelevant. A. I don't know. The Court: The objection will be overruled. The District Attorney: How? Mr. Jorgenson: What was the answer? A. I couldn't tell anything about it." The ruling referred to in this paragraph was error.

[6] The office nurse was asked whether appellant, at a time when police officers came to his office, did not hide in a closet, and she responded that she did not know. She was then asked whether she told one of the officers, on the same occasion, that appellant had said "he was going away for a few days." The district attorney then presented to her a statement made by her to certain police officers, and asked her whether it refreshed her recollection as to what was said at the time. She said it did not. He then offered to read a question and answer he had shown the witness, and objection was made and overruled. The prosecutor next inquired whether at a place and date specified and in the presence of persons named—police officers and others —she did not make a statement. Objection was again made and overruled. The prosecutor then inquired whether at the time specified the witness was asked, "He came in hurriedly, didn't he?" evidently referring to appellant, and whether she did not answer, "Yes." Objection was again made and overruled, whereupon the nurse answered that she did not remember saying that. She was then asked whether any one had told her what testimony to give, and whether any one had told her to refuse to testify. To both questions she answered in the negative. She

was next asked: "Isn't it a fact that counsel for the defendant told you to refuse to testify in this case?" Objection was made and overruled, and the inquiry was answered in the negative.

The prosecutor then read to the witness the following portion of a statement given the district attorney after the preliminary examination: "Q. Do you know a lawyer by the name of John C. Jorgenson? * * * A. Yes. Q. You know he is the lawyer for Arthur O. Berg? A. Yes. Q. He is not your lawyer, is he? A. No. * * * Q. He has never come to see you? A. No; just to get Dr. Berg's license after the hearing. * * * Q. Prior to that time you had never had any dealings with him? A. No. Q. You remember the day you went to court on this? A. 22d of June. Q. Did he talk to you at that time? A. He talked to me; yes. Q. What did he say to you? A. Just talked, said 'Hello,' and I said, 'Do you think things are going to be all right?' and he said 'Yes.' Q. Then what did he say? A. I remember what I said, 'Will I be the first one called up?' and he said, 'No,' he did not think so. He said, 'It is nothing to worry about; just refuse to testify.' Q. Did he tell you why you should refuse to testify? A. No; I did not ask him. Q. You followed out his instructions, and you refused to testify; is that right? A. Yes. Q. And the only reason is because he told you not to? A. Yes; that is the only reason." The witness then stated that she had so answered the questions. She also said that the statement was the truth, but an objection was made to the question which drew forth this answer, after it was made. The objection was sustained and the answer was stricken.

After the office nurse had concluded her testimony, and after other witnesses had testified, the trial judge made the following remarks, interspersed with statements of counsel: "While the witness Corinne Kissell was on the stand certain questions were asked her, apparently for the laying of the foundation for impeaching questions, and the state has not offered any evidence of an impeaching nature, and I think that the jury should be instructed to disregard any inference that may have been gained or gathered by them from the asking of those questions. * * * I am going to cover it in this way: Ladies and gentlemen of the jury, before the case proceeds further, if you have gained any inference through the asking of any questions of the witness Corinne Kissell that she may have made statements at other times contrary to her testimony here on the stand, you must disregard any such inference. Is that clear to the jury? In other words, without emphasizing those particular matters by asking the reporter to read back in his notes, to read over those questions, you will merely disregard that such questions were asked. If that is not entirely clear to the jury, I can explain it farther. Very well, proceed. The District Attorney: Do I understand your honor is instructing them to disregard her own admission that she at other times made contradictory statements? The Court: No; no; not as to that, but as to anything other than the testimony of the witness on the stand that she may at other times have made a statement contradictory to her sworn testimony during the progress of this trial. The District Attorney: In other words, your honor is instructing them that they must not draw an inference from the asking of the question where we have not proved the contrary, but if the contrary has been proved by other witnesses, or by her own testimony, the jury may make proper inferences from that? The Court: Oh, yes; the jury may, of course, consider any testimony that has been admitted here properly, any testimony of witnesses from the stand may be considered and weighed by you; but from the mere fact of the asking of the questions, or certain of the questions, of the witness, that the witness Corinne Kissell may have made, if you have drawn such inference, that she may have made certain admissions, from the mere asking of the questions, you must disregard such inference or any inference based solely upon the fact that such questions were asked her. A Juror: But we can take her testimony? The Court: You can take her testimony; yes."

During the final argument of the cause before the jury the district attorney said of the office nurse that at "one time she said nobody told her not to testify, and the next time she said somebody told her not to testify." The trial judge here interrupted the prosecutor and counsel for appellant objected to his statement. The judge observed: "There is no evidence in the case, no statement admitted in evidence, indicating she made that statement." This remark was followed by a colloquy between court and counsel and then the following occurred: "The Court: Well, I fear the jury may misconstrue the evidence, and I am going to take this occasion here and now to instruct the jury. The testimony of the witness Corinne Kissell was: 'Q. Has any one told you to refuse to testify? A. No, sir.' Then there were certain questions asked her, and the objection was sustained. And later in the case, if I recall correctly, she was asked if, at the time she made a statement in the district attorney's office, it was true and [sic] false, and she said true, but that statement is not in evidence, and the purpose of impeaching questions is not to establish the fact embraced in the question, or the assumed fact, I should say, embraced in the question, but rather to raise an issue as to the credibility of the witness, and therefore you may consider those questions and answers as to contradictory statements for the purpose of the credibility of the witness, to determine whether or not the witness did in these particulars or in other particulars speak the truth, but not as to the facts assumed in the questions themselves. The District Attorney: The statement itself that she gave there at that time, your honor, was read into the record in this case, and she said that that statement was true. That was what I had reference to. The Court: You asked her if she did not make the statement, and she said the statement was true. The District Attorney: Yes. The Court: But she at the same time denied the fact that she had been instructed not to testify in the case; so her admission that the statement was true might be taken by the jury as touching upon her qualifications to speak the truth; in other words, as to her credibility as a witness, but not as to the truth contained in the statement, which is not in evidence. In other words, it is an admission that she made a contradictory statement at another time."

Before the district attorney concluded his argument, the trial judge again took up the same subject: "The Court: Well, I think we had best take an adjournment at this time. Before we do, and while the matter is on my mind, I am thinking of the testimony concerning which you have just made reference to with respect as to whether the witness Corinne Kissell was or was not instructed to refuse to testify, and I fear that that evidence, particularly in view of the fact that it has been emphasized by the district attorney, might be misconstrued by the jury. That is not an issue in this case whatever. The evidence is introduced, and the jury is required to consider the evidence in determining whether or not the crime was committed as charged in the information. I fear that the cross-examination, amounting almost to impeachment of the witness Kissell, was or might be construed as an attempt to impeach the witness on an immaterial matter, and I believe, inasmuch as the matter has been emphasized, that I will instruct the jury to disregard entirely the questions as to whether the witness Corinne Kissell was or was not instructed to refuse to testify in this case, and to consider only the evidence of the witness Kissell with respect to the issues in the case; that is, to consider the evidence only for the purpose of determining whether there was or was not a crime committed as charged in the information."

Closely following these observations the record shows this: "A Juror: Your honor, can we consider whether she was a willing or a reluctant witness? The Court: Yes; you have an opportunity, as I will advise you further at the conclusion of the case, to weigh the testimony of every witness, consider their manner upon the stand, and the manner in which they testify. That is exclusively within your province to consider, not only the spoken words, but the attitude of the witness while on the stand, and the manner of the witness' testimony. That applies, of course, not only to the one witness, but to every witness who is produced in the case."

In his final instructions the trial judge told the jury that a witness may "be impeached by evidence that he has made, at other times, statements inconsistent with his present testimony as to any matter material to the cause on trial," and he gave the following specific instruction concerning the testimony of the office nurse: "You are instructed to disregard all questions to and answers by the witness Corinne Kissell made during the trial of this case in this court relating to what such witness may or may not have stated or testified heretofore and her conduct in reference to such former statements or testimony, if any, excepting only such statements which the evidence shows she may or may not have made at the time of the defendant's arrest at her apartment, but you may consider all other testimony of such witness and weigh it in accordance with the rules I have given or will hereafter give you the same as the testimony of any other witness in the case."

[7] Thus was this involved chain of circumstances ended. Appellant contends that the trial court erred in permitting, over repeated objections, that portion of the examination of the office nurse which terminated in the question whether in her statement to the police officers she had answered in the affirmative the question, "He came in hurriedly, didn't he?" We think the contention must be upheld. The witness was not confronted with her earlier statement for the purpose of showing that she had made assertions inconsistent with her testimony, but with the intent only of showing something to which she had not testified. "If a witness merely fails to testify as expected, that does not authorize the party calling him to prove that the witness had elsewhere made the desired statements." People v. Creeks, 141 Cal. 529, 75 P. 101.

It is also insisted that the court erred in allowing the district attorney to question the witness about her statement made to him, in which she referred to her refusal to testify at the preliminary examination, and in which she gave the reasons for the refusal. We think the point is well taken. We can conceive of no theory upon which this evidence was admissible.

[8] We proceed, now, to other features of the case. A statement made by appellant in the form of question and answer, taken down in shorthand and transcribed before the trial, was exhibited to a witness who had heard the questions asked and answered, and he was asked whether the answers were "free and voluntary." The question was objected to on the ground that it called for a conclusion of the witness, and the same point is now made here. The objection was not good. It is the constant and proper practice to ask such a question as a part of the foundation for the reception in evidence of confessions made by those charged with crime, although

technically it does call for the statement of a conclusion. The recognized practice, after such a question is answered in the affirmative, is for the defendant to show, by a cross-examination which he may at once conduct, the entire circumstances surrounding the making of the confession.

[9] The defense made by appellant was that an operation for an abortion had been performed upon his alleged victim by some other person, and that she had come to him for relief from its effects. Appellant sought to detail to the jury what the alleged victim said to him when she came to his office for treatment, but the testimony was ruled out as hearsay. He also endeavored to prove what the woman told him as to her condition while she was on his operating table, and this evidence was excluded on the same ground. We are pointed to no case which decides whether or not such evidence is admissible on behalf of a defendant, but we are clearly of the opinion that it is. The people may undoubtedly show in a criminal abortion case that the victim had declared to the defendant that she came to him for the purpose of procuring an abortion to be performed upon her, as the decided cases are plainly to the effect that such declarations, when made to third parties before a visit to the defendant, are admissible to show the purpose of the visit. People v. Wright, 167 Cal. 1, 138 P. 349; People v. Thomas, 51 Cal. App. 731, 197 P. 677. And see People v. Seiffert, 81 Cal. App. 195, 253 P. 189. It would be strange indeed if the defendant could not prove, in such a case, either by his own testimony or by that of others who were present, that the alleged victim declared that she came to him for a totally different purpose, for instance, to be treated for a condition resulting from an operation for abortion already performed by some other person.

Other points are made by appellant, but we think it unnecessary to consider them. We have found it unnecessary, in view of the nature of the errors shown in the record, to read the transcript of the testimony taken at the trial, in view of the provisions of section 4½ of article 6 of the Constitution. Appellant was damaged by the questions propounded to his office nurse, and which were intended to show the age, sex, and condition of the patients who frequented his office, especially as the witness made answer to one of the questions to the effect that most of the patients were women. He was also damaged by other improper questions addressed to the same witness, especially those which brought out the fact that, upon the suggestion of his counsel, she had refused to testify at the preliminary examination.

We think this harm was not wholly eradicated by the involved instructions, which the trial judge gave to the jury with relation to that testimony, especially in view of what the court said, in connection with that very matter, in response to the question of a juror as to whether the jury might consider whether the witness was a reluctant one. We think the court's response conveyed to the jury the idea that they might determine, from the fact of her refusal to testify at the preliminary examination, that the witness was an unwilling one.

The crowning error, we think, was in the court's refusal to permit appellant to testify to what his alleged victim told him as to the purpose of her call upon him. In view of this error, it can make little difference what was the evidence upon which the jury pronounced its verdict of guilt. If appellant had been permitted to present the excluded testimony, a field of inquiry might have been opened which would have fastened the crime under investigation upon some person other than himself.

We find it unnecessary, because of the view we take concerning the errors of the court, to determine whether the district attorney was guilty of misconduct while the office nurse was on the witness stand.

Judgment and order reversed.

We concur: CRAIG, J.; THOMPSON, J.

---

96 Cal. App. 488

PEOPLE v. CITY OF OAKLAND et al. ★
(Civ. 6570.)

District Court of Appeal, First District, Division 2, California. Jan. 30, 1929.

Rehearing Denied March 1, 1929. Hearing Denied by Supreme Court March 29, 1929.

1. Municipal corporations ⚷63(1)—City council's determination that public convenience requires street vacation is subject to judicial review.

Determination of city council that public necessity or convenience requires vacation of street, or portion thereof, is subject to review by the courts.

2. Municipal corporations ⚷63(1)—City council's determination of what constitutes public convenience in proceeding to vacate street is generally conclusive.

Determination of city council of what constitutes public interest or convenience in proceeding for vacation of public street is legislative in character, and is conclusive, in absence of fraud or collusion.

3. Appeal and error ⚷544(3)—On appeal from judgment, on judgment roll alone, court was confined to errors appearing on face of judgment roll, and sufficiency of evidence was not presented.

Where appeal from judgment was taken on judgment roll alone, scope of appellate review was limited to errors appearing on the face of the judgment roll, and question of sufficiency of evidence to support findings was not presented.

★Rehearing denied. Hearing denied by Supreme Court.

4. Municipal corporations 🔑225(5), 657(2)—Vacation of part of street at instance of abutting property owner, and conveyance of property to it, held authorized, where public convenience was promoted and city received consideration (St. 1889, p. 70; Oakland City Charter, § 51, subd. 50).

Vacation of part of street at instance of abutting property owner, and execution of deed to property owner covering the vacated portion of the street, *held* authorized, under St. 1889, p. 70, and Oakland City Charter (St. 1911, p. 1551) § 51, subd. 50, where public convenience was promoted and city received consideration.

5. Municipal corporations 🔑657(2)—Subject to constitutional limitations, state has plenary power to vacate streets, which it may delegate to municipal corporations, free from judicial control in exercise thereof, in absence of fraud or abuse of power.

State has plenary power to vacate public streets within its borders, subject to constitutional limitations, and may delegate this power to municipal corporations, free from review of action of municipal authorities by the courts, in absence of fraud or plain abuse of power.

6. Municipal corporations 🔑657(2)—Streets may be vacated, whether acquired by condemnation or dedication.

All streets and public ways of city are subject to power of vacation, which may be exercised, irrespective of whether the street was acquired by condemnation or dedication.

7. Municipal corporations 🔑657(1)—Street vacation ordinance held not invalidated by incidental private benefit to abutting property owner, to whom city deeded land, where public convenience was promoted thereby (St. 1889, p. 70; Oakland City Charter, § 51, subd. 50).

Fact that city's vacation of street and conveyance thereof for consideration to abutting property owner resulted in incidental private benefit to the property owner did not constitute legal fraud, or render vacation ordinance invalid, under St. 1889, p. 70, and Oakland City Charter (St. 1911, p. 1551) § 51, subd. 50, where vacation was also for the benefit of the city at large.

Appeal from Superior Court, Alameda County; J. J. Trabucco, Judge.

Action by the People against the City of Oakland and others. Judgment for defendants, and the People appeal. Affirmed.

Hearing denied by Supreme Court: WASTE, C. J., and SHENK, J., voting for a transfer.

U. S. Webb, Atty. Gen. (Forrest M. Pearce, of Oakland, of counsel), for the People.

Preston Higgins, City Atty., and Homer W. Buckley, Deputy City Atty., both of Oakland, for respondent city of Oakland.

Fitzgerald, Abbott & Beardsley, of Oakland, for respondent H. G. Prince & Co.

LUCAS, Justice pro tem. This is an appeal from a judgment of the superior court of Alameda county, declaring valid an ordinance adopted by the city council of Oakland ordering vacated that portion of East Eleventh street generally described as lying between Twenty-Eighth avenue and Twenty-Ninth avenue.

East Eleventh street, prior to the closing of that portion thereof lying between Twenty-Eighth and Twenty-Ninth avenues, pursuant to the judgment of the trial court herein appealed from, extended from Twenty-Third avenue to Twenty-Ninth avenue, a distance of 1,958.76 feet. The defendant H. G. Prince & Co., one of the respondents herein, owned all of the property fronting on either side of that part of East Eleventh street which was ordered vacated by said ordinance as well as the fee to the street itself. In 1887 the public acquired an easement for a public street over a portion of that part of the street so ordered vacated, and in 1912 acquired a similar easement over the remainder thereof. On the 26th day of August, 1920, pursuant to ordinances of its council, the defendant city of Oakland, another respondent herein, for the purpose of extending East Tenth street and East Ninth street to Twenty-Ninth avenue, instituted two proceedings in eminent domain against the said H. G. Prince & Co.

On the 4th day of November, 1921, and during the pendency of said proceedings in eminent domain, said H. G. Prince & Co. presented to the council of respondent city of Oakland a written petition, in which it requested said council to close up and abandon that portion of said East Eleventh street involved in this action upon the grounds that three streets, to wit, East Eleventh street, East Tenth street, and East Ninth street, were not required in said locality, and hampered the industrial development of said locality, and particularly prevented defendant H. G. Prince & Co. from extending and adding to its plant. In said petition it was proposed that, if the city of Oakland would close up said portion of East Eleventh street, it (the said H. G. Prince & Co.) would convey to the city of Oakland the property described in the above-mentioned eminent domain proceedings, and at its own expense improve, by paving, guttering, sidewalking, and curbing, East Ninth street and East Tenth street, between Twenty-Eighth avenue and Twenty-Ninth avenue, and pave Twenty-Eighth avenue from the southerly line of East Eleventh street to the northerly line of East Tenth street, and move the fire hydrants on East Eleventh street to such locations as might be required by the fire department of the city of Oakland.

Upon its receipt, the council referred said petition to the city planning commission. On November 21, 1921, the city planning commission, after a full and complete investigation as to the location of the streets in question, traffic needs, the character of development in the vicinity of said streets, and the general character of the surroundings, recommended to the city council the granting of the said petition of H. G. Prince & Co., the closing of said East Eleventh street, and the opening and extension of East Tenth street and East Ninth street as proposed. On November 28, 1921, said city council passed its resolution of intention, No. 23066, New Series, entitled "Resolution of Intention to Close up and Abandon a portion of East Eleventh Street." Thereupon the superintendent of streets of said city posted and published notices in the manner and for the time provided by section 3 of the "Street Opening Act of 1889," and within the time required by section 4 of said act certain interested persons filed a written protest, objecting to said proposed improvement, and to the extent of the district to be affected thereby.

Thereafter several hearings thereon were had before the said city council. The protest was overruled and the said city council, on March 7, 1922, passed Ordinance 2267, New Series, entitled "An ordinance ordering the closing up and abandoning of a portion of East Eleventh street northwesterly of Twenty-Ninth avenue, and authorizing and directing the execution, acknowledgment, and delivery of a deed to the abutting owner, 'and finding and determining that equity requires the conveyance to said abutting owner, and that the compensation therefor is adequate and proper.'" In and by the terms of said ordinance the council found that public convenience and necessity required the closing of said street, and directed the mayor of said city to execute a deed conveying to said H. G. Prince & Co. all the city's right, title, and interest in and to said portion of East Eleventh street ordered closed and abandoned by said ordinance, and to deliver said deed in escrow, to be finally delivered upon the fulfillment by the said H. G. Prince & Co. of its promises and agreements.

Action was brought in the name of the people of the state of California, by Attorney General U. S. Webb, seeking to enjoin the closing of the portion of East Eleventh street above referred to, and asking that the action of the city council to that end be declared void. The trial court upheld the proceedings of the city council, and plaintiff appeals from its judgment.

[1, 2] Counsel for appellant in their opening brief contend that the determination of the Oakland city council that public necessity or convenience required the vacation of a portion of East Eleventh street is subject to judicial review (citing People v. City of Los Angeles, 62 Cal. App. 781, 218 P. 63); that courts will look beyond the recitals of an ordinance vacating streets and examine the results and surrounding circumstances, to determine whether or not the purpose of the ordinance is public and therefore within the scope of legislative discretion, or private and therefore without the scope; and that an inspection of the judgment roll in this case clearly establishes the fact that the vacation of that portion of East Eleventh street complained of was for no other purpose and with no other result than private gain to said H. G. Prince & Co.

It is true, as contended by appellant, that the determination of a city council that public necessity or convenience requires the vacation of a street or a portion thereof is subject to judicial review. Were it otherwise, as suggested in People v. City of Los Angeles, supra, a false recital in a municipal ordinance to the effect that public necessity or convenience required certain legislative action would give validity to an act which would have been invalid had the ordinance recited the truth. Such action would sound in fraud, and fraud and collusion may be inquired into. But, as also stated in the City of Los Angeles Case, at page 786 of 62 Cal. App. (218 P. 65): "The authorities are quite uniform, that as a general legal proposition, in the absence of fraud or collusion, the decision by the city council of what constitutes public interest or convenience in a matter of the sort here in question [the vacation of a public street] is legislative in character, and that a determination by the city council of such a question is conclusive."

[3] Appellant herein, in conformity with the right of judicial review, brought action in the superior court, and we take it all of the acts and proceedings of the city council were at the time of trial judicially reviewed. This appeal being taken on the judgment roll alone, there is no evidence before this court; but the findings of fact recite that evidence, oral and documentary, was introduced on behalf of the respective parties, and that the cause was duly submitted to the court for its decision. Thereupon the trial court found:

(1) "That the adoption of said ordinance vacating said portion of East Eleventh street was solely because of public necessity and convenience and for the purpose of rearranging the streets in the vicinity to more adequately serve the public needs, necessity, and convenience."

(2) "That in said closing and abandoning of said portion of East Eleventh street, and every act and thing done in connection therewith, and incidental thereto, the members of the council of the city of Oakland, and each of them, and every officer, agent, and representative of the said city of Oakland, acted in good faith, and without any fraud or collusion, or abuse of discretion, and solely for and by reason of the public necessity, interest and convenience."

The findings of the trial court in the City of Los Angeles Case, relied upon by plaintiff, are far different, for there the court found:

"That neither the public necessity nor interest nor convenience required the abandonment of such portion of Argyle avenue, and that the public derived no benefit therefrom." Page 791 of 62 Cal. App. (218 P. 67).

It is the law that, "when an appeal from a judgment is made upon the judgment roll alone, the scope of appellate review is confined to alleged errors appearing on the face of the judgment roll. (Marr v. So. Cal. Gas Co., 198 Cal. 278, 282 [245 P. 178]; Neale v. Morrow, 174 Cal. 49 [161 P. 1165]; Miller v. Yule [80 Cal. App. 618, 252 P. 737].) In such an appeal no question can arise as to the insufficiency of the evidence to support the findings." This being the law, and the trial court herein having found the existence of public necessity and convenience, and the nonexistence of fraud or collusion, such findings cannot be disturbed.

[4] Since no question can arise as to the sufficiency of the evidence to support the findings, and since appellant does not point out any error in the pleadings, and indeed a inspection of the pleadings reveals none, it would appear that the scope of this court's review is limited to a consideration of but one question, namely: Do the findings of fact support the judgment?

In the closing brief of appellant it is contended that they do not for two reasons: First, because the city council had no power to adopt the ordinance of vacation; and, second, because the findings of fact show legal fraud on their face. The act (Stats. 1889, p. 70) and the several acts amendatory thereof, under which said portion of East Eleventh street was vacated, authorizes the vacation of a public street only "whenever the public interest or convenience may require." The charter of the city of Oakland (Stats. 1911, p. 1551), in section 51, subdivision 50, provides:

"Powers of the Council.

"Sec. 51. Except as herein otherwise expressly provided, the council shall exercise all the general powers of the city herein set forth and all powers now held by or that may hereafter be given to the city under the Constitution or the laws of the state; but only in the manner and under the conditions of this charter, and subject to all the provisions thereof.

"In addition to all such powers, the council, subject to the provisions and restrictions of this charter, shall have power * * *

"(50) Whenever any street or portion of a street shall be abandoned or closed by ordinance, to convey by deed such street or portion of street so abandoned or closed, to the owners of the lands adjacent thereto in such wise as the council shall deem that equity requires. But the council shall have no power to convey by deed or otherwise without adequate compensation any street or portion of a street which shall have been acquired by the city by deed from any person or persons whatever. And this section shall not be construed as empowering or authorizing the council to close any street or portion thereof merely by the consent of owners of lands adjacent thereto and when the public convenience does not so require."

It thus appears that the city council by statute was empowerd to close said portion of East Eleventh street whenever the public interest or convenience so required, and that the city council, upon said closing, under the charter provision heretofore quoted, was empowered to convey by deed said portion of East Eleventh street to H. G. Prince & Co., the owner of lands adjacent thereto, in such manner as the council should deem that equity required, providing the city of Oakland received adequate compensation therefor. In fact, the council had no power to make such a conveyance unless the city actually received adequate compensation. The findings herein conclusively establish that the city council vacated said portion of East Eleventh street in accordance with the provisions of the Statutes of 1889, p. 70, and that the city council, in accordance with the above quoted provision of the Oakland City Charter did convey by deed the public easement in said portion of East Eleventh street so vacated to H. G. Prince & Co., the owner of lands adjacent thereto, for adequate compensation.

Since the city council was empowered by statute to close the street in question, and followed strictly the procedure outlined therefor by the general laws, for appellant's contention that the council acted without power to be sound it must be based on the principle that the empowering statute itself is unconstitutional. Yet appellant's counsel point out no constitutional inhibition against such an enactment, but instead content themselves with arguing that there is a distinction between municipal property of a private nature and that of a public nature—that the street in question was public in nature, impressed with a trust for the use and benefit of the people of the state, and under the authorities cannot be alienated by the municipality nor can the Legislature authorize or sanction its alienation.

An examination of the authorities cited, however, shows that they are easily distinguishable from the case at bar in this: They either refer to lands originally dedicated to public use by an act of Congress and the state's control over them was therefore limited, or there was no legislative act by the state authorizing alienation. An attempt is made further to distinguish between lands held in fee by a municipal corporation and those where dedication for a public use has been made of merely an easement therein. We find no justification under the authorities for such a distinction, in so far as they are applicable to the facts of this case.

[5] The general rule on the question of au-

thority for vacating streets as stated by Mr. Justice Rudkin in Lockwood v. City of Portland (C. C. A.) 288 F. 480, seems to be universally upheld: "The following propositions are so firmly established as to require no citation of authority in their support: First, subject to the limitations contained in the Constitution of the United States, and in its own Constitution, the power of a state to vacate public streets within its borders is plenary and absolute; second, this power may be delegated to municipal corporations; and, third, a court of equity cannot review the action of the municipal authorities in the exercise of the power thus delegated in the absence of fraud or a plain abuse of power."

[6] It is also the general rule that: "All the streets and public ways of a city, however acquired, are subject to the power of vacation. A power to vacate streets may be exercised whether the public acquired the street to be vacated by condemnation or by dedication." 44 Cor. Jur. 895; McQuillan on Municipal Corporations (2d Ed.) vol. 4, p. 263. "The Legislature may delegate the power to vacate streets to the municipal authorities, and has done so, but the exercise by the local authorities of this power is dependent on the will and subject to the control of the Legislature, and after such power has been committed, the Legislature may revoke it in part as well as in whole or, at least under the former Constitution, it might without an express revocation, itself exercise the power in any particular instance. This rule applies to streets which have been dedicated to public use, since a street, when dedicated, becomes the property of the whole state, which, by its Legislature, can deal with or dispose of it at its pleasure." 19 Cal. Jur. pp. 33, 34.

[7] These rules are apparently recognized by appellant's counsel, for in their final contention that the findings do not support the judgment because legal fraud appears upon their face it is conceded that the Oakland City Charter conferred upon that municipality the power of selling property which had once been used for street purposes, where the city owned the fee, and that in proper cases a municipality has the right to abandon or vacate a public easement in a street. In this regard, however, it is contended the case at bar is not a proper case, because the face of the record shows that the vacation proceedings were for private benefit rather than the public good. To this we cannot agree. The validity and the finality of the findings of public convenience and necessity have already been discussed. The face of the record does not show the purpose to be one of private gain—at most all that can be said is that the private benefit presumably accruing to H. G. Prince & Co. was incidental to the public welfare. This does not constitute legal fraud.

"Faithfulness to the public trust reposed in the members of the legislative body will be presumed. So the fact that some private interest may be served incidentally will not invalidate the vacation ordinance." McQuillan, supra, vol. 4, p. 267. "The true rule seems to be that a municipality cannot vacate a street or a part thereof for the sole purpose of benefiting an abutting owner, and that the power to vacate streets cannot be exercised in an arbitrary manner, without regard to the interest and convenience of the public or individual rights; but that the municipality may vacate a street on the petition of an abutter for his benefit where the vacation is also for the benefit of the municipality at large; i. e., where the use to which the vacated part of the street is to be put is of more benefit to the community than the retention of such land as a way for a street. As to what are public as distinguished from private purposes, an eminent legal author has said: 'The abolition of grade crossings, the construction or improvement of railroad depots and terminals, and the rearrangement of streets to secure a more regular and harmonious system, are public purposes for which the power of vacation may properly be exercised.'" McQuillan, supra, pp. 269, 270.

In the opinion of the court the foregoing considerations effectually dispose of appellant's contentions.

The judgment appealed from is affirmed.

We concur: KOFORD, P. J.; STURTEVANT, J.

96 Cal. App. 590

TURNEY v. SHATTUCK. (Civ. 5690.)

District Court of Appeal, Second District, Division 2, California. Feb. 1, 1929.

1. Executors and administrators 🔑473, 474 (1)—Settlement of account in probate of removed executrix was necessary before suit against her for money had and received (Code Civ. Proc. §§ 1628, 1629).

Settlement of account in probate by removed executrix at the instance and request of administrator with the will annexed, in accordance with authority of Code Civ. Proc. §§ 1628, 1629, was necessary before suit would lie against executrix for money had and received, in that the administrator with the will annexed was not entitled to have a plurality of independent inquiries on the same subject in the same court at the same time.

2. Pleading 🔑237(6)—Permitting amended supplemental complaint to conform to proof as to executrix's account, settlement of which was pending at time original complaint was filed, held erroneous.

Where settlement of account of removed executrix pending in probate court at time suit was brought by administrator with the will annexed for money had and received was completed during the trial, the court erroneously permitted amended supplemental complaint to be filed to conform to proof on the subject, since at time original complaint was filed the matter alleged therein was in exclusive jurisdiction of probate court, and under such circumstances the complaint could not be vivified by amendment or supplement, particularly since the order settling account was an appealable order and the time for appeal had not expired at time supplemental complaint was filed.

Appeal from Superior Court, Los Angeles County; John L. Fleming, Judge.

Suit by Harold Turney, administrator with the will annexed of the estate of Nicholas John Steiner, deceased, against Maud S. Shattuck. Judgment for plaintiff, and defendant appeals. Reversed.

Walters & Mauk, of Los Angeles, for appellant.

Andrew J. Copp, Jr., of Los Angeles, for respondent.

STEPHENS, Justice pro tem. The defendant in this case was named in the will of Nicholas John Steiner as executrix without bond, and shortly after the death of Steiner she was duly appointed to that office and qualified on June 20, 1917. On February 25, 1924, citation issued commanding the executrix to appear May 9, 1924, and show cause why she should not be removed. Her powers were suspended in the order for the citation. On June 2, 1924, she was removed by order of the superior court sitting in probate. On August 1, 1924, Rev. Harold Turney was appointed administrator with the will annexed. He is the plaintiff and respondent herein. On September 16, 1924, said administrator caused a citation to issue by which the defendant was directed to appear in probate court on October 17, 1924, to show cause why she should not be examined as to property belonging to the estate and fraudulently disposed of by her while executrix. On October 30, 1924, the removed executrix filed her account in probate, and on the 3d day of December, 1924, filed a supplemental account. On November 24, 1924, the administrator with the will annexed filed exceptions to such account. There were several sessions upon the hearing of the report, running from the latter part of October to November 21, all in 1924. Settlement thereof was submitted. The administrator appeared at these hearings and interposed objections to items in the report. The report showed on its face that the executrix had received $248.41 more than she had expended in the estate. During the period of these hearings, and before November 1, 1924, the administrator demanded of appellant that all property of the estate be turned over to him. No assets of the estate of any kind were ever turned over to him, and on November 1, 1924, he filed a suit in the superior court for money had and received, and demanded $2,366.82. On the 16th day of July, 1926, the removed executrix's account was settled, showing that $850.91 was the sum of unexpended funds which should be in her hands. The case went to trial on the 23d day of June, 1926. Thereafter it was continued to July 26, 1926, when the cause was submitted with permission tentatively granted to plaintiff to file a supplemental amended complaint setting up the settlement of the account. On August 19, 1926, a supplemental complaint was filed, setting up, among other allegations, the facts as to settlement of account on July 16, 1926, and prayed for the amount therein determined and double thereof. Subsequently the court found for the plaintiff in the sum of $850.91. Defendant appeals.

The parties agree in their briefs that the sole question for this court to decide is whether or not the cause was prematurely brought. The appellant (defendant below) presented her objection to all testimony on the ground that the whole matter was pending in the same court as a probate proceeding, and that the probate proceeding was exclusive until the account of the removed executrix had been settled. Some evidence on this point was excluded by the court and some admitted, but at all times under the comment of the court that it was of the same opinion as counsel making such objection. Respondent's counsel asked that such testimony be admitted on the ground that the removed executrix was no longer in a representative capacity and that the administrator with will annexed could pursue estate money converted by the removed executrix by direct suit. At the conclusion of plaintiff's case, defendant moved a nonsuit, which was denied. Defendant then rested without offering any evidence.

[1] We are of the opinion that appellant was right in her contentions and that the settlement of the account in probate was necessary before suit would lie.

Before the establishment of the superior court, which embraces within its jurisdiction suits at law and in equity and special proceedings, the powers of the probate court were comparatively limited, and the probate courts of many eastern states remain so to this day. Because of this fact, cases arising in California before the change and later eastern cases are often quoted to show numerous instances where equity steps in to aid the probate proceedings. The cases of Burris v. Kennedy, 108 Cal. 331, 41 P. 458, Heydenfeldt v. Superior Court, 117 Cal. 348, 49 P. 210, and Toland v. Earl, 129 Cal. 148, 61 P. 914, 79 Am. St. Rep. 100, treat this phase of the question exhaustively and review the leading cases. While it is unnecessary to decide herein whether or not this case would have been proper under the system of the old district court and separate court for probate proceedings, it is interesting to note the case of Allen v. Tiffany, 53 Cal. 16, wherein the following language is used:

"The Probate Judge has exclusive jurisdiction to determine the state of accounts between the guardian and ward. The ward may agree upon a settlement with the guardian, subject to the approval of the Probate Judge, or may apply for a citation compelling the guardian to settle his accounts before the Probate Judge. But to hold that prior to such accounting before the Probate Judge, or to his order at proving the settlement in pais, the ward may bring suit in the District Court for a supposed balance, would destroy the symmetry and efficiency of the system furnished by our law for the appointment and conduct of guardians of infants." See Graff v. Mesmer, 52 Cal. 636; Weihe v. Statham, 67 Cal. 84, 7 P. 143.

The point at issue is placed beyond doubt by the language of Mr. Justice Sloss in King v. Chase, 159 Cal. 420, 115 P. 207, a case in which a second personal representative sought an accounting from the executor of his predecessor. Quoting at length from the opinion:

"This action was commenced after the enactment of section 1639 of the Code of Civil Procedure in its present form. It is in the nature of a bill in equity to compel a rendition and settlement of the accounts of a deceased executor. Prior to 1905, when section 1639 was adopted, the statutes of this state contained no provision authorizing the superior court sitting in probate to settle such accounts. Nor was any such power conferred on the probate court, as that court existed under the constitution of 1849. For this reason, it was uniformly held that a bill in equity to compel the executor or administrator of an executor or administrator to settle the account of his testator or intestate with the estate in which the decedent had been acting, was the appropriate, as it was the only, procedure. (Bush v. Lindsey, 44 Cal. 121; Chaquette v. Ortet, 60 Cal. 594; In re Thompson, 101 Cal. 349, 35 P. 991, 36 P. 98, 508; Vance v. Smith, 124 Cal. 219, 56 P. 1031; Slater v. McAvoy, 123 Cal. 437, 56 P. 49; Zurfluh v. Smith, 135 Cal. 644, 67 P. 1089; Guardianship of Wells, 140 Cal. 349, 73 P. 1065.) The power of a court of equity to entertain a suit of this character is, in these cases, based upon the very ground that there is no other method of compelling the accounting. Thus, in Bush v. Lindsey, 44 Cal. 121, the court said: 'We are referred to no provision of the probate act which authorizes the probate court to cite the administrator of an administrator to settle the account of his intestate with the estate of which he was the administrator, and, after a careful examination of the act, we find none which confers that authority. The power must be lodged in some tribunal to require such an account to be taken and settled; and if the probate court does not possess it, it must reside in the district court, as a branch of its equitable jurisdiction.' So, in Chaquette v. Ortet, 60 Cal. 594, the court states that 'there is no provision of the statute providing for the settlement of the account of an administrator who dies before rendering an account. It is because of the absence of such statutory provision, that the right and duty to compel such accounting belongs to a court of equity.'

"It would seem, therefore, that upon the enactment of a statute giving to the court sitting in probate the power and duty of compelling an accounting in such cases, the occasion and ground for the interposition of a court of equity must have ceased. Such a statute came into being by the adoption, in 1905, of section 1639 of the Code of Civil Procedure, reading as follows: 'If any executor or administrator dies, his accounts may be presented by his personal representatives to, and settled by, the court in which the estate of which he was executor or administrator is being administered, and, upon petition of the successor of such deceased executor or administrator, such court may compel the personal representatives of such deceased executor or administrator to render an account of the administration of their testator or intestate, and must settle such account as in other cases.'"

While the whole opinion in King v. Chase may be read with profit in connection with the matter before us, we shall resist a temptation, in the interests of brevity, to quote further from it.

If the facts of the instant case were substituted for the facts in the quoted case, and section 1629 of the Code of Civil Procedure, which covers the proceeding before us, was substituted for section 1639 therein, the reasoning would be conclusive in the instant case. Section 1629 reads as follows: "When the authority of an executor or administrator ceases, or is revoked for any reason, he may be cited to account before the court, at the instance of the person succeeding to the administration of the same estate, in like manner as he might have been cited by any person interested in the estate during the time he was executor or administrator."

See In re Philbrook, 47 Cal. App. 679, 191 P. 77, and Estate of Clary, 71 Cal. App. 22, 234 P. 851, where Mr. Justice Hart exhaustively reviews the authorities. Also see Bauer v. Bauer, 201 Cal. 267, 256 P. 820.

Lord Redesdale said, in Bateman v. Willoe, 1 Sch. L. 201: "I do not know that equity ever does interfere to grant a trial of a matter which has already been discussed in a court of law, a matter capable of being discussed there, and over which the court of law had full jurisdiction."

Respondent argues that the court is impotent to enforce its orders in the probate proceedings, but there is nothing in this point, as will appear from the cases hereinabove cited and the following cases: Philbrook v. Randall, 195 Cal. 95, 231 P. 739; In re Clary, 112 Cal. 292, 44 P. 569; Cook v. Ceas, 143 Cal. 221, 77 P. 65; Elizalde v. Murphy, 4 Cal. App. 114, 87 P. 245; Ex parte Smith, 53 Cal. 204; section 1628, Code Civ. Proc. It may also be noted that the accounting in probate proceedings was availed of by respondent by citation at his instance and request and also by objections at the hearing on the account, but he also proceeded in an independent suit before administration of the matters submitted to the court in probate. Certainly he was not entitled to have a plurality of independent inquiries on the same subject in the same court at the same time; or, as was said in Toland v. Earl, supra: "Why should Judge Coffey, sitting in probate, be instructed by Judge Coffey, sitting in a case in equity brought for that purpose?"

Having arrived at the conclusion that the accounting was not proper outside of the probate proceeding, it will be seen that the original suit was prematurely brought. This was the contention of appellant, and the trial court apparently adhered to the same conclusion throughout the trial.

[2] Subsequently to the beginning of the trial in the instant case, and before its conclusion, the probate court settled the account, and the trial court admitted evidence thereof over appellant's objection. He then allowed an amended supplemental complaint to be filed to conform to proof on this subject. Appellant contends that this does not assist plaintiff, for the reason that a supplemental complaint cannot aid a complaint which was prematurely filed; in other words, when the complaint in the instant case was filed, the matter alleged therein was already in the exclusive jurisdiction of the probate court, and that under such circumstances the complaint never can be vivified by amendment or supplement. In this also we agree with appellant.

"Furthermore, since a supplemental pleading is proper only in aid of the case made by the original complaint, relief cannot be granted upon a supplemental complaint, where the proof shows that the plaintiff had no cause of action when his original complaint was filed. 'If a party has no cause of action at the time of the institution of his action he cannot maintain it by filing a supplemental complaint founded on matters which have subsequently occurred.' (Wittenbrock v. Bellmer, 57 Cal. 12; Gordon v. San Diego, 108 Cal. 264 [41 P. 301]; Hill v. Den. 121 Cal. 42 [53 P. 642].)" Imperial Land Co. v. Imperial Irr. Dist., 173 Cal. 668, 673, 161 P. 116, 119; Miles v. Bybee, 59 Cal. App. 613, 211 P. 251.

Even if the supplemental complaint could breathe the breath of life into a stillborn cause, it could not do so in the circumstances of this case, because the probate court order settling the account was an appealable order and the time for appeal had not expired at the time the supplemental complaint was filed.

We do not herein consider the question as to whether or not an equitable proceeding independent of the probate court, but concerning subject-matter already pending therein, would lie where the powers of the probate court would be ineffective to provide a remedy for an alleged wrong.

The judgment is reversed.

We concur: WORKS, P. J.; IRA F. THOMPSON, J.

96 Cal. App. 576

HENDERSON v. ELECTRIC LOOP LAND CO. SAME v. RICHMOND ANNEX LAND CO. SAME v. HAVENSCOURT CO. (Civ. 6575.) ★

District Court of Appeal, First District, Division 2, California. Feb. 1, 1929.

Rehearing Denied Feb. 28, 1929. Hearing Denied by Supreme Court April 1, 1929.

1. Appeal and error ⚷882(3)—Finding on set-off could not be objected to for first time on appeal as not sustained by pleadings, where treated as in issue.

Where action to recover commissions on sale of realty was tried by both parties and by court on theory that defendants' right to credit or set-off for advance commissions retained by broker from collections for defendants was in issue, and court made finding of fact on such issue, objection that finding on right of set-off was not sustained by pleading could not be raised for first time on appeal.

2. Executors and administrators ⚷434(1)—Claim for money collected for defendants and retained by decedent could be offset against claim for commissions earned by decedent.

Cause of action based on contracts executed by deceased during his lifetime to recover commissions for sales made by deceased and earned and which could only be defeated by purchaser's failure to pay installments, and cause of action for set-off against claim for commissions arising out of same contracts of amounts collected for defendants and retained by decedent, *held* not lacking in mutuality so as to prevent offset of one against the other.

3. Executors and administrators ⚷434(4)—Defendants could offset amount appropriated by decedent against administratrix's claim for decedent's commissions collected after his death, though estate was insolvent.

Where decedent during lifetime collected money belonging to defendants and unlawfully appropriated money to own use, and defendants under same contracts of sale came into posses-

★Rehearing denied. Hearing denied by Supreme Court.

sion of commissions claimed by decedent's administratrix, and all sums due for commissions had been collected, defendants were entitled to equitable set-off of their claims against claim for commissions, against objection that offset would work preference amongst creditors of decedent's insolvent estate.

4. Executors and administrators 🔑450—Testimony of decedent's statement that money appropriated was advance on commissions authorized set-off of money appropriated against claim for commissions.

In action to recover commissions on sale of realty, in which defendants filed set-off against claim for commissions for money wrongfully appropriated by decedent during lifetime on same contracts of sale, testimony of bookkeeper that decedent, at time of appropriation of money belonging to defendants, stated that payments were merely advances on his commissions, was sufficient to justify allowance of set-off.

5. Executors and administrators 🔑437(7)—Administratrix's allowance of claim but rejection of set-off did not require suit within three months to preserve right to set-off (Code Civ. Proc. §§ 1494, 1498).

Where defendants filed separate claims against estate of decedent for amounts collected by decedent for defendants and wrongfully appropriated and credited on claim sums collected subsequent to decedent's death and which were due him as commissions, and administratrix allowed claim in full but rejected right of set-off, there was no rejected claim requiring defendants to bring suit within three months after rejection or lose right of set-off under Code Civ. Proc. §§ 1494, 1498.

6. Appeal and error 🔑1039(13)—Whether defendants' set-off against claim for commissions was based on money unlawfully converted by decedent or advanced by defendants held not variance requiring reversal.

In action to recover commissions on sale of realty in which defendants claimed right of set-off for money collected by decedent and due defendants and right of set-off was considered by all parties as properly before court, question whether credit to which defendants were entitled might be considered as money unlawfully converted by decedent or as advancement by defendants would not constitute such variance as to require reversal.

Appeals from Superior Court, Alameda County; John J. Allen, Judge.

Separate actions by Florence B. Henderson, as administratrix of the estate of Edward James Henderson, deceased, against the Electric Loop Land Company, the Richmond Annex Land Company, and the Havenscourt Company, consolidated for trial. Judgments for defendants, and plaintiff separately appeals. Affirmed.

Gottesfeld, Mann & Carmody and Raymond Benjamin, all of San Francisco, and William T. Kearney, of Richmond, for appellant.

Fitzgerald, Abbott & Beardsley, of Oakland, for respondents.

BURROUGHS, Justice pro tem. These three cases were consolidated for trial and are brought here upon one record.

The plaintiff, as the administratrix of the estate of Edward James Henderson, deceased, sought to recover from the defendant Electric Loop Land Company $13,336.39; from the defendant Richmond Annex Land Company $12,202.54; from the defendant Havenscourt Company $10,925.11. In each one of the three cases the court gave judgment for the defendant, and from said judgment the plaintiff appeals.

The cause of action is the same in each case. It is alleged, as the foundation of the several actions, that during the lifetime of said Edward James Henderson certain contracts for the sale of real estate were entered into by him with the several defendants, whereby, as agent, he agreed to sell said real estate according to the terms of said contracts, and for his services was to receive the compensation provided for in such contracts as and when the same were paid by the various purchasers of said land; that Henderson kept and performed all of the conditions of said contracts, and that since his death the respective defendants have collected the amounts hereinbefore set forth and which are due under the terms of said contracts to plaintiff as the administratrix of the estate of Henderson, as commission for the sale of the lands described in the several contracts, and that said defendants have failed and refused to pay the same to the plaintiff as the successor in interest of said Henderson.

The separate answers of the defendants admit the contracts, deny that Henderson performed the conditions thereof, allege that at the date of his death Henderson had been paid all commissions to which he was entitled under the terms of the contracts and that prior to his death the defendants did advance and pay to said Henderson, on account of commissions then earned by him, but not then due and payable, all sums of money to which he was entitled. It is further alleged in the several answers that prior to the date of his death said Henderson made collections on account of sales made by him pursuant to the contracts, and out of the money so collected by him defendants did advance and prepay to him the following sums of money, to wit, Electric Loop Land Company, $14,922.40, Richmond Annex Land Company, $36,962.88, Havenscourt Company, $13,536.29, on account of contingent commissions earned by him but not then due and payable under the terms of the contracts, and that subsequent to the 9th day of January, 1924, the defendants made collections on account of sales made by said Henderson under said contracts in the respective amounts which the plaintiff is now seeking to collect from them and which would have been due to him or his personal representative on account of commissions earned by him prior to his death had he not been prepaid by defendants as aforesaid. It is further alleged in the answers that each one of the defendants presented a claim against the estate of said deceased for the several sums which Henderson had thus collected, and that the amount of commissions collected by the defendants since the death of Henderson were credited upon said claim. It is further alleged in said answers that defendants at the same time and in the same manner presented to plaintiff and filed with the clerk of the court, its contingent claim having for its basis the amount of commissions collected by the defendants, as aforesaid, provided the court should refuse to allow the same as a set-off against the claim for moneys belonging to the defendants and which had been collected by Henderson.

At the trial, the following facts were stipulated between the parties or proved by competent evidence: That Edward James Henderson died January 9, 1924, and in due time the plaintiff qualified as administratrix of his estate. That on January 1, 1918, said Henderson entered into a contract with the defendant Richmond Annex Land Company, April 8, 1918, he entered into a contract with the defendant Havenscourt Company, September 30, 1914, and May 8, 1918, he entered into contracts with the defendant Electric Loop Land Company. These contracts are the same in substance except as to names, tracts of land described, and amounts. Under their terms, Henderson was employed as agent to sell the several parcels of land described and also to collect all unpaid installments of the purchase price of said land as the same fell due and pay them over to the defendant entitled thereto, except he was authorized to retain his commission on the sales from the first payment, and, if the first payment was insufficient for that purpose, then he was to retain from each subsequent payment 75 per cent. thereof until his entire commission had been paid. It was also stipulated by counsel that unpaid commissions were contingent upon the purchaser paying future installments of his contract of purchase. At the time of his death, Henderson had collected under the terms of the several contracts the following sums of money over and above all of the commissions to which he was entitled at that time, and which sums he had failed to pay to the several defendants, to wit: Richmond Annex Land Company, $36,962.88; Electric Loop Land Company, $14,922.40; Havenscourt Company, $13,536.29. After the death of Henderson the several defendants took over the collection of the unpaid installments on sales made by Henderson and collected the following contingent commissions which were earned by Henderson under the terms of the contract: Richmond Annex Land Company, $12,202.54; Electric Loop Land Company, $13,336.39; Havenscourt Company, $10,925.11. That within the time allowed by law the defendants presented separate claims to the administratrix of the estate of said Henderson for the full amount of their respective claims and gave credit thereon to the estate for all sums of moneys collected by them as commissions. The defendants also included therein contingent claims for the amount of commissions collected by them since the death of Henderson, provided the court failed and refused to allow them the credit upon the claim for the amounts which Henderson had collected and had failed to pay over to them. Each one of said claims bears the following indorsement: "The foregoing claim is allowed for (stating the full amount claimed by each defendant) this first day of December, 1924. Offset disallowed. Florence B. Henderson, Administratrix of the Estate of Deceased." It also appears from the evidence of Miss Peterson, who was the bookkeeper for the Electric Loop Land Company and Richmond Annex Land Company, that, at the times Henderson appropriated the money, which should have been paid to the said defendants, he stated to her that he was merely paying himself in advance on his commissions, and that he instructed her to charge the several amounts taken by him to his personal account. The witness stated that it was the habit of Henderson before taking these several sums to compare his contingent commission account with the amounts that he was taking, and that in nearly every instance he would state that he was merely paying himself in advance.

It further appears from the record that the estate of Henderson is insolvent, also that Henderson at the time of making the various contracts referred to and up to the time of his death was the president of each one of the defendant corporations.

Appellant claims that the findings of the trial court that the respective respondents were entitled to a credit or set-off against the demands of plaintiff on account of the several sums collected by Henderson during his lifetime are not sustained either by the pleadings or the evidence.

[1] The first question we believe to be easily disposed of. The case was tried by both parties and by the court upon the theory that the defendants' right to a credit or set-off on account of said sums so collected by Henderson was in issue. That all parties so considered it appears from the record, wherein it was stipulated by counsel that, to obviate the necessity of filing supplemental pleadings, all collections made by the respondents after the death of Henderson and prior to October 31, 1926, should be used as the basis for a judgment in the several actions, and counsel for the respondents then stated, "And we are entitled to the set-off—our claim that we are

equally entitled to it now as well as at the date of the commencement of the action?" to which counsel for appellant replied, "Yes." And, the court having made its finding of fact upon said issue, the objection cannot for the first time be raised upon appeal. Bayly v. Lee, 174 Cal. 137, 162 P. 96; Smithson v. Atchison, etc., Ry. Co., 174 Cal. 148, 162 P. 111; Lamberson v. Bashore, 178 Cal. 321, 173 P. 401.

In support of the claim that the findings are not sustained by the evidence, it is contended that there is an absolute lack of mutuality between the claims of appellant and those of respondents, in that respondents' causes of action were against Henderson and arose during his lifetime and existed at the time of his death, and that appellant's causes of action arose after the death of Henderson and accrued to his estate. There can be no doubt but that the general rule upon this subject is that contended for by appellant, and is tersely stated in People v. California, etc., Trust Co., 168 Cal. 248, 141 P. 1184, L. R. A. 1915A, 299, where it is said: "The general rule, too, is well settled, as claimed, that in actions by executors or administrators upon a cause of action arising to them after the death of the testator or intestate, a defendant cannot set off a demand against the decedent existing at the time of his death."

[2] But, under the evidence in these cases, does it appear that plaintiff's causes of action are in favor of the estate of the decedent? All three of the causes of action sued upon by appellant are based upon contracts executed by Henderson during his lifetime. The sales from which the commissions were earned were made by Henderson, and were earned and could only be defeated by failure of the purchaser to pay future installments of the purchase price. The sums of money which the several respondents seek to offset against this claim of appellant arose out of the same contracts which they had executed with Henderson, and the several amounts that they have asked for were retained by Henderson in violation of the very terms of the contracts which his administratrix now seeks to make the basis of her claim against respondents. We are of the opinion that the causes of action set out by the appellant and the offsets claimed by the several defendants are not lacking in mutuality so as to prevent and offset one against the other.

The California decisions cited by appellant do not appear to be in point. In People v. California, etc., Trust Co., supra, the transaction arose out of a deposit in the bank by the administrator of funds belonging to the estate. The bank held an allowed claim against said estate based upon a promissory note made by the decedent during his lifetime. Under these circumstances it is clear that the deposit created a cause of action in favor of the estate, as distinguished from the cause of action in favor of the bank and which was in existence at the time of the death of said decedent. But it was also held in the case last cited that the general rule requiring mutuality was subject to exceptions, and under the facts a set-off was allowed in that case. First National Bank v. Wakefield, 148 Cal. 558, 83 P. 1076, we believe is distinguishable from the case at bar, in that in the cited case the moneys which the bank sought to apply to a mortgage debt owed by decedent in his lifetime was a deposit of moneys in the bank made by the administrator of the estate to a partnership account, in the belief that they were partnership funds of himself and his intestate. In a proceeding had for that purpose, it was judicially determined that no such partnership ever existed. The bank thereupon transferred said funds to the account of the estate of the decedent and immediately reapplied them to the mortgage debt as aforesaid. This the Supreme Court held it might not do. The distinction to our mind is that the deposit made by the administrator, subsequent to the death of his intestate, could not be applied to a debt of deceased existing at the time of his death. Counsel cites a number of cases from foreign jurisdictions which seem to uphold his claim, but we are of the opinion that these cases do not find sanction in this state. Ainsworth v. Bank of California, 119 Cal. 470, 51 P. 952, 39 L. R. A. 686, 63 Am. St. Rep. 135.

[3] But we are of the opinion that there is another reason why respondents were entitled to the offsets allowed by the court, particularly in view of the fact that at the date of the trial all sums of money claimed to be due the appellant had been collected by the defendants, and under stipulation of counsel the rights of all three parties, including any right of set-off, was for the purpose of avoiding the necessity of supplemental pleadings considered due as of that date, and under the decisions were the proper subject of set-off (Ainsworth v. Bank of California, supra), and we believe that this is a proper case for the application of the doctrine of "equitable set-off." It appears without contradiction that during his lifetime plaintiff's intestate under and by virtue of the contracts before the court came into the possession of thousands of dollars belonging to the defendants and which it was his duty to pay over to them, but which he unlawfully appropriated to his own use. By virtue of the same contracts, the respondents have lawfully come into possession of certain commission claimed by the administratrix of his estate, and which she is now seeking to recover from the respondents without offering to offset one debt against the other, this upon the plea that to allow said set-off would work a preference among the creditors of the insolvent estate of her intestate. In other words, the respondents are asked to pay their debt to the estate in full and then share their

own money pro rata with the other creditors. We believe the following cases negative such an unjust and inequitable rule and are decisive of these appeals.

In the case of Pendleton v. Hellman Commercial Trust & Savings Bank, 58 Cal. App. 448, 208 P. 702, the defendant bank applied the amount of a deposit held by it on a note made by decedent in his lifetime. The note was not yet due. The estate of the decedent was insolvent. The claim was made that, as the note was not due, the bank had no right to credit the deposit on the note. The court held that, "under ordinary conditions, where the debt to the bank is not due, the banker's right to set off a deposit against such debt does not exist." But in this behalf the court held that the contention that the lien (banker's) was not enforceable because the debt to the bank was not due took no account of the fact of insolvency of the estate. It is further stated in the opinion of the court that so far as they are advised, the question has not been decided in this state. In laying down the rule that the doctrine of "equitable set-off" may be applied in cases of insolvency, the court says:

"We are of the opinion that the fact of insolvency of the debtor as applied to the situation existing in this case is sufficient to sustain the right of set-off in favor of the creditor bank, notwithstanding that the debt of the depositor was not due at the time when he died leaving an insolvent estate. The principles involved are discussed at length in Nashville Trust Co. v. Fourth Nat. Bank, 91 Tenn. 336, 15 L. R. A. 710, 18 S. W. 822. In that decision it was noted that the doctrine of set-off, whether legal or equitable, is essentially a doctrine of equity. It was that natural justice and equity which dictates that the demands of parties, mutually indebted, should be set off against each other, and only the balance recovered, that gave birth to the idea of accomplishing the result in a judicial proceeding. Although the common law determined otherwise, the rule was amended, in the case of bankrupts, by English statutes. 'In pursuance of these old statutes and of the dictates of equity, the principle of set-off between mutual debts and credits has, for nearly two centuries past, been adopted in the English bankrupt laws, and has always prevailed in our own whenever we have had such a law in force on our statute book; and it mattered not whether the debt was due at the time of bankruptcy or not.' (Carr v. Hamilton, 129 U. S. 255 [32 L. Ed. 670, 9 S. Ct. 295 [296], see, also, Rose's U. S. Notes].) 'The jurisdiction of courts of equity over the subject of set-off was exercised before there was any statute upon the subject. * * * By the civil law, from which the great body of our system of equity comes, a cross-debt was, by mere operation of law, without any act of the parties, extinguished. It was treated as an absolute payment. Courts of equity in this country, while not going so far, have accomplished the same results in numerous cases, by granting perpetual injunctions against judgments in favor of insolvent persons who were indebted in larger amounts to the judgment debtor. * * * The court, in all such cases, is governed, not by the statute of set-off, but by the general principles of equity.' (Nashville Trust Co. v. Fourth Nat. Bank, supra.) The court further held, in the case last cited, that insolvency of itself is a sufficient ground for the application of equitable set-off, and that the fact that the indebtedness on one side is not due when the set-off is claimed constitutes no obstacle to the assertion of the right against an insolvent debtor.

"We perceive no reason why a bank's right of set-off, as against an insolvent depositor who is also indebted to the bank, should be confined to the statutory right of set-off recognized by the Civil Code. 'The "banker's lien" referred to in section 3054 of the Civil Code was familiar, as a part of the law, long before the enactment of the codes. Section 3054 does not extend its scope.' (Berry v. Bank of Bakersfield, 177 Cal. 206, 209, 170 P. 415.) We may add, the section does not restrict the scope of the principles thereby recognized. There is no magic in the statutory enactment of a rule derived from equity, whereby in receiving this legislative sanction the principle is deprived of its equitable qualities. It is not just that the representative of an insolvent debtor who on another account is the creditor of his debtor should be permitted to enforce the insolvent's claim without paying the other, merely because the obligation in his favor is due while the correlative obligation is not due. 'It is well settled that the insolvency of a party against whom a set-off is claimed constitutes a sufficient ground for the allowance of a set-off not otherwise available.' (People v. California, etc., Trust Co., 168 Cal. 241, 250 L. R. A. 1915A, 299, 141 P. 1181.)"

The foregoing case also cites with approval Ainsworth, Executrix, etc., v. Bank of California, supra, in the following language: "There is one decision of our supreme court, arising out of facts very much like those of the present action, except that in that case the bank presented to the executrix its claim, although not for the entire amount of the note, but for a stated balance, crediting thereon the amount of the deposit; and except, also, that the fact of insolvency did not appear. At the time of his death the decedent was indebted to defendant on a note not yet due, and had on deposit in the bank a lesser sum. When the note matured the bank applied on the note the amount of the deposit. The bank having refused to pay to the executrix the amount of the deposit, she brought this action. The supreme court, reversing the judgment of the superior court, held that the bank was entitled to credit for the amount of the deposit, as a cross-demand which might be set off against the note; that although the note of deceased was not due when he died, it was sufficient that it had become due when the action was brought. In its decision, the supreme court pointed out that there was no finding or evidence as to the solvency or insolvency of the estate. The decision was grounded upon the proposition that the purpose of the law was to ascertain the balance existing and to give to both the claimant and the estate the benefit of all just offsets, whether the estate be solvent or insolvent. In view of this conclusion, the court held it 'unnecessary to decide whether the appellant had a right to apply the deposit by virtue of the banker's lien claimed by it.'"

In City Investment Co. v. Pringle, 73 Cal. App. 782, 239 P. 302, in adverting to the rule of equitable set-off, the court says: "The majority of the cases wherein the rule has been applied have been those in which a bank has sought to set off the unmatured indebtedness of an insolvent depositor to it as against a claim for the deposit by the depositor or his representative or as against the assignee of such depositor. The principal, however, applies in all cases where a right of the insolvent is asserted, and in accordance with equitable principles set-off should be permitted. As held in Nashville Trust Co. v. Fourth Nat. Bank, supra, cited with approval in the cases of Pendleton v. Hellman Com., etc., Bank, supra, and Coonan v. Loewenthal [147 Cal. 218, 81 P. 527, 109 Am. St. Rep. 128], supra, insolvency itself is a sufficient ground for the application of equitable set-off, and the fact that the indebtedness on one side is not due when set-off is claimed constitutes no obstacle to the assertion of the right as against an insolvent debtor. While it is our view that the claim of appellant as against respondents upon the fund on which it is sought to impose a lien is measured by the rights of the original lessee in the premises, should it be urged that there was no mutuality as between the demands of appellant and respondents, and that, therefore, respondents may not set off a claim for the deposit as against appellant's demand for the rent, it is well settled that a court of equity will take cognizance of a cross-claim between litigants though wanting in mutuality, and set off one against the other whenever it becomes necessary in order to effect a clear equity or prevent irremediable injustice (24 R. C. L., Set-Off and Counterclaim, sec. 70, p. 865; Georgia Seed Co. v. Talmadge [96 Ga. 254, 22 S. E. 1001], supra; Kentucky Flour Co.'s Assignee v. Merchants' Nat. Bank, 90 Ky. 225 [9 L. R. A. 108, 13 S. W. 910]); and, as held in the case of People v. California, etc., Trust Co., supra, where an administratrix deposited funds in her hands as administratrix in a bank which held an allowed claim against the estate, the bank having subsequently become insolvent, a want of mutuality was no defense as against the right of the administratrix to set off her deposit claim against the allowed claim of the receiver of the bank."

In the case at bar we are of the opinion that, under the facts above shown, the rule applied by the court in Pendleton v. Hellman Com., etc., Bank, supra, and City Investment Co. v. Pringle, supra, applies with equal force, especially in view of the fact that under the stipulation of the parties all amounts claimed by appellants were then due. Ainsworth, Executrix, etc., v. Bank of California, supra.

[4] One other point in favor of the affirmance of the judgment is made by the respondent relating to the claim of the Electric Loop Land Company and the Richmond Annex Land Company. In each one of these cases the testimony of Miss Peterson, the bookkeeper for said companies, shows that Henderson at the time of the appropriation of the several amounts of money which belonged to the said defendants, stated to her that such payments were merely advances on his commissions; that he was paying himself in advance. We are of the opinion that these declarations on the part of Henderson, irrespective of equitable set-off, are sufficient to justify an affirmance of the judgment in said cases. No such evidence was introduced relating to the Havenscourt Company.

It is further claimed by the respondents that, Henderson being the president of all three defendant corporations, the utmost good faith was required in his dealings with said companies, and that his administratrix cannot now be permitted to set off Henderson's wrongdoings to enable her to collect the amounts claimed in the complaint. Under the views above expressed, it is unnecessary to pass upon this question.

[5] One other contention made by appellant for the reversal of the judgment is based upon the fact that all three of the respondents presented separate claims against the estate of the decedent for the several amounts which Henderson had collected and failed to pay over to them. They also gave credit on said claims for all sums which they had collected subsequent to the death of Henderson and which were due him as commissions. The administratrix of the estate allowed the claims in full, but rejected the right of set-off. It is now claimed that, the right of set-off having been rejected, the respondents were required to bring suit thereon within three months after such rejection, and, having failed to do so, the right of set-off is lost, citing section 1498, Code Civ. Proc. The claims filed by respondents had attached thereto the affidavit provided by section 1494 of the Code of Civil Procedure, where it

is held that a claim against an estate must be supported by an affidavit that the amount claimed is justly due and that there are no offsets to the same. We are of the opinion that the claims having been allowed for the full amount, and the only thing disallowed being a credit in favor of the estate, there was no rejected claim requiring suit. In the case of Jones v. Walden, 145 Cal. 523, 78 P. 1046, and in Consolidated Nat. Bank v. Hayes, 112 Cal. 75, 44 P. 469, cited by appellant, there was a partial rejection of the amount of claim, and it was held that, as to the portion of the claim rejected, suit must have been brought within the statutory time. In the case of Holt Manufacturing Co. v. Ewing, 109 Cal. 353, 42 P. 435, cited by appellant, a vendor under a conditional sales contract filed a claim for the purchase price of a harvester. He could not maintain an action for the possession of the same on the theory that title had not passed to the purchaser. We are therefore of the opinion that the contention is unsound.

[6] The further contention of appellant that there is a material variance between the claims presented by the several defendants and their pleadings and proof does not appeal to us as being meritorious. The right of offset was considered by all parties as properly before the court, and whether or not the credit to which the several defendants were entitled be considered as money unlawfully converted by Henderson to his own use or as an advancement by the defendants, it would not constitute such a variance as was held fatal in Etchas v. Orena, 127 Cal. 588, 60 P. 45; Moore v. Gould, 151 Cal. 723, 91 P. 616, and other cases cited by appellant.

We are satisfied that equity and good conscience require that the judgment in each one of the cases be affirmed, and it is so ordered.

We concur: NOURSE, Acting P. J.; STURTEVANT, J.

---

96 Cal. App. 373

PEOPLE v. SMITH et al. (Cr. 1700.)

District Court of Appeal, Second District. Division 2, California. Jan. 22, 1929.

1. Criminal law 🔑1166½(10)—Where court prevented clerk's reading part of information regarding prior conviction, after clerk had uttered a few words indicating defendant had been in court before, there was no prejudicial error (Pen. Code, §§ 1025, 1093).

In prosecution for burglary, where court prevented clerk from reading part of information regarding prior conviction, after clerk had uttered words "that before commission of offense charged in this information said defendant, H. J. P., in the superior court of the state of Washington," there was no prejudicial error, since words quoted conveyed no information that defendant had suffered prior conviction, as contemplated by Pen. Code, §§ 1025, 1093.

2. Criminal law 🔑747—Jury must decide on conflicting testimony.

It is the province of the jury alone to decide on conflicting testimony.

3. Criminal law 🔑696(2), 698(1)—Where defendant's counsel failed to object to testimony, or to move to strike it out, he waived objection to evidence.

Where defendant's counsel failed to object or move court to strike out evidence, which it was claimed related to another offense, it is presumed he waived any objection to the evidence that he might have interposed thereto, and it must be concluded that he acquiesced in its remaining in case.

4. Burglary 🔑16—Where defendant, on first visit with others, saw goods on porch, and later sent the others back for them, second visit was an unlawful entry, with intent in defendant's mind to commit larceny, and was "burglary."

Where defendant went to another's house with others, and saw auto top material on screened porch, and informed the others that he had purchased such material, and later, after returning home, he sent the others back for the auto top material, which did not belong to him, second visit was an unlawful entry, with intent, in mind of defendant, at least to commit crime of larceny, and was "burglary."

5. Burglary 🔑16—Defendant, sending innocent agents to commit crime of burglary, was a "principal" (Pen. Code, § 971).

Under Pen. Code, § 971, defendant, sending innocent agents to commit crime of burglary, by telling them that he had purchased goods which were on another's porch, committed and was "principal" in burglary, though absent in person and not actually participating in commission of crime.

[Ed. Note.—For other definitions, see Words and Phrases, First, Second, and Third Series, Principal.]

6. Criminal law 🔑1030(1)—Objections raised for first time on appeal cannot be considered.

Objections raised for first time on appeal cannot be considered on appeal.

7. Criminal law 🔑1178—Objection with reference to admission of evidence cannot be considered on appeal, where no citation of authority or argument was offered.

Objection with reference to admission of certain evidence cannot be considered on appeal, where no citation of authority or argument was offered by defendant's counsel.

Appeal from Superior Court, Los Angeles County; Charles L. Bogue, Judge.

Henry J. Peterson was convicted of burglary in the second degree and he appeals. Affirmed.

A. Perry Harris, of Fresno, for appellant.
U. S. Webb, Atty. Gen., and Frank Richards, Deputy Atty. Gen., for the People.

KEETCH, Justice pro tem. The appellant, Henry J. Peterson, together with Hoyt W. Smith and Thomas I. Boreman, was charged with burglary in an information filed by the district attorney of Los Angeles county. Peterson was found guilty of burglary in the second degree, and Smith and Boreman were acquitted. This appeal is taken from the order denying Peterson's motion for a new trial, and from the judgment of conviction.

Immediately prior to and at the time of his arrest, Peterson was engaged in the business of repairing and renewing auto tops in the town of Sawtelle. Smith and Boreman were inmates of the Soldiers' Home at Sawtelle, and were daily visitors at Peterson's shop; Martis Smith, a brother of the defendant Hoyt Smith, being employed by Peterson. Martis Smith owned a Chevrolet automobile, which he sometimes used in running errands for Peterson. On April 13, 1928, Peterson asked the defendant Hoyt Smith to drive him to Santa Monica to look at a hair picker, a machine used for renovating mattresses. Boreman asked if he might go along, and the three left in the Chevrolet. After looking at the hair picker, which was in a garage in Santa Monica, Peterson procured the address of the owner of the machine and proceeded to his house. The owner was the complaining witness, John G. McNichols. The latter was absent from home at the time, and, not finding any one in the house, the three went inside a screened porch, which ran along one side of the building. In a toilet on this porch they discovered several rolls of auto top material and bow lining. According to the testimony of Smith and Boreman, the appellant, Peterson, then and there stated that he had purchased this material a few days before and would have to have some one take it to his place of business. Upon returning to Peterson's shop, the latter requested the defendant Smith to go back with the Chevrolet and get the material. Smith objected, unless Peterson furnished the cost of gasoline and oil for the trip. This Peterson agreed to do, and promised to give Smith $5 on the following morning. Smith and Boreman then drove back to the McNichols house and took all the material from the screened porch and brought it to Peterson's. A few days later, in company with police officers, McNichols went to appellant's place of business, where some of the material was found in the shop, and a large portion of it in the basement of the building. McNichols identified the property as his, and upon the trial testified that the taking was without his knowledge or consent.

[1] The first point of error claimed by appellant is in connection with the reading of the information before the jury. Peterson was charged with a prior conviction, and on arraignment admitted the charge. It is contended that the clerk, in reading the information to the jury, informed the jurors of the fact of the prior conviction. According to the record, after the reading of the accusatory paragraph relating to the crime for which Peterson was on trial, the clerk began the reading of the next paragraph, as follows: "That before the commission of the offense charged in this information said defendant, Henry J. Peterson, in the superior court of the state of Washington"—At this point the clerk was interrupted by the district attorney as follows: "Just a moment Mr. Clerk." Whereupon the court interposed: "It is not necessary to read that portion, Mr. Clerk." No objection was made by counsel for appellant, nor was a request made of the court to instruct the jury to disregard the mistake and the clerk then concluded the reading of the information, omitting any further reference to the prior conviction. It is claimed that this was in contravention of sections 1025 and 1093 of the Penal Code. In the former section it is provided, in connection with the taking of the plea of a prior conviction: "In case the defendant pleads not guilty and admits that he has suffered the previous conviction, the charge of the previous conviction must not be read to the jury, nor alluded to on the trial." In subdivision 1 of section 1093 it is provided that "in cases where it [the information] charges a previous conviction, and the defendant has confessed the same, the clerk in reading it shall omit therefrom all that relates to such previous conviction."

In support of his contention that the foregoing was prejudicial, appellant cites People v. Meyer, 73 Cal. 548, 15 P. 95. In that case the court permitted the clerk to read, over defendant's objection, that portion of the information charging prior conviction, after such conviction had been admitted by the defendant on arraignment. There are two grounds which distinguish that case from the instant one: First, that the court permitted the reading; and, second, that it was done over the objection of counsel for the defendant. In the instant case it is apparent that, as soon as the trial judge perceived that the clerk was about to make a mistake, he immediately interrupted, and stopped the latter from doing so. The most that can be said of the few words uttered by the clerk before he was interrupted is that they suggested that the defendant Peterson had been in the superior court of Washington, which in and of themselves conveyed no information to the jury that he had suffered a prior conviction, as contemplated and intended by the language of the sections quoted. In the second place, as we have already noted, defendant's counsel failed to object or request the court to instruct the jury on the matter, and it is too well settled to need authority that under such circumstances the appellant will not be heard to object for the first time on appeal.

[2, 3] It is next contended that the evidence does not support the verdict, and attention is called to the testimony of certain witnesses, which counsel contends was "contradictory, most conflicting, and false." Needless to say, it is the province of the jury alone to decide upon conflicting testimony. As is said in People v. McKelvey (Cal. App.) 267 P. 390, 391: "To the jury, as the sole judges of the credibility of a witness, is assigned the duty of determining the weight to be given to the testimony of a witness, and, when the jury has performed this function and entered its decision, neither the trial court, nor this court on review, will interfere with that decision, unless it appears that the verdict was without substantial foundation." To the same effect are the cases of People v. Kelly, 146 Cal. 119, 121, 79 P. 846; People v. Tom Woo, 181 Cal. 315, 326, 184 P. 389; People v. Logan, 123 Cal. 414, 415, 56 P. 56.

It is also urged that the court erred in admitting certain evidence of another offense outside of the issues charged, namely, the possession of wine by appellant. It appears from the testimony of a police officer that a trapdoor led down from Peterson's shop to the basement. Much of the automobile top material taken from the complaining witness' house was found in this basement. The officer testified: "I showed Peterson the material, and he said, yes, that was the material that come out from under the house; he said that he did not know how it got under the house; that he had gone down under the house some time in the night following my first visit there, to look after some wine that he had, and found this automobile top material." If the testimony was objectionable, counsel for the defendant failed to object, or move the court to strike it out. "If he fails to proceed in accordance with this rule, it is presumed that the defendant waives any objection to the evidence he might have interposed thereto, and it must be concluded that he acquiesced in its remaining in the case." 8 Cal. Jur. 500, citing People v. Durrant, 116 Cal. 179, 48 P. 75.

[4] In connection with his contention that the evidence does not support the verdict, counsel for appellant raises the point that "Peterson was not present and did not participate in the taking of the auto top material." Beyond this mere statement, no further comment, argument, or authority is offered. In the statement of facts we have already pointed out that upon the first visit to the complaining witness' house Peterson was present at the time of the entry and discovery of the auto top material in the toilet on the screened porch, and thereupon, according to the testimony of his two companions, he informed them that he had purchased this material a few days before, and would have to get some one to take it to his place of business; that upon the return to Peterson's shop the latter requested the defendants Smith and Boreman to go back to the house and get the material. Upon their objecting, because of the expense in the operation of the automobile Peterson promised to give them $5 the next morning. Upon this promise, they testified, they returned to the house, leaving Peterson at his shop. This was in the afternoon, and within a few hours of the first entry. McNichols, the owner of the house, was still absent therefrom, and Smith and Boreman again entered upon the premises, took the material, and brought it back to Peterson, who took possession of it.

The intent is governed by the circumstances and the conduct of the accused. The jury had a right to assume, from the facts in the case, that Peterson, as evidenced by his conduct, had formed the intent and purpose to gain entrance to the house and get possession of the material, by inducing Smith and Boreman to immediately return and make the entry, during the absence of the owner. This second visit, particularly, was an unlawful entry with the intent, in the mind of Peterson, at least, to commit the crime of larceny, and was burglary under the law of this state. Under the common law Peterson would have been an accessory before the fact, but under section 971 of our Penal Code it is provided that "a distinction between an accessory before the fact and a principal, and between principals in the first and second degree, in cases of felony, is abrogated; and all persons concerned in the commission of a felony, whether they directly commit the act constituting the offense, or aid and abet in its commission, *though not present*, shall hereafter be prosecuted, tried, and punished as principals." The jury in the instant case found the defendants Smith and Boreman not guilty by their verdict, but had the latter been in fact accomplices under the law, Peterson was a principal, notwithstanding the fact that he did not actually participate in the entry. His was the directing mind, and the defendants Smith and Boreman acted as his agents in the commission of the crime. Whether or not they acted innocently, or had guilty knowledge, does not change the situation so far as Peterson is concerned.

In People v. Outeveras, 48 Cal. 21, 24, the defendant was jointly charged with one Carter with burglary. In pursuance of an understanding between them, Carter entered the house and stole some silver cups. Outeveras did not enter the house, but, at the request of Carter, waited outside until the latter came out with the stolen property. The two then went to the room they occupied together, and endeavored to obliterate the names engraved upon the cups. The point raised on appeal was that under the evidence there was a fatal variance between the indictment, charging the defendant Outeveras as a principal, and the proof, which showed, at the most, that he was an accessory, aiding and abetting. The court, however, said: "At the common law an accessory at the fact might be indicted and convicted as principal, for the common law declares that he who stands by, advises, and encourages the murderer to give the blow, gives the blow himself as much as if he held the weapon in his own hands. Our Legislature has gone one step further, and provided that he who, not being present, hath advised or encouraged the giving of the blow, hath given the blow as much as if he had stood by and encouraged it, or even had struck with his own hands. It is no more a fiction of law to declare that he gives the blow, by advising and encouraging it beforehand, than it is to affirm that he gives it by advising and encouraging it at the time. Both proceed upon the principle that what we advise or procure another to do, in the eye of the law, we do ourselves. All are principals, and as such should be indicted and punished."

[5] By their verdict the jury in the instant case found that the defendants Smith and Boreman were innocent agents of Peterson in the commission of the crime. There do not appear to be any cases directly in point in this state where an innocent party committed a criminal act at the instigation of another, who alone possessed the criminal intent. However, in Russell on Crimes, vol. 1, p. 165, the author says: "When an offense is committed through the medium of an innocent agent, the employer, though absent when the act is done, is answerable as a principal. Thus, if a child under years of discretion, a madman or any other person of defective mind, is incited to commit a murder or other crime, the incitor is the principal ex necessitate, though he were absent when the thing was done. * * * And if a man give another a forged note, that the other may utter it, if the latter be ignorant of the note being forged, the uttering by the latter is the uttering of the former, though the former were absent at the time of the actual uttering."

McClain in his work on Criminal Law, vol. 1, § 187, says: "The general maxim 'qui facit per alium facit per se' is applicable in criminal law to make one accountable for acts done for him by an agent under his instruction or by his consent. And in regard to the liability of the principal it is wholly immaterial whether the act is procured to be done through a guilty or an innocent agent. If the act is done through an innocent agent, the one who procures it to be done is guilty as principal, as though he had done the act himself. But if the agent or servant through whom the act is done is guilty, the principal or master is deemed an accessory before the fact only, unless present."

In Wharton's Criminal Law, vol. 1, p. 312, § 241, the author says: "A party also who acts through the medium of an innocent or insane person, or a slave, is guilty, *though absent*, as principal in first degree." (Italics ours.)

Based upon such respectable authorities, the conclusion follows that Peterson, as the directing and procuring mind, was the principal in the burglary, though absent in person and not actually participating in the commission of the crime. It makes no difference if he stood in the street outside the house and directed the actions of the agent, or did so from his shop several miles away.

[6, 7] Other contentions raised by counsel for appellant with reference to the admission of certain testimony are subject to the same criticism heretofore made. All the objections are raised for the first time on appeal, with one exception, and therefore cannot be considered. Folsom v. Burns (Cal. App.) 266 P. 1007. As to the one exception, no citation of authority or argument is offered by counsel for appellant, and we are therefore not called to pass upon it. People v. Pilbro (Cal. App.) 260 P. 303.

Judgment affirmed.

We concur: CRAIG, Acting P. J.; THOMPSON, J.

[3] It is not questioned that stock certificates, under the law of this state, are not negotiable in the strict sense (Geary St., etc., R. R. Co. v. Bradbury Est. Co., 179 Cal. 46, 52, 175 P. 457; O'Dea v. Hollywood Cemetery Ass'n, 154 Cal. 53, 97 P. 1; 6 Cal. Jur., p. 785), but that by the customs of trade one of the attributes of negotiability, viz. the passing of title to shares of stock by indorsement in blank and delivery of the certificate, has been given to such certificates. Civ. Code, § 324. This, however, does not serve to make them negotiable, in the sense that equities in favor of the owner are cut off by the delivery of a certificate to a bona fide purchaser. Kohn v. Sacramento Elec., Gas & Ry. Co., 168 Cal. 8, 141 P. 626; Civ. Code, § 1459. No title passes to a bona fide purchaser, who receives delivery of a certificate of stock indorsed in blank and stolen by another, without any fault or negligence on the part of the owner. In such case the latter retains title and may pursue his property. Swim v. Wilson, 90 Cal. 126, 27 P. 33, 13 L. R. A. 605, 25 Am. St. Rep. 110; Barstow v. Savage Mining Co., 64 Cal. 388, 1 P. 349, 49 Am. Rep. 705; Sherwood v. Meadow Valley M. Co., 50 Cal. 412.

Exceptions to the general rule that stock certificates indorsed in blank are nonnegotiable, are found, but such exceptions are usually provided for by statute. In the absence of a statute making such instruments negotiable, the declaration by courts that a purchaser for value and without notice of a stock certificate indorsed in blank obtains title thereto has not precluded an investigation into the equities. In proper cases, and this case is one, the equities should be examined in accordance with the familiar principles that, "where one of two innocent persons must suffer by the act of a third, he by whose negligence it happened, must be the sufferer" (Civ. Code, § 3543), and that where the true owner clothes another with the indicia of ownership of property, and therefore the apparent authority to transfer title thereto, and innocent third parties are thereby led into dealing with such apparent owner, the true owner will be estopped to deny that the apparent authority is the real authority (Code Civ. Proc. § 1962, subd. 3). In such cases the equities are found to be in favor of the bona fide purchaser rather than in favor of the owner who has by his own conduct clothed another with the power to commit the fraud.

In the leading case of McNeil v. Tenth National Bank, 46 N. Y. 325, 7 Am. Rep. 341, the owner of indorsed stock certificates pledged them with his broker as security for a loan, and the broker, without authority, pledged them with another for a larger sum, and the court announced the applicability of the equitable principle of estoppel in the following language: "It must be conceded that, as a general rule, applicable to property other than negotiable securities, the vendor or pledgor can convey no greater right or title than he has. But this is a truism, predicable of a simple transfer from one party to another, where no other element intervenes. It does not interfere with the well-established principle that, where the true owner holds out another, or allows him to appear, as the owner of, or as having full power of disposition over, the property, and innocent third parties are thus led into dealing with such apparent owner, they will be protected. Their rights in such cases do not depend upon the actual title or authority of the party with whom they deal directly, but are derived from the act of the real owner, which precludes him from disputing, as against them, the existence of the title or power which, through negligence or mistaken confidence, he caused or allowed to appear to be vested in the party making the conveyance. * * * 'The mere possession of chattels, by whatever means acquired, *if there be no other evidence of property or authority to sell from the true owner*, will not enable the possessor to give a good title.' * * * But if the owner entrusts to another, not merely the possession of the property, but also written evidence, over his own signature, of title thereto, and of an unconditional power of disposition over it, the case is vastly different. There can be no occasion for the delivery of such documents, unless it is intended that they shall be used, either at the pleasure of the depositary, or under contingencies to arise. If the conditions upon which this apparent right of control is to be exercised are not expressed on the face of the instrument, but remain in confidence between the owner and the depositary, the case cannot be distinguished in principle, from that of an agent who receives secret instructions qualifying or restricting an apparently absolute power."

This rule has been approved and applied in this state. Northwestern P. C. Co. v. Atlantic P. C. Co., 174 Cal. 308, 163 P. 47; Fowles v. National Bank of California, 167 Cal. 653, 140 P. 271; Brittan v. Oakland Bank of Savings, 124 Cal. 282, 57 P. 84, 71 Am. St. Rep. 58; Arnold v. Johnson, 66 Cal. 402, 5 P. 796; Rapp v. Fred W. Hauger Motors Co., 77 Cal. App. 417, 246 P. 1067. See, also, Shafer v. Lacy, 121 Cal. 574, 54 P. 72, and Barstow v. Savage Mining Co., 64 Cal. 388, 1 P. 349, 49 Am. Rep. 705, where the language of McNeil v. Tenth National Bank, supra, is quoted and approved.

[4, 5] It is not questioned that the indorsement of a stock certificate in blank is an indicium of ownership with which the possessor thereof must be clothed by the owner before his act in relation thereto will operate as an estoppel against him. And it was held in Northwestern P. C. Co. v. Atlantic P. C. Co., supra, that the entry of the transfer on the corporate books is not essential to a legal transfer of the title to the stock and the rights thereunder upon a sale or pledge by delivery of the certificate duly indorsed. The

appellant contends that the principles of McNeil v. Tenth National Bank, supra, are applicable to the facts of the present case, while the respondent insists that, because the persons to whom she gave possession of the indorsed stock certificates were, under the facts adduced, guilty of larceny by trick and device, the respondent has not clothed them with indicia of ownership, and the rules governing stolen nonnegotiable instruments are controlling.

We have fully considered the arguments presented and the authorities cited by counsel for both sides and by amici curiæ, and feel constrained to agree with the contentions of the defendant. Without reviewing the authorities in detail, each of the cases relied on by the respondent is distinguishable on the facts from the present case, and in none of them was the owner of the certificate so indorsed in blank guilty of any negligence which was the proximate cause of the loss, nor did he voluntarily part with the possession of such certificates for any purpose and thus by his own act place it within the power of another to hold himself out as the true owner. See Shafer v. Lacy, 121 Cal. 574, 54 P. 72, involving jewelry, where there was no indicium of ownership beyond mere possession; Barstow v. Savage, 64 Cal. 388, 1 P. 349, 49 Am. Rep. 705, theft; Sherwood v. Meadow Valley Mining Co., 50 Cal. 412, loss of certificate; Swim v. Wilson, 90 Cal. 126, 129, 27 P. 33, 13 L. R. A. 605, 25 Am. St. Rep. 110, theft; Kohn v. Sacramento Electric Gas & Ry. Co., 168 Cal. 1, 141 P. 626, theft; The Yamato v. Bank of Southern California, 170 Cal. 351, 149 P. 826, theft; Bryant v. Century Bank of City of New York (Sup.) 155 N. Y. S. 1010, involving checks, wherein it was held that the bank was justified in refusing payment where it had notice that they were obtained by fraud; Soltau v. Gerdau, 119 N. Y. 380, 23 N. E. 864, 16 Am. St. Rep. 843, theft of goods which the thief stored in a warehouse and had warehouse receipts issued to himself. In Reichard v. Hutton & Co., 158 App. Div. 122, 142 N. Y. S. 935, the defendant was held to respond in damages for conversion. The judgment was affirmed, on the theory that, on the facts the defendant had notice of the opportunity which its agent had to perpetrate a fraud on the plaintiff as to one certificate, and as to the others that the defendants participated in the transaction to such an extent that it would not be heard to say that it did not hold its fraudulent agent out as its representative to do what was actually accomplished. The effect of that case is in harmony with the principles approved herein, and any general language in the opinion which might be construed in favor of the respondent herein was unnecessary to the decision, and not in accordance with the law as we find it to be.

[6] The respondent attempts to make a distinction between the present case and cases like McNeil v. Tenth National Bank, supra, and the cases following it, on the ground that, while the facts of the present case may seem to be within the language of the cases relied on by the appellant, yet in the present case there was no intention on the part of the respondent to part with any property in the shares, while in the other cases the owner intended to part with some property interest therein. This is answered first by the fact that the law creates the estoppel, not because of any intention which the owner has to part with some property in the certificates, but from the conduct of the owner in clothing another with all the indicia of ownership, which amounts to a representation by him to innocent third parties that the person in possession has complete power of disposition. It is pointed out that the party against whom an estoppel may operate must have intended others to act upon his representation; but intent, in the sense urged by respondent, is not an element. "It is sufficient if the acts, representations, or silence relied on are of such a character as to induce a reasonable and prudent man to believe that they were meant to be acted on." 21 C. J. p. 1121, and cases cited.

The second answer is that the principle of estoppel has been applied against the original owner in cases which are not distinguishable on the facts from the present case. Russell v. American Bell Tel. Co., 180 Mass. 467, 62 N. E. 751, was a case involving the doctrine of estoppel on a similar state of facts. In that case the owner of a certificate indorsed in blank intrusted it to a fraudulent agent for the purpose of surrendering it to the company in order to obtain a new certificate. See National Safe Deposit, Savings & Trust Co. v. Hibbs, 229 U. S. 391, 395, 33 S. Ct. 818, 57 L. Ed. 1241. The purported agent pledged the stock for his own purposes to the defendant, a bona fide pledgee. The same distinction attempted to be made by the respondent here was urged in that case; i. e., that only the possession, not the property, passed to the agent, and that, "as the possession was obtained by fraud, it was obtained by larceny in judgment of law." The contention was disposed of by Mr. Justice Holmes, then Chief Justice of Massachusetts, speaking for the court, in the following language:

"The qualification of the rule, as not applying when the instrument is stolen, is not based upon the name of the agent's crime but upon the fact that in the ordinary and typical case of theft the owner has not intrusted the agent with the document and therefore is not considered to have done enough to be estopped as against a purchaser in good faith. He certainly has not done enough if the estoppel is based upon the principle that when one of two innocent persons is to suffer the sufferer should be the one whose confidence put into the hands of the wrongdoer the means of doing the wrong. But in a case like the present the agent has been intrusted with the converted property, and it is totally immaterial whether by a stretch which extends larceny beyond the true field of trespass, his wrong has been brought within the criminal law or not. The ground of the estoppel is present and the estoppel arises. The distinction is not new. On the one side are cases like Knox v. Eden Musee Americain Co., 148 N. Y. 441, 42 N. E. 988, 31 L. R. A. 779, 51 Am. St. Rep. 700, where an agent or servant simply had access to a document remaining in the possession of the owner; on the other cases like Appeal of Pennsylvania R. Co., 86 Pa. 80, where possession is intrusted to the agent for one purpose and he uses it for another. It cannot matter in the latter class that the agent intended the fraud from the outset." A judgment for the plaintiff in that case was reversed.

The reasoning and principle of the case has been followed in Baker v. Davie, 211 Mass. 429, 97 N. E. 1094, 37 L. R. A. (N. S.) 944, where a similar state of facts existed, and also has been approved and similarly applied by the Supreme Court of the United States in National Safe Deposit & Trust Co. v. Hibbs, 229 U. S. 391, 33 S. Ct. 818, 57 L. Ed. 1241. In the latter case, Mr. Justice Day, delivering the opinion of the court, added: "In such case we think the principles which underlie equitable estoppel place the loss upon him whose misplaced confidence has made the wrong possible."

The Case of Russell v. American Bell Tel. Co., supra, has been approved and quoted from in Kohn v. Sacramento Elec., Gas & Ry. Co., supra, wherein this court distinguished cases of stolen nonnegotiable instruments transferable by delivery, where possession was intrusted to the thief, from cases where possession was obtained by the thief without the consent or fault of the person in possession, although that was a case of the latter type. In Arnold v. Johnson, supra, which follows McNeil v. Tenth National Bank, supra, and distinguishes the facts of the case before it from the case of Barstow v. Savage Mining Co., supra, on the ground that, unlike the latter case, the certificate was voluntarily delivered, the owner had delivered certificates indorsed in blank for a purpose other than a transfer of any property therein, to wit, for the purpose only of exchanging it for a new certificate. The case of Fowles v. National Bank of California, 167 Cal. 653, 140 P. 271, discusses the cases of McNeil v. Tenth National Bank, supra, Barstow v. Savage, and Arnold v. Johnson, supra, and states: "But where such person has not only the possession, but also written indicia of ownership, with which he has been *voluntarily* furnished by the true owner, the principle [of estoppel] is applicable."

In addition to the foregoing considerations of law which are applicable to a statement of the facts most favorable to the respondent—i. e., that the certificates were to be taken by the two men for purposes of the correction of the corporation's records—there is a consideration of fact, appearing by the testimony of the respondent herself, which shows beyond question that she intended that the certificates should be taken and used as security, to the end that the stock represented by the canceled subscription might be acquired by her or the subscription reinstated. In this respect the record discloses an intention on her part to constitute the two men her agents for that purpose, and thereby to part with some property interest in the shares for purposes of security. This case on all of its facts is therefore farther removed from the application of the law as contended for by the respondent.

The case of Popp v. Exchange Bank, 189 Cal. 296, 208 P. 113 relied on by the respondent, follows the general rule that the seller of nonnegotiable paper can transfer to the buyer no better title than he has himself; but that case is distinguishable from the case at bar on the facts in this: That it did not appear in that case that the true owners of the bonds had by any affirmative act, assuming that they had the legal capacity to act, placed the fraudulent pledgors in a position to mislead the innocent pledgee by evidence on the face of the instruments or otherwise into a belief that the pledgors had a right to pledge the bonds. That case is in line with the rule that the mere possession of nonnegotiable paper by a fraudulent seller or pledgor is not, in itself, sufficient to constitute fault or negligence on the part of the true owner. There was, therefore, in the Popp Case no necessity or occasion to apply the equitable principles which must be applied in this case.

[7] On the record before us the equities of the parties are not equal. The appellant is in the position of an innocent third party who has parted with full value for the stock without notice of the fraud perpetrated on the respondent. On the other hand, the respondent was at fault in misplacing her confidence in the perpetrators of the fraud, and by the affirmative act of placing her signature on the assignment and power of attorney attached to the certificates, enabling the wrongdoers to mislead an innocent third party to his detriment. The last section of the Civil Code and section 1962, subd. 3, of the Code of Civil Procedure, are therefore applicable to the facts in the case, and prevent a recovery by respondent on the record before us.

The respondent is a woman of the age of 70 years, but it is not shown, nor is it claimed that she was laboring under any infirmity or disability in the transaction. It appears that she fully appreciated what she was doing when she intrusted her indorsed stock certificates to the "confidence" men. She was imposed upon and of course had a cause of action against those who defrauded her. It may be assumed that such a right of action would be of doubtful fruition, but we may not be led to announce unsound principles of law because of the misfortune of the respondent.

We therefore conclude that on the findings of the court judgment should have been entered for the appellant.

The judgment is reversed.

We concur: WASTE, C. J.; PRESTON, J.; LANGDON, J.; SEAWELL, J.; RICHARDS, J.; CURTIS, J.

---

206 Cal. 396

MAYHEW v. BURKE et ux. (L. A. 9551.)

Supreme Court of California. Jan. 31, 1929.

1. Notice 🔑6—Plaintiff's notice of defendants' land contract or of facts sufficient to provoke inquiry after recordation of conveyance to plaintiff cannot affect plaintiff's rights (Civ. Code, §§ 19, 1107, 1161, 1213, 1214, 1217).

Where recordation of defendants' land contract did not charge subsequent purchasers with notice of its contents because it was not acknowledged by vendor and therefore not entitled to recordation under Civ. Code, §§ 1107, 1161, 1213, 1214, 1217, notice to plaintiff of defendants' contract or of facts sufficient to provoke inquiry under section 19, received after recordation of conveyance to plaintiff, would not affect plaintiff's rights.

2. Appeal and error 🔑994(3), 1012(1)—Credibility of witnesses and weight of testimony was for trial court.

It was function of trial court to resolve inconsistencies in testimony and to judge credibility of witnesses and weight of their testimony.

3. Quieting title 🔑44(4)—In action to quiet title, evidence supported finding plaintiff had no notice of defendants' prior land contract when plaintiff received her deed.

In action to quiet title, in which both plaintiff and defendants claimed an interest in real property derived from the same company, evidence *held* to support finding to effect that plaintiff had no notice of defendants' prior contract when plaintiff received her deed after recordation thereof.

4. Quieting title 🔑44(2)—Where plaintiff purchaser claimed she had no notice of defendants' prior land contract, excluding policy of title insurance issued to plaintiff, stating her title was subject to prior contract, held not error.

In action to quiet title, in which plaintiff claimed that when she purchased real property she had no notice of defendants' prior contract for purchase of same property, excluding policy of title insurance issued to plaintiff, which stated that her title was subject to prior contract, *held* not error, where such policy was not received by plaintiff until after her deed had been recorded.

5. Principal and agent 🔑178(1)—Title insurance company issuing policy to purchaser was not purchaser's agent, and its knowledge of prior contract cannot be imputed to purchaser.

Title insurance company issuing policy of title insurance to purchaser was not agent of purchaser, and any knowledge it may have possessed regarding condition of title was not imputable to purchaser who claimed that she had no notice of defendants' prior contract for purchase of same real property.

Department 1.

Appeal from Superior Court, Los Angeles County; Frank C. Collier, Judge.

Action to quiet title by Anna E. Mayhew against Harry F. Burke and wife. From a judgment for plaintiff, defendants appeal. Affirmed.

Otto & Linn, and Roy A. Linn, all of Los Angeles, for appellants.

James, Pace, Smith & Younkin, of Los Angeles, for respondent.

SEAWELL, J. Defendants appeal from a judgment for plaintiff in a suit brought by plaintiff to quiet her title to certain real property in the city of Los Angeles. Both plaintiff and defendants claim an interest in said real property derived from the Howard Park Realty Company. On November 12, 1919, said company executed a contract of sale agreeing to convey said property to one Melby, upon receipt of full payment of the purchase price, which Melby agreed to pay in monthly installments. The defendant Harry F. Burke is the assignee of the Melby contract of sale, and defendant Frances H. Burke is his wife. Said contract of sale was placed of record on May 23, 1924, and was recorded again on July 30, 1924, after the assignment from Melby to the defendant Harry F. Burke had been placed thereon. The contract was not, however, acknowledged by the Howard Park Realty Company, and hence the record thereof did not operate as constructive notice to plaintiff, who claims title in fee under a contract of sale executed by the company in her favor in 1920, and a deed from said company to herself dated December 11, 1924, and recorded January 9, 1925.

No deed was ever executed by the realty company to Melby or to the Burkes. On or about August 22, 1924, defendants Burke tendered to the realty company $1,250 in payment of the amount due as principal, interest, and taxes on the contract of sale under which they claim. The purchase price of the lot was $1,000, of which $250 was paid at the execution of the contract. None of the monthly installments provided by said contract to be paid had ever been paid. The said contract provided that, if the buyer should fail to make payments therein promised to be made, all his rights should forthwith cease, at the option of the realty company, and without notice to the buyer, and the realty company should be released from all obligations in law or equity to convey said property, or to refund any payments made, and the buyer should thereupon forfeit all right to a conveyance and to all moneys paid, which should be retained by the realty company as rent and liquidated damages, and should surrender possession of the property on demand. Plaintiff does not here claim, however, and from the evidence appearing in the bill of exceptions, it cannot be said that she asserted in the court below that any rights which Melby or the Burkes may have had were forfeited and the contract of sale terminated by their failure to pay the stipulated monthly installments for a period of almost five years.

[1] Plaintiff's contention is that she took title free and clear of any interest of defendants as a purchaser for value without notice of the rights of defendants under the prior Melby contract of sale. Since the recordation of said contract did not charge subsequent purchasers with notice of its contents, for the reason that it was not acknowledged by the realty company, and therefore not entitled to recordation (Civ. Code, §§ 1107, 1161, 1213, 1214, 1217; Keese v. Beardsley, 190 Cal. 465, 213 P. 500, 26 A. L. R. 1538), the question here presented is whether plaintiff was a purchaser with actual notice of said contract, or with notice of circumstances sufficient to put her on inquiry as to the state of the title. "Every person who has actual notice of circumstances sufficient to put a prudent man upon inquiry as to a particular fact, has constructive notice of the fact itself in all cases in which, by prosecuting such inquiry, he might have learned such fact." Civ. Code, § 19. Defendants contend that it appears from the testimony of plaintiff and the witness Tabor, that the latter, a neighbor of plaintiff and an employee of a title insurance company insuring titles to property in the city of Los Angeles, had told her, in the course of a neighborly conversation, that there was a "cloud" against the property. It may be conceded that statements such as those made by Tabor to plaintiff would be sufficient to put a prospective purchaser upon inquiry. It does not appear, however, as a matter of law, that Tabor's statements were made before plaintiff had paid the balance due under her contract of sale and the deed to her had been placed on record. Notice of the contract or of facts sufficient to provoke inquiry, received after recordation of the conveyance, would not, of course, affect plaintiff's rights.

[2, 3] Neither the testimony of plaintiff nor that of Tabor is free from uncertainties and contradictions. Plaintiff expressed an inability to remember clearly, not only dates, but other details of the transaction. She did testify, however, that it was after she received the deed that Mr. Tabor came to her home and told her that he had heard there was some trouble about the title. Plaintiff received the deed from the realty company, to which it had been returned by the recorder after being placed of record. Plaintiff further stated that the final payment of $400 on the lot was made in December, 1924, and that she learned of the Melby contract soon after "she had paid up all on the lot." Plaintiff stated in another portion of her testimony that it was in the summer of 1924 that Tabor talked with her concerning the title. This testimony would also establish the summer of 1924 as the time when the balance of $400 on the purchase price was paid, since plaintiff stated that she did not talk with him until after she paid it. It would be unusual for a delay of several months to take place before the issuance of a deed after payment of the purchase price in full and demand for a deed. The court may have considered this in reaching the conclusion here attacked and accepting the testimony that the final payment was made in December, 1924, and notice acquired after receipt of the deed.

The witness Tabor stated that the conversation with plaintiff probably occurred about March, 1924, and that he told her there was a contract of purchase on record. The Melby contract of purchase, however, was not recorded until May, 1924. In another portion of his testimony he stated that he would not want to say positively, but it was his recollection that he spoke to her about the time the assignment of the contract of sale went on record, which was in July. He also stated that it was possible several months elapsed before the particular subject of the lot came up, and that he would not fix a definite date as to when he told her. It was the function of the court below to resolve inconsistencies in the testimony and to judge of the credibility of the witnesses and of the weight of their testimony. We are of the view that plaintiff's statement, to the effect that the conversation with Tabor took place after she received the deed, a circumstance that would likely fix in the mind approximately the day on which she was made aware of the Melby-Burke transaction, supports the finding upon which judgment was based, to the effect that plaintiff had no notice of the prior contract when she received her deed after recordation thereof. Other statements of plaintiff made in the course of her examination, and the testimony of Tabor, we do not deem of a sufficiently definite and convincing character to warrant us in overthrowing the finding of the trial court.

[4, 5] Defendants also contend that the judgment should be reversed for the refusal of the court below to admit in evidence a policy of title insurance dated January 9, 1925, and issued to plaintiff, which stated that her

title was subject to the Melby contract. But said policy could not have been received by her until after her deed had been recorded. Said title insurance company was not the agent of plaintiff, and any knowledge it may have possessed as to the condition of the title was not imputable to plaintiff.

The judgment is affirmed.

We concur: PRESTON, J.; CURTIS, J.

206 Cal. 414

WASHBURN v. SPEER et al. (Sac. 4078.)

Supreme Court of California. Feb. 2, 1929.

1. **Principal and agent 🔑89(8)—Evidence sustained findings that sale was procured through plaintiff's efforts, and that manufacturer represented commissions extended to all heaters installed in county.**

In action for commissions for sale of orchard heaters under exclusive agency contract for particular county, evidence *held* to sustain findings of trial court that sale for which commissions were sought was made through plaintiff's efforts, and that manufacturer represented to plaintiff that contract provided for payment of commissions on all sales of heaters to be installed in county.

2. **Principal and agent 🔑81(2)—Plaintiff held entitled to commissions for sale of heaters installed in his territory, where his efforts induced by defendant contributed to sale.**

Plaintiff *held* entitled to commissions for orchard heaters sold for use in his territory, under contract giving him exclusive agency for sales in that territory, where defendant manufacturer represented that commissions would extend to all local installations and urged plaintiff to undertake sale, and where plaintiff's own efforts materially contributed to the sale, notwithstanding fact that contract of sale was entered into in another county.

Department 1.

Appeal from Superior Court, Tulare County; J. A. Allen, Judge.

Action by Lowell M. Washburn against Charles P. Speer and the Kittle Manufacturing Company, in which defendant first named interposed a cross-complaint. Judgment for plaintiff, and defendant last named appeals. Affirmed.

Page, Nolan, Rohe & Freston, Ralph E. Lewis, and Eugene D. Williams, all of Los Angeles, for appellant.

John T. Fuller, of Portersville, for respondent Washburn.

J. E. Ricketts, of Covina, for respondent Speer.

CURTIS, J. Action brought to recover for a commission alleged to be due and owing plaintiff on the sale of 10,000 orchard heaters. The plaintiff had judgment, and the defendant the Kittle Manufacturing Company has appealed. The defendant Charles P. Speer, against whom the judgment also ran, has not appealed.

[1] The appellant's first contention is that the findings are not supported by the evidence. The court found: That the sale of said heaters "was made through the joint efforts of the defendant Kittle Manufacturing Company and the plaintiff, Lowell M. Washburn. That the plaintiff was the first to ascertain that the owners of the Camilla Grove were prospects for the purchase of the Kittle Heaters and thereupon advised the defendant corporation thereof, and in company with the said representative of said defendant corporation, and at his request, made several trips to said property and demonstrated said heaters thereon. That the defendant Kittle Manufacturing Company, prior to said sale being made, represented to the plaintiff and led him to believe that his contract provided for the payment of commissions on all sales of heaters made, to be installed in Tulare county, and with full knowledge that the plaintiff so interpreted his contract, said defendant corporation permitted, encouraged and requested the plaintiff to advertise and demonstrate said heaters on the said Camilla Grove."

It appears from the evidence that the appellant, the Kittle Manufacturing Company, entered into a contract with defendant Speer whereby the latter was appointed the agent of appellant to act as sales representative for the Kittle Smokeless Orchard Heater in certain territory of this state, including the county of Tulare. Speer was to receive as compensation for sales made by him a commission of from 20 to 40 cents per heater. While this contract was in force, a representative of Speer named Morehouse called upon the plaintiff for the purpose of interesting plaintiff in the sale of the Kittle heaters in the county of Tulare. Later Morehouse introduced a Mr. Meehan, a representative of the appellant, to the plaintiff. In conversation with Mr. Meehan, the plaintiff informed him that he would not undertake the sale of the heaters unless he would secure the exclusive agency in the county of Tulare. Mr. Meehan replied that Mr. Speer had the exclusive contract for the state, so that any contract must come from Mr. Speer, and that he would take the matter up with the defendant Speer, and have such a contract prepared and sent to plaintiff. A contract was prepared in the office of the appellant and sent to plaintiff. Plaintiff objected to some of its terms and so notified Mr. Meehan personally. The latter acquiesced in the objections made by plaintiff and in the suggestions made by plaintiff as to certain changes in the contract, which if made would render the contract acceptable to plaintiff. These changes were embodied in a subsequent draft of the contract, prepared in the office of the appellant, and the same was executed both by the plaintiff and Speer. During the time these negotiations regarding the terms of the contract were pending, the plaintiff and Meehan engaged in interesting prospective purchasers in Tulare county in the purchase of the type of heaters covered by the contract and which were manufactured by the appellant. Among those solicited by the plaintiff and Meehan in their joint efforts to make sales of heaters was the owner of the Camilla Grove, who, as a result of the efforts of plaintiff, together with the assistance of Meehan, purchased 10,000 of said heaters. The contract between plaintiff and Speer is dated September 5, 1925, and the plaintiff testified that he signed it on that date, and on September 15, 1925, he gave it to his wife to mail, and was under the impression that it had been mailed on the last-named date. On the morning of October 6th plaintiff left on a hunting trip. Just before his departure he received a telegram from Meehan asking him to go to the Camilla Grove and give a further demonstration. Plaintiff had Morehouse, who was then in his employ, make the required demonstration of the heaters on said grove. On the same day Meehan wired plaintiff that 10,000 heaters had been sold to the owner of the Camilla Grove. This telegram did not reach plaintiff until his return from the hunting trip, which was on the 11th of October. The plaintiff then found that the contract between himself and Speer had not been mailed to Speer. He thereupon forwarded the contract to Speer, who refused to accept it for the reason, as stated by him, that he had surrendered his contract covering Tulare county "to the manufacturers several weeks ago." About October 14th the plaintiff had a conversation with Meehan, in which the latter informed plaintiff that Speer had relinquished all his rights in Tulare county, and for that reason no commissions were due him on the sale of the heaters for the Camilla Grove. Meehan further told plaintiff that as he did not make the sale he should not expect any commission. It does not appear that Speer ever claimed any commission on the sale of these heaters. This was probably due to the fact that he had surrendered his contract before the sale was made, and for the further reason that by his contract he was simply appointed by appellant to represent them in territory described therein as its agent in the sale of heaters manufactured by appellant. No attempt was made therein to give him the exclusive agency in any territory whatever. He could not, therefore, have given the plaintiff the exclusive agency for the sale of said heaters in the county of Tulare. It is not shown, however, that plaintiff knew the extent of Speer's contract with appellant, but it plainly appears that Meehan, the secretary and representative of the appellant, must have been familiar with the terms of said contract, and he not only informed plaintiff that Speer could give him an exclusive agency contract, but Meehan had prepared in the office of the appellant such a contract, which was later signed by Speer and the plaintiff. Not only did Meehan represent to plaintiff that Speer had authority from appellant to give to the plaintiff such a contract, but on the strength of these representations he induced the plaintiff to advertise said heaters and to give numerous demonstrations as to their capabilities on the Camilla Grove and elsewhere in said county of Tulare for the purpose of inducing owners of citrus groves to purchase the same. The evidence shows that on the very day on which the plaintiff was informed by Meehan that the heaters here in question were sold, the plaintiff was directed by Meehan to give a further demonstration of said heaters to the owner of said grove. These directions were carried out by the plaintiff through his employé, Morehouse. The sale was made by written contract, executed by the appellant and the owner of the Camilla Grove in San Francisco on the 2d day of October 1925. Just why Meehan directed plaintiff to give a further demonstration of the heaters on the 6th day of that month and after the sales contract had been executed does not appear, but it is clear that he did so and that his directions were complied with by plaintiff. The plaintiff testified that he made five or six trips to the Camilla Grove for the purpose of interesting the owners thereof in the purchase of said heaters. On more than one of these visits demonstrations were given by him of the heaters. On some of these trips he was accompanied by Meehan, and the evidence shows without conflict that the two men worked together for weeks in introducing, advertising, and demonstrating said heaters in different parts of the county of Tulare, and that during all this time Meehan was assuring plaintiff that he would receive a commission on sales made by him in said county, and that he would receive an exclusive agency covering said county for the sale of said heaters. It is true that this agency was to come through Speer, but the latter had no contract which would authorize him to give such authority, which fact must have been known to Meehan at all times, as he was not only the secretary of the appellant, but he appears in a large degree to have had charge of its sales department, particularly was that the case in its dealings with the plaintiff. In fact, Meehan appears to have been the only officer or representative of the Kittle Manufacturing Company with which the plaintiff had any dealings. He was not produced as a witness at the trial. The evidence of the plaintiff, therefore, regarding his dealings with Meehan, is not denied either by Meehan or by any other witness. This evidence, in our opinion, fully sustains the findings of the court in favor of plaintiff, including the finding hereinbefore set out.

[2] It is contended, however, that even if this evidence sustains the contention of plaintiff that he held an exclusive contract for the sale of heaters manufactured by appellant covering the county of Tulare, he has still not shown any right of recovery against appellant, as the contract of sale for said heaters was executed in San Francisco, and outside the said county of Tulare. Appellant insists that there is a broad difference between an exclusive agency for the sale of merchandise in a certain territory and an exclusive right to make sales in that territory. In the former case, according to appellant's contention, the agent would have the right to recover only for commissions on sales which were actually made in said territory, while in the latter case upon a sale being made of merchandise to be used in said territory, the agent would be entitled to a commission, notwithstanding said sale was made and consummated without the territory. It may be conceded that this distinction as to the legal effect of these two classes of contracts exists as contended for by appellant. We do not think, however, that this principle of law alters the liability of the appellant toward the plaintiff. In support of its contention that the plaintiff cannot recover for the reason that the contract for the sale of the heaters was made in San Francisco and not in the county of Tulare, the appellant relies upon the following decisions of the courts of this state: Golden Gate Packing Co. v. Farmers' Union, 55 Cal. 606; Haynes Auto Co. v. Woodill Auto Co., 163 Cal. 102, 124 P. 717, 40 L. R. A. (N. S.) 971; Parry v. American Motors, etc., Co., 25 Cal. App. 706, 145 P. 165. In each of these actions the agent sued for a commission on sales alleged by him to have been made within the territory in which he held an exclusive agency. Recovery was denied in all of these actions. But it was not shown or claimed in any of said actions that the agent had anything to do with negotiating the sale upon which he claimed a commission. In the cases of Haynes Auto Co. v. Woodill Auto Co., supra, the decision states that: "Defendant [the agent] does not assert that it had anything to do with negotiating the sale, but bases a claim for compensation solely upon the contract between it and plaintiff by which the Woodill Auto Company was given the exclusive sale in Los Angeles and vicinity of the cars manufactured by plaintiff." In Parry v. American Motors, etc., Co., 25 Cal. App. 706, 710, 145 P. 165, 166, the court said: "The evidence as to the sale of these cars, however, shows that, although sold to residents of Alameda County, the sales were made in San Francisco. It is not shown by the plaintiff that in order to effect these sales the defendant's representatives or employees entered the territory of the plaintiff. We think, therefore, that such sales do not come within the terms of the contract, so as to entitle the plaintiff to a commission or discount thereon." In the present action, as we have already seen, the appellant did invade the territory of the plaintiff. Not only did its representative visit Tulare county, but he importuned the plaintiff to undertake the sale of the heaters in said county, and assured plaintiff that he would receive a commission upon all sales made in said county. Upon this assurance upon the part of the representative of appellant the plaintiff rendered services for appellant in demonstrating the heaters upon the Camilla ranch, which, we cannot help but believe, materially contributed to the sale upon which he now claims a commission. These facts take the present action out of the rule enunciated in the authorities cited by appellant, and render the appellant liable to plaintiff for the commission upon the heaters, the sale of which was largely due to the efforts of plaintiff. From the evidence it appears that the owner of the Camilla Grove resided or had its principal place of business in the city of San Francisco, and it was no doubt due to that fact that the contract for the sale of the heaters was made and executed in that city.

The further claim is made that plaintiff's cause of action should be against Speer alone and not against appellant. We think the finding already referred to sufficiently answers this claim. From this finding it appears that the appellant represented to the plaintiff and led him to believe that his contract provided for the payment of commissions on all sales of heaters to be installed in Tulare county, and with full knowledge that plaintiff so interpreted his contract, the appellant permitted, encouraged, and requested the plaintiff to advertise and demonstrate heaters on the Camilla Grove. The evidence further shows that the appellant through its representative Meehan informed plaintiff that Speer had relinquished his contract and that for that reason the plaintiff had no claim for a commission on the heaters sold. These facts unquestionably establish a just and legal claim in favor of plaintiff and against the appellant.

The judgment is affirmed.

We concur: SEAWELL, J.; PRESTON, J.

206 Cal. 421

RATTO et al. v. YOUNIE et al. (Sac. 3896.)

Supreme Court of California. Feb. 4, 1929.

1. Appeal and error 🔑1011(1)—Trial court's finding on conflicting evidence, where substantially supported, cannot be disturbed.

Finding of trial court, supported by positive and substantial evidence, cannot be disturbed on appeal, where evidence was conflicting.

2. Mechanics' liens 🔑290(4)—Contractor held not entitled on appeal to recover under implied contract on account of variations, where trial court found building was constructed under original contract and found nature of extras furnished.

In action to foreclose contractor's lien, plaintiffs *held* not entitled on appeal to disregard original contract and recover under implied contract on account of changes from original plans and specifications, where trial court found that the building was constructed under the original contract and found nature and extent of extras furnished.

Department 1.

Appeal from Superior Court, Lassen County; H. D. Burroughs, Judge.

Action by A. B. Ratto and Victor Ratto, copartners doing business under the firm name and style of A. B. Ratto & Son, etc., against W. A. Younie and others. From the judgment, plaintiffs appeal. Affirmed.

R. M. Hardy, of Susanville, for appellants.

N. J. Barry and Hardin Barry, both of Susanville, and C. C. Hall, for respondent Younie.

J. A. Pardee, of Susanville, for respondent Lassen Industrial Bank.

CURTIS, J. Action brought to recover the balance claimed to be due plaintiffs upon a contract for the construction of a business block in the city of Susanville, county of Lassen, and to foreclose a contractor's lien against the premises upon which the building is located for the amount found to be due. Plaintiffs sought also to establish the priority of their lien over a mortgage lien held by the defendant the Lassen Industrial Bank against said real property. The trial court gave judgment in plaintiffs' favor in the sum of $3,325.03 against the defendant W. A. Younie and decreed that they were entitled to a lien for that amount against said real property, but held that their lien was subsequent and subject to the lien of the defendant the Lassen Industrial Bank. Plaintiffs concede the correctness of said judgment in so far as it establishes the priority of the lien of said bank over their own lien, but are dissatisfied with the amount awarded them in the judgment against the defendant Younie. They have appealed therefore from that portion of the judgment awarding them judgment against the defendant Younie in the sum of $3,325.03.

[1] Plaintiffs contend that they constructed said building under a contract with Younie whereby they were to be paid the actual cost of all labor and materials furnished in the erection of said structure and in addition thereto 15 per cent. of the actual cost of said labor and materials, in payment of their services for supervising and directing the construction of said building. On the other hand, the defendant Younie contends that prior to the erection of said building he entered into a contract with the plaintiffs whereby they agreed to construct said building for the sum of $45,000. The court found for the defendant upon this issue, and that said building was constructed under said contract; that extras in the amount of $7,792.38 had been furnished by the plaintiffs; and that defendant had paid plaintiffs the sum of $49,467.35, leaving a balance due plaintiffs in the sum of $3,325.03.

Plaintiffs now contend, as they contended before the trial court, that they are entitled to recover upon their contract as pleaded in their amended complaint or upon what is frequently referred to as a "cost-plus contract," rather than upon a contract for a stated or agreed amount. The contract between the parties was verbal, and, as might be expected, the evidence offered by the respective parties to establish the same was contradictory in the extreme. There was positive and substantial evidence given by Younie, and corroborated by apparently reliable and disinterested witnesses, that the building was to be constructed by the plaintiffs for an agreed price of $45,000. Therefore, the finding of the court as to the character of the contract under which the building was constructed cannot be disturbed by this court.

[2] It is further contended by the plaintiffs that the evidence shows, even if the original contract between the parties was for the construction of the building at a fixed amount, that the building as finally erected and completed was so radically different from the one originally contracted for, and deviated so materially from the plans and specifications originally agreed upon by the parties, that the plaintiffs were warranted in disregarding the original contract, and may recover upon an implied contract for the labor and materials furnished in the erection of the building. This contention, we think, is fully answered by the findings of the court. After finding that the parties entered into a contract for the construction of a building at an agreed price of $45,000, the trial court then found that said building was thereafter constructed under said contract. It then proceeded to find the nature of the extras furnished by the plaintiffs and the value of each extra so furnished. This finding of the court

that the building was constructed under a contract, fixing the contract price thereof, would preclude this court from holding that the evidence shows that the contract was so far deviated from as to justify the plaintiffs in disregarding it and suing on a quantum meruit. Besides, as just stated, the court found the extent and nature of the extras furnished by the plaintiffs. These extras would denote the changes and deviations made from the original plans and specifications of the building. Without setting them out here in detail, we do not think that they to the least extent justify the claim of the plaintiffs that the building as finally erected and completed was radically different from the one originally agreed upon or that it deviated in any substantial respect from the building delineated in the plans and specifications which the parties adopted at or immediately after they entered into their contract. The authorities cited by plaintiffs in support of this last-mentioned contention no doubt contain a correct statement of the law considered therein, but they are not applicable to any state of facts in the present action. Particularly is this true regarding the case of S. F. Bridge Co. v. Dumbarton L. & I. Co., 119 Cal. 272, 51 P. 335, which plaintiffs contend announces the rule that, where the owner does some act amounting to a rescission of the contract, he cannot set up the original contract to defeat the contractor's action for value of labor and materials furnished. As already intimated, there is nothing in the evidence in the present action which even tends to show that the defendant Younie had committed any act amounting to a rescission of the contract.

The judgment is affirmed.

We concur: PRESTON, J.; SEAWELL, J.

---

206 Cal. 307

CAVASSA v. OFF et al. (S. F. 13001.)

Supreme Court of California. Jan. 29, 1929.

1. Criminal law 🔑1200—Statute requiring cancellation of pharmacist's license on third conviction of violating act held to limit such power to court in which conviction judgment was rendered (Act to Regulate Practice of Pharmacy 1905, §§ 7(i), 9, 12, as amended).

Act to Regulate Practice of Pharmacy 1905 (Deering's Gen. Laws 1923, Act 5886) § 12, as amended, providing that one convicted for third time of violating the act shall, in addition to penalties mentioned, have his registration as a pharmacist canceled, requires cancellation of license to be inflicted by court in which third conviction judgment was rendered, and does not authorize revocation of license by board of pharmacy, since section 7(i), and section 9, authorizing revocation by board whenever license holder is guilty of habitual intemperance, is narcotic addict, or has been convicted of felony, or for nonpayment of license fee, limit powers of board to those specified, under rule expressio unius est exclusio alterius.

2. Indictment and information 🔑114—Prior conviction relied on to increase penalty must be alleged in indictment or complaint and be proved on trial.

Where a prior conviction is relied on for purpose of empowering a court to inflict an increased penalty on defendant, indictment or complaint must allege the prior conviction, and on the trial, unless admitted, such prior conviction must be proved by competent evidence.

3. Criminal law 🔑1202(6)—License of pharmacist convicted of third violation of regulatory statute could not be canceled where prior violations were not alleged nor proved (Act to Regulate Practice of Pharmacy 1905, as amended).

Court in which pharmacist was convicted of a third offense of violating Act to Regulate Practice of Pharmacy 1905, as amended (Deering's Gen. Laws 1923, Act 5886), had no power to enter an order canceling his license where it was neither alleged nor proved that defendant had prior thereto been twice convicted of violating the act.

4. Criminal law 🔑1201—Statute providing for cancellation of pharmacist's license on third conviction is penal and should be strictly construed (Act to Regulate Practice of Pharmacy 1905, § 12, as amended).

Act to Regulate Practice of Pharmacy 1905 (Deering's Gen. Laws 1923, Act 5886) § 12, as amended, providing for cancellation of pharmacist's license on his third conviction of violating the act, is highly and strictly penal in its nature, and should therefore receive a strict construction and not be construed to include anything which is not embraced within its terms.

5. Property 🔑2—Right to practice profession is "property," which should not be taken away without clear proof of violation of statute.

The right of a person to practice the profession for which he has prepared himself is "property" of the very highest character, and should not be taken from him except on clear proof that he has forfeited it, and then only in strict conformity to the statute authorizing its forfeiture.

[Ed. Note.—For other definitions, see Words and Phrases, First, Second, and Third Series, Property.]

Richards, J., dissenting.

In Bank.

Appeal from Superior Court, City and County of San Francisco; James M. Troutt, Judge.

Application for writ of prohibition by H. A. Cavassa against E. T. Off and others, comprising the California State Board of Pharmacy, and another, to prevent revocation of petitioner's license as pharmacist. From a judgment denying the writ, petitioner appeals. Reversed.

Superseding opinion in 265 P. 1022.

Pardini & Scampini, of San Francisco, for appellant.

U. S. Webb, Atty. Gen., and Charles A. Wetmore, Jr., Deputy Atty. Gen., for respondents.

CURTIS, J. This proceeding was originally instituted in the superior court of the city and county of San Francisco. The petitioner is a registered licentiate in pharmacy under the laws of this state, and the respondents, other than the respondent Zeh, constitute the California state board of pharmacy, and the respondent Zeh is the secretary of said board. This action was brought for the purpose of prohibiting the respondents from revoking or canceling the license of petitioner or his registration as a licentiate in pharmacy.

It appears from the record before us that the California state board of pharmacy served written notice upon the petitioner to appear before said board and show cause why his registration as a licentiate in pharmacy should not be canceled because of petitioner's conviction for the third time of the violation of the provisions of the act of the Legislature of the state of California to regulate the practice of pharmacy in the state of California, approved March 20, 1905 (Deering's Gen. Laws 1923, No. 5886) and the acts amendatory thereto. Said notice was as follows:

"California State Board of Pharmacy.

"San Francisco, California, July 24, 1926.

"Harry A. Cavassa, Peninsula Drug Company, Colma, California—Dear Sir: You are hereby notified to appear before the California State Board of Pharmacy at its office in the State Building, San Francisco, California on the 30th day of July, 1926, at the hour of two o'clock p. m. on said day then and there to show cause if any you may have why your registration as licentiate in pharmacy, Certificate No. 4146, should not be by this Board cancelled because of your conviction the third time of a violation of the provisions of the Act of the Legislature of the State of California to Regulate the Practice of Pharmacy in the State of California, approved March 20th, 1905 and the acts amendatory thereto. It appears from the official records of the Justices Court of the First and Second Townships, County of San Mateo, State of California that you were convicted of a violation of the said act on March 16th, 1923 and that you suffered a second conviction of a violation of the provisions of said act on March 17th, 1925, and a third conviction for a violation of the provisions of said act on December 16th, 1925.

"By order of the California State Board of Pharmacy. Louis Zeh, Secretary."

Petitioner, instead of appearing before said board in response to said notice, instituted this proceeding, claiming that said board of pharmacy was without jurisdiction to revoke or cancel his license to practice pharmacy upon any ground set forth in said notice. The respondents appeared in said proceeding, and, after an answer was filed by them to petitioner's petition, the matter came on for trial. At the trial there was no dispute as to the facts, but the sole controversy was as to the power of the board of pharmacy to revoke petitioner's license to practice pharmacy on the ground that he had been convicted for the third time of the violation of the provisions of the act of the Legislature regulating the practice of pharmacy in this state. The trial court gave judgment for the respondents, and petitioner has appealed. There is but one question before this court on this appeal and it is the same question that was presented to the trial court at the hearing of this cause in said court, and that is whether the California state board of pharmacy is authorized to revoke and cancel petitioner's license to practice pharmacy in the state of California upon the ground that petitioner had been convicted for the third time of the violation of said act of the Legislature.

The divergent views of the parties hereto are in the main due to the different constructions placed by them upon various sections of said act relating to the powers of said board to revoke and cancel a license issued to a registered pharmacist. By section 7 of said act the powers and duties of said board are defined. By subdivision (i) of said section it is provided that said board shall have power "to provide by proper rules and regulations for the revocation by said board of licenses issued under the provisions of this act, whenever the holder of such license shall be guilty of habitual intemperance or addicted to the use of narcotic drugs, or shall have been convicted of a felony." It is apparent that the board of pharmacy, under the provisions of subdivision (i) of section 7 of said act, has no power to revoke a license issued by it except for one of the causes set forth in this subdivision of said section 7, and conviction for a third time of a violation of the provisions of said act is not one of said causes. Section 9 of said act provides for the revocation of a pharmacist's license upon his failure to pay the annual fee required to be paid by all holders of licenses from the state board of pharmacy. It is equally clear that this section gives no power to said board to revoke petitioner's license on the ground set forth in said notice served upon petitioner.

The only other sections of said act which, by any possible construction or interpretation, might be held to empower the board of pharmacy to proceed against petitioner under said notice served upon him are sections 6 and 12 of said act. They are, in part, as follows:

Section 6. "It shall be the duty of the secretary of the board to erase from the register the name of any registered pharmacist or assistant pharmacist, * * * who in the opinion of the board has forfeited his right under the law to do business in this state." Section 12. "* * * any person violating any of the provisions of this act, when no other penalty is provided, shall be deemed guilty of a misdemeanor, and upon conviction thereof shall be liable to punishment by a fine of not less than twenty dollars, and not more than one hundred dollars, or by imprisonment of not exceeding fifty days, or by both such fine and imprisonment. All fines recoverable under this act shall be paid by the magistrate receiving the same to the state board of pharmacy. Any person convicted of violating the provisions of this act the third time shall in addition to the penalties hereinbefore mentioned have his or her registration as a pharmacist cancelled."

[1] Respondents contend that under these sections of the act the board of pharmacy is authorized to proceed under the notice served upon petitioner and cancel his name from the list of registered pharmacists on file in the office of said board. This contention is stated in the brief of the Attorney General, representing the respondents herein, as follows: "In our view of the matter, section 12 of the act itself *revokes the license* of a pharmacist who has been convicted of violating the provisions of the Pharmacy Act the third time, and the requirement that the registration of such pharmacist be cancelled calls for nothing more than a ministerial act upon the part of the board, and its provisions are mandatory." To a certain extent we are in agreement with the position taken by the Attorney General, as set forth in the above excerpt from his brief. Undoubtedly under section 12 of the act the license of a registered pharmacist may be revoked, as provided in said section, and, when so revoked or canceled, the name of the pharmacist may be erased from the list of registered pharmacists. In order, however, for a license to be revoked, there must be some board, or court, or other power, vested with authority to declare and order such revocation. In whom is the power of revocation provided for in section 12 lodged by the terms of said section? Has the board of pharmacy or the court in which the defendant is convicted this power to declare the license revoked?

An examination of the provisions of section 12 of said act convinces us that it was the intention of the Legislature in the enactment of said section to provide that a revocation or cancellation of a license for the third conviction was a part of the penalty to be inflicted upon the defendant by the court in which such judgment of conviction was rendered, and that said section does not in any way attempt to authorize the revocation of a license by the board of pharmacy upon the third conviction of the holder thereof. Not only by its caption, but by its context, this section refers to the *penalty* to be suffered by one violating the provisions of said act. In other words, section 12 of the act contains the penal provision enacted for the purpose of making more effective the terms and provisions of said act, and without which the whole act might become exceedingly difficult of enforcement. It provides that any person violating the provisions of said act shall be guilty of a misdemeanor, and then proceeds to prescribe the punishment, not only for a single conviction under said act, but for subsequent convictions, and finally provides that: "Any person convicted of violating the provisions of this act the third time shall in addition to the penalties hereinbefore mentioned have his or her registration as a pharmacist cancelled." It is perfectly clear from the reading of said section as a whole that it relates to and concerns exclusively proceedings instituted to enforce the penal provisions of said act, and, when it provides for the cancellation of a pharmacist's license for a third conviction, it is dealing with the power of the court in which such third conviction is had and not with the power of the board of pharmacy to cancel said certificate. It is not contended that the court in which petitioner suffered his third conviction directed or ordered the cancellation of petitioner's license. It is true that section 12 is mandatory in this respect, the exact wording being, "shall in addition to the penalties hereinbefore mentioned have his or her registration as a pharmacist cancelled," but this language of the statute must be considered in connection with other provisions of the law applicable to the power of a court to impose an increased penalty upon a person convicted of crime by reason of the fact that he had prior thereto suffered one or more convictions.

[2, 3] The court in which the petitioner was found guilty of violating the provisions of said act for the third time, as just stated, did not order the cancellation of petitioner's license. We doubt, under the facts as shown by the record, whether it had any authority to include such order in its judgment of conviction. There was no legal showing made before said court that the judgment of conviction rendered therein was the third conviction of petitioner. It is not shown that the fact of petitioner's prior convictions was either alleged in the complaint in said action or that any proof was offered before said court of the fact of petitioner's prior convictions. It is well established in this state, where a prior conviction is relied upon for the purpose of empowering a court to inflict an increased penalty upon a defendant, that the indictment or complaint must allege the prior conviction, and upon the trial, unless admitted, such prior conviction must be prov-

en by competent evidence. People v. Delany, 49 Cal. 394, People v. Coleman, 145 Cal. 609, 612, 79 P. 283. In the Coleman Case this court said: "The former conviction is a fact, and a very important one, which constitutes or goes to make up this aggravated offense, and being a material fact in the case, necessarily it must be pleaded, and if issue be joined in reference thereto, * * * must be proven as any other material fact in the trial of the cause." Therefore the court in which petitioner was convicted of the third offense had no power to enter an order canceling his license, even if it had attempted to do so, by reason of the fact that it was neither alleged nor proven that petitioner had prior thereto been twice convicted of a violation of said act.

[4] The provision of section 12, providing for a cancellation of a pharmacist's license upon his third conviction, is highly and strictly penal in its nature, and should therefore receive a strict construction. In the case of Schomig v. Keiser, 189 Cal. 596, 598, 209 P. 550, 551, in construing a provision of the Real Estate Broker's Act (Stats. 1919, p. 1256) relative to the power of the state real estate commissioner to revoke the license of a real estate broker, this court, in an opinion written by Chief Justice Shaw, held that: "The portion of the act which authorizes the real estate commissioner to forfeit the license of a broker or salesman and take it away from him is highly penal in its nature, and should not be construed to include anything which is not embraced within its terms." We think this same rule should apply with equal potency with reference to the terms of the act before us, providing for the forfeiture of a license held by a registered pharmacist. In our opinion section 12 of the act relates only to the authority of the court in which the third conviction may be had, giving it power to revoke the license of a registered pharmacist upon his third conviction, and it should not be construed to give to the board of pharmacy this same power, as there is nothing in the section, or in any other part of the act, which directly or by reasonable implication confers such power upon said board.

We think it reasonably appears from the provisions of said act, and particularly from subdivision (i) of section 7 of said act and from section 7 of said act, above referred to, that it was not the intention to give to said board of pharmacy power to revoke the license of a registered pharmacist upon his third conviction of the violation of the terms of said act. In said subdivision (i) it is set forth that the board shall have power to provide proper rules and regulations for the revocation by said board of licenses issued by it "whenever the holder of such license shall be guilty of habitual intemperance or addicted to the use of narcotic drugs or shall have been convicted of a felony" Had it been intended to vest said board with power to revoke a license for the third conviction of a holder thereof of the violation of said act, it would seem that such power would have been included in subdivision (i) of said section 7. The well-established rule, expressio unius est exclusio alterius, would seem to apply in the construction of this provision of the act. The same may be said regarding section 9 of said act, giving power to the board to revoke a license for the nonpayment of license fee. In these two sections of the act four instances are specified in which a license may be revoked by the board of pharmacy. The express mention of these four instances in which the board may revoke a license under the act would seem, under the rule above announced, to exclude any other instance not included therein.

[5] The right of a person to practice the profession for which he has prepared himself is property of the very highest character. Hewitt v. Board of Medical Examiners, 148 Cal. 590, 84 P. 39, 3 L. R. A. (N S) 896, 113 Am. St. Rep. 315, 7 Ann Cas. 750. Due to the severe and exacting tests now generally required before a person can legally follow a profession at the present day, this right can only be acquired after years of arduous effort and closest application. It is generally the only means of the holder thereof whereby he may support himself and family, and it usually affords such holder the best opportunity to become a useful and sustaining member of the community in which he resides. This right should not be taken from one who has thus acquired it, except upon clear proof that he has forfeited the same, and then only in strict conformity to the statute authorizing its forfeiture. We are satisfied, for the reasons given herein, that the board of pharmacy has no authority under the proceedings instituted by it to revoke petitioner's license nor to cancel or erase his name from the list of registered pharmacists kept by it in the office of its secretary.

The judgment is therefore reversed.

We concur: WASTE, C. J.; SHENK, J.; SEAWELL, J.; LANGDON, J.; PRESTON, J.

I dissent: RICHARDS, J.

206 Cal. 392

CALIFORNIA-MICHIGAN LAND & WATER CO. v. FLETCHER et al. (L. A. 9521.)

Supreme Court of California. Jan. 31, 1929.

1. Quieting title 🔑35(2)—Complaint, in action to quiet title, alleging that plaintiff is owner and that defendants claim adversely but have no interest, held sufficient.

Complaint, alleging that plaintiff is owner of particular described property, that defendants claim interest therein adverse to plaintiff and that such claim is without right, and that defendants have no right, title, or interest in the premises or any part thereof, *held* sufficient in action to quiet title.

2. Injunction 🔑118(3)—Count incorporating allegations of plaintiff's title, and further alleging that plaintiff had sold lots subject to restrictive covenant which defendants were violating, held insufficient for injunction.

Count of complaint, incorporating by reference allegations of previous count, alleging plaintiff's title to premises, and setting forth in addition that plaintiff had sold part of lots in tract subject to building restrictions for benefit of remaining portion of tract, and that defendants were erecting building on lot in violation of restrictions, *held* not to state cause of action for injunction, since it did not appear to whom the property was sold or that defendants did not have possession as trespassers or under claim of title from third party.

3. Injunction 🔑62(3)—One selling land subject to restrictive covenants could not enjoin violation thereof as against trespassers upon his own land.

If building restrictions imposed on sale of lots in tract by plaintiff are regarded as covenants, plaintiff retaining ownership of part of lands had no cause of action in equity to enjoin violation of the covenants as against trespassers or adverse possessors of his own land.

4. Deeds 🔑168—Equity will not adjudge plaintiff's title to property for breach of condition of deed, where plaintiff's title was never divested.

Equity will not adjudge title to be vested in plaintiff for forfeiture of conditions attached to deed, where title to particular property involved was never divested by sale or otherwise.

Department 1.

Appeal from Superior Court, Los Angeles County; William C. Doran, Judge.

Action by the California-Michigan Land & Water Company against John E. Fletcher and others. From a judgment of dismissal, plaintiff appeals. Reversed in part and affirmed in part.

Goodspeed, Pendell & Neff and Ezra Neff, all of Los Angeles, for appellant.

Thomas T. Robinson, of Los Angeles, for respondents.

SEAWELL, J. This appeal is taken from a judgment of dismissal entered after defendants' demurrer to plaintiff's complaint had been sustained with leave to amend and plaintiff failed or refused to amend. The grounds of demurrer were: First, that the complaint did not state facts sufficient to constitute a cause of action; second, that the facts set forth as a second cause of action failed to state a cause of action; third, fourth, and fifth, that said complaint was ambiguous, uncertain, and unintelligible, respectively, in that it could not be ascertained therefrom by or on what theory plaintiff sought to enforce restrictions against these defendants.

The complaint is in two counts. The first count contains the usual averments appropriate in a suit to quiet title, alleging that plaintiff is the owner of certain described land and premises situate in the Michillinda tract in the county of Los Angeles, that defendants claim an estate or interest in said property adverse to plaintiff, and that the claim of defendants is without any right whatever, and they have no estate, right, title, or interest whatever in said land or premises or any part thereof.

"For a further and second cause of action," plaintiff incorporates by reference the allegations of the first count of the complaint, and then proceeds to allege that defendants are erecting upon said land and premises a building to be used as a dwelling which will be of a cost and value of less than $5,000, to wit, of the value of $500, and are occupying the uncompleted structure for residence purposes. It is further alleged that "plaintiff was at one time the owner of all of said Michillinda Tract, but has since sold more than half of the lots in said tract, * * * and has made all of such sales and the subsequent use of each lot to be sold expressly subject to the conditions and restrictions substantially similar to the following:

" 'It is provided and covenanted, said covenants running with the land herein described * * * that any building to be used as a dwelling erected or moved upon said premises shall be of the cost and value of not less than five thousand dollars ($5000). * * * No building on said premises shall be occupied for residence purposes until the completion thereof and full compliance with said requirements as to location and cost.' "

It is also alleged that "in selling said lots in said tract under said conditions, plaintiff has followed a 'general scheme' of building and use restrictions for the benefit of the remaining portion of said tract, which is still owned by plaintiff." Allegations that plaintiff has no plain, adequate, direct, and speedy remedy at law, and that it has demanded of defendants that they desist from erecting said building, conclude the statement of the second cause of action. It is not alleged that defendants are plaintiff's grantees, or deraign title through it, or through or from any of its grantees.

The prayer of the complaint is that defendants be enjoined during the pendency of the action from erecting a building of less than $5,000 in value and from occupying said premises, or any part thereof, and that the court make said injunctions prayed for permanent, quiet plaintiff's title to the property involved, and assess such damages as may be just.

[1] Beyond question the first count of the complaint states a cause of action to quiet title. It is alleged therein that plaintiff is the owner of the described property, that defendants claim an interest therein adverse to plaintiff, and that such claim is without right, and defendants have no estate, right, title, or interest whatever in said premises or any part thereof. That is all the law requires. Hyatt v. Colkins, 174 Cal. 580, 163 P. 1007. We conclude, therefore, that the trial court erred in sustaining the demurrer to said first cause of action.

[2-4] As to the second cause of action, a different situation is presented. Insufficiency of the facts set forth in the said second cause of action was specifically urged as a ground of demurrer. In the second division of the complaint plaintiff plainly intended to set forth a cause of action based on the alleged violation of a building restriction against the erection of a dwelling at a cost of less than $5,000, and the occupation of said dwelling before it was completed. The statement of said cause of action attempted to be set forth is insufficient, in that it does not appear from the facts alleged that defendants are persons against whom a cause of action based on a violation of said restrictions could be sustained. Considered together, the allegations of said count are to the effect that defendants are building upon a lot owned by plaintiff, in which defendants have no right, title, or interest. Although it is alleged that plaintiff once owned the entire tract, and has since sold part of it subject to restrictions for the benefit of the entire tract, it is not alleged either directly or inferentially that plaintiff ever sold the lot in question to defendants or to any other person. For aught that appears in said count, defendants may have entered upon said land as trespassers or in the exercise of rights of ownership claimed by them to have been derived from some other source than plaintiff. If the restrictions be regarded as covenants, there would be no cause for a court of equity to enjoin violations of restrictive covenants by injunction against trespassers or adverse possessors upon land owned by plaintiff. If, on the other hand, the restrictions created conditions, a court of law would not adjudge title to be vested in plaintiff as a result of a forfeiture and revestiture of title for breach of conditions where its title was never divested by a sale or otherwise.

Plaintiff having failed in its attempt to state a cause of action based on the violation of building restrictions, the court below did not err in sustaining the demurrer as to said cause of action.

The judgment is reversed as to the first cause of action, and as to the second cause it is affirmed.

We concur: PRESTON, J.; CURTIS, J.

---

206 Cal. 378

PARSONS v. ROBINSON et al. (L. A. 8775.)

Supreme Court of California. Jan. 31, 1929.

Judgment ⚷780(5)—Wife to whom husband executed deed to qualify her as surety on bail bond had title to which lien of judgment attached.

Wife to whom husband executed deed of realty for purpose of qualifying her to become surety on his bail bond had title to which lien of judgment against her attached, without regard to agreement of parties that deed was not to be recorded.

Preston, J., dissenting.

In Bank.

Appeal from Superior Court of Los Angeles County; K. S. Mahon, Judge.

Action by S. J. Parsons against Annie Dell Robinson, also known as A. D. Robinson (formerly Annie Dell Segno), and others. Judgment for plaintiff, and defendants appeal. Affirmed.

Superseding opinion in 266 P. 833.

Hilton & Christensen, of San Francisco, for appellants.

S. J. Parsons, of Los Angeles, in pro. per.

CURTIS, J. This action is one in the nature of a creditor's bill, to subject certain real property, situated in the county of Los Angeles, to the payment of a judgment, rendered in the superior court of said county in favor of the plaintiff and against the defendant A. D. Robinson (formerly Annie Dell Segno).

The plaintiff was the owner of a valid judgment against said defendant A. D. Robinson (formerly Annie Dell Segno) on the 19th day of October, 1923, the day on which there was conveyed to her the real property sought by this action to be charged with the payment of said judgment. Said judgment was docketed in the office of the clerk of the court in which it was rendered on the 7th day of April, 1919, and thereby became a valid lien upon all real property then owned by said defendant, or which she might thereafter acquire during the life of said lien, situated in said county and not exempt from execution.

On the 19th day of October, 1923, the defendant Harry T. Robinson was the owner of said real property. He had been arrested upon a charge preferred against him in the United States court, and required a bail bond in the sum of $25,000. A friend of his by the name of R. E. Fitzgerald offered to go on his bond, but Robinson was informed by his attorney that he required two bondsmen in order to effect his release from imprisonment. His wife, the said defendant A. D. Robinson (formerly Annie Dell Segno), was asked to act as the second bondsman. She replied that she had no property and could not justify as a bondsman. It was then suggested that the defendant Harry T. Robinson convey to his wife the real property described in the complaint herein for the purpose of enabling her to qualify as one of said bondsmen. This suggestion was acted upon, and the defendant Harry T. Robinson by grant deed conveyed said real property to his wife in order that she might qualify as a bondsman upon the bond then required of him. On the same day said defendant A. D. Robinson, together with the said R. E. Fitzgerald, and one Olive S. Fitzgerald, executed said bond, and the same was approved, and the defendant Harry T. Robinson was released from custody. In order for said bondsmen to qualify on said bond, it was necessary for each of them to be worth the amount of said bond, and to make oath to that fact. In compliance with this requirement, the said defendant A. D. Robinson, R. E. Fitzgerald, and Olive S. Fitzgerald each subscribed and swore to the verification annexed to said bond, which verification, exclusive of its formal parts, was as follows: "Mrs. A. D. Robinson, R. E. Fitzgerald and Mrs. Olive S. Fitzgerald, being duly sworn, each for himself, deposes and says that he is a householder in said district, and is worth the sum of twenty-five thousand dollars, exclusive of property exempt from execution, and over and above all debts and liabilities."

At the time of the execution and delivery of said grant deed by the said defendant Harry T. Robinson to his wife, it was understood and agreed that it should not be placed of record in the office of the county recorder of said county, but, upon the advice of the attorney for the defendant Harry T. Robinson, said deed was on the day of its date filed for record in the office of said county recorder. On the release of Mr. Robinson from jail, he learned that said deed had been placed of record in the office of said county recorder. He immediately took steps to make different arrangements for his bail bond. The result of said action on his part was that a day or two after the execution of said deed, Mrs. Robinson, at the request of her husband, conveyed said real property to defendant Thomas D. Shannon, and the latter was substituted as a bondsman in the place of Mrs. Robinson. Shannon was a friend of Harry T. Robinson, and said conveyance was made to him in order that he might be able to qualify as one of Robinson's bondsmen. It appears that the reason the defendant Harry T. Robinson directed his attorney not to record the deed to his wife was that he knew of plaintiff's judgment, and he did not wish to make himself liable for its payment.

The court found the foregoing facts, and also "that no other consideration passed from the said A. D. Robinson to the said Harry T. Robinson for the said real property at the time of the conveyance of the real property, except as set forth in finding III above (finding III deals with the facts and circumstances surrounding the giving of the bail bond and the conveyance of said real property to the said A. D. Robinson for the purpose of qualifying her to become a surety on said bail bond, as related above), it being understood and agreed at the time between the said Harry T. Robinson and the said Annie Dell Robinson, otherwise known as A. D. Robinson, that upon the exoneration of the bail bond aforesaid, the said real property should be reconveyed by the said A. D. Robinson to the said Harry T. Robinson." The court also found, finding XVI: "That the said deed made, executed and delivered by Harry T. Robinson to A. D. Robinson on the 19th day of October, 1923, is a valid deed given for a valuable consideration and vested title in fee to said property in A. D. Robinson." The trial court upon this finding rendered judgment in favor of the plaintiff, and the defendants have appealed.

Appellants contend that Mrs. Robinson by the deed from her husband, dated October 19, 1923, took merely the naked legal title to the real property described therein and that respondent's judgment lien did not attach to said real property, or to any interest therein, and that the complete equitable title remained in the said appellant Harry T. Robinson. Appellants have cited the case of Fulkerson v. Stiles, 156 Cal. 703, 105 P. 966, 26 L. R. A. (N. S.) 181, and a large number of other cases decided by the appellate courts of this and other states in support of their foregoing contention. There can be no question but that the cases relied upon by the appellants correctly state the law applicable to the facts, as claimed by the appellants. In our opinion, however, the appellants have misconceived the legal effect of the facts as found by the court. Appellants insist that Mrs. Robinson received nothing but the naked legal title to the real property conveyed to her by her husband, and that all the facts and circumstances surrounding the execution and delivery of the deed established that such was the intention of the parties to said deed. In this we think the appellants are in error. There is no dispute as to just what actually took place at the time the deed was executed and delivered. Mr. Robinson desired another bondsman. It was suggested that his wife act as such bondsman, and she replied that she had no property and could not therefore legally qualify as a bondsman. It was then decided by her and her husband that the latter would convey to his wife sufficient property so as to enable her to qualify as a bondsman on the $25,000 required of him. In order for her to qualify, it was necessary that she be the actual owner of property equal to the amount of the bond. Not only was this required of her, but the further requirement of the law was that she should make affidavit to that fact. It is conceded that she made the required affidavit and swore that she was worth the amount of the bond—$25,000. She could not truthfully have made such an affidavit if she were merely the owner of the naked legal title to said property. The property was conveyed to her by her husband for the express purpose of qualifying her to act as such bondsman. Can it now be successfully contended by the parties to said deed that Mrs. Robinson took only a naked legal title to said real property? In order to so hold, it would be necessary to disregard the uncontroverted evidence, not only of said parties, but of all witnesses who testified regarding said transaction.

In Fulkerson v. Stiles, supra, community real property had been taken in the name of the wife, against whom the defendant held a judgment which he claimed became a lien upon said real property. In an action by the husband to quiet his title to said real property, both the husband and the wife testified that, in taking title to said real property in the name of the wife, there was no intention to make a gift thereof to the wife, but it was done merely for the purpose of pleasing the wife. There was no evidence to the contrary, and the court held that no title passed to the wife by such conveyance. Another case relied upon by appellants is Fanning v. Green, 156 Cal. 279, 104 P. 308. In that case the controversy was between the surviving husband and the heirs of the deceased wife over certain real property which stood in the wife's name at the time of her death. The court held that, while the intent that the property should become the separate property of the wife might, "and possibly must, be inferred where there is no other evidence than that showing the mere direction by the husband [that the deed be made in the wife's name], it may also be shown not to have existed by any competent evidence. In the present case the evidence is held sufficient to sustain the finding that the husband did not intend to make a gift to his wife." Other cases are cited and relied upon by appellants. In a number of them the facts show that, where property is paid for by one person and the title is taken in the name of another, the latter takes but the naked legal title, and he has not such an interest in said property to which judgment against him can attach. It is manifest that none of these cases reach the exact point involved in the present action.

In none of these cases, nor in any others to which our attention has been called, or which we have been able to discover, has it been held, where the express intent of the parties to a deed to real property was to invest the grantee with an absolute title in fee to the property conveyed, that said grantee does not hold said title absolutely for all purposes, and that he does not have such an interest in said real property to which a judgment against said grantee would attach. We confess we have not been able to find any authority directly holding that an interest in real property, such as that acquired by Mrs. Robinson under the deed from her husband, is subject to the lien of a judgment rendered against the grantee named in said deed. But it seems illogical and contrary to well established principles of law to hold, when the absolute legal title to real property is voluntarily transferred by the owner thereof to another, that the grantor can complain of the results which naturally flow from his voluntary act.

It is suggested by appellants that the agreement of the parties, that the deed from Robinson to his wife was not to be recorded, is strong proof that Robinson did not intend to make a deed to the property to his wife. Just what this agreement might imply, standing by itself, is not necessary for us at this time to determine, as the testimony of Robinson himself is that the reason that he did not want the deed recorded was that he knew of the judgment against his wife and did not wish to become responsible for it. He no doubt realized, at the time he planned to execute and deliver the deed to his wife, that he was thereby vesting title in her to said property to which the respondent's judgment lien would attach. Under these circumstances, we hardly think that the agreement between Robinson and his wife that the deed should not be recorded is entitled to any great consideration.

A further contention is made by appellants that, if the property was not conveyed to Mrs. Robinson in trust and thereby she acquired merely a naked legal interest therein, the evidence shows that it was conveyed to her as security, and for the purpose of indemnifying her against any loss that she might sustain by reason of her becoming a surety on her husband's bail bond. A complete answer to this contention is that there is not a scintilla of evidence to support this contention. Nothing was said by any of the parties at any time about indemnifying Mrs. Robinson against any loss she might incur as a bondsman on said bond, but, on the other hand, the evidence is clear, convincing, and uncontroverted that the sole purpose Robinson had in mind in executing and delivering the deed to his wife was to invest her with the title to property of a sufficient value that she would be able to qualify as one of his bondsmen.

We can see no escape from the conclusion that respondent's judgment against Mrs. Robinson attached to and became a lien upon the real property conveyed to her by her husband by the deed of date October 19, 1923.

The present action is therefore maintainable, and the judgment rendered therein in favor of the respondent should be and is hereby affirmed.

We concur: SHENK, J.; RICHARDS, J.; SEAWELL, J.; LANGDON, J.

PRESTON, J. (dissenting). I respectfully dissent from the views announced by Mr. Justice CURTIS in the above cause. The undisputed facts disclosed by the findings are that the deed in question was made by Robinson to his wife solely to qualify her as a bondsman upon the bail bond required of him in the federal court. The understanding was that, when liability ceased on said bond, the property was to be reconveyed. No consideration other than this called the transaction into being.

The opinion holds that, inasmuch as the wife was required to take an oath that she was worth the amount of the bail over and above all her just debts and liabilities and property exempt from execution, she of necessity took the whole beneficial interest in the property under this deed, and the husband must have so intended it.

But no contention is made that the transaction was anything other than as found by the court, nor that any rule of public policy condemned such an arrangement, nor that any rule of estoppel would prevent the husband from demanding the return of said property upon the cessation of liability upon said undertaking. This being true, no reason appears for holding that the wife received anything more than a qualified estate subject to defeat upon the release of her liability upon the bond. It should also be here noted that, within two days after making this deed to her, her liability on this undertaking did cease; the defendant Shannon being substituted for her thereon. The said husband and wife conveyed the property covered by said deed to him to secure him for the assumption of said liability. The effect of this transaction has been noted in the opinion.

Whatever estate the wife may have received, if any, under this deed, it was, when she was released from said liability, divested out of her. The release from liability left her with only the bare, naked, legal title. The principles of law controlling here are well understood and everywhere recognized. "* * * The judgment * * * becomes a lien upon all the real property of the judgment debtor, * * * owned by him at the time, or which he may afterwards, and before the lien expires, acquire. The lien continues for five years. * * *" Code Civ. Proc. § 674.

"The law is well settled that the lien of a judgment does not attach to a naked title, but only to the judgment debtor's interest in the real estate; and if he has no interest, though possessing the naked title, then no lien attaches." Iknoian v. Winter (Cal. App.) 270 P. 999. See, also, Riverdale Min. Co. v. Wicks, 14 Cal. App. 526, 112 P. 896; Nat. Bank of Pacific v. W. P. R. R., 157 Cal. 573, 108 P. 676, 27 L. R. A. (N. S.) 987, 21 Ann. Cas. 1391.

"The interest which the lien of judgment affects is the actual interest which the debtor has in the property, and a court of equity will always permit the real owner to show that the apparent ownership of another is or was not real, and, when the judgment debtor has no other interest except the naked legal title, the lien of judgment does not attach." Iknoian v. Winter, supra, citing Freeman on Judgments (4th Ed.) § 357, and Black on Judgments (2d Ed.) §§ 420, 421.

This principle has been expressed in various ways by the courts. In Eagle v. McKown (W. Va.) 142 S. E. 65, 67, the court says: "Where statute enactments do not interfere, a judgment creditor can acquire no better right to the estate of the debtor than the debtor himself had when the judgment was recovered; and his lien will be limited to the actual interest of the judgment debtor in the property."

Again: "The lien of a judgment is subject to prior liens, and will not prevail over prior equitable claims on the same property. It is subject to every equity which existed against the land in the hands of the judgment debtor at the time of the rendition of the judgment, and courts of equity will protect the equitable rights of third persons against the legal lien, and will limit such lien to the actual interest which the judgment debtor has in the estate." 15 R. C. L. p. 798, § 255.

In Knaak v. Brown, 115 Neb. 268, 212 N. W. 434, 51 A. L. R. 242, it is said: "Indeed, this bank, by the filing of its transcript, obtained a lien. But its lien attached only to the actual interests of the judgment debtor, Van Valin, in the mortgaged premises, and was subject to all existing equities, whether of record or not. Judgment lien merely conferred the right to levy upon the property in litigation here to the exclusion of all other adverse interests subject to the judgment. [Citing cases.] 'A judgment lien is, in equity, but a charge on the title held by the defendant when the lien attaches, or which is subsequently acquired. It can only hold the legal estate subject to the equity. "It is well settled that a judgment lien on the land of the debtor is subject to every equity which existed against the debtor at the rendition of the judgment; and courts of equity will always limit the lien to the actual interest of the judgment debtor." * * * Thus, if through an innocent mistake the holder of a trust deed has released it as to more of the land than was intended, the lien of an intervening judgment is subject to the equitable right to have the release reformed, notwithstanding a recital in it of full payment.' 2 Freeman, Judgm. (5th Ed.) p. 1997, § 950, and cases cited."

Again: "It is generally conceded that the lien of a judgment does not attach to land to which the judgment debtor has only a naked legal title, unaccompanied by any beneficial interest, the equitable and beneficial title being in another. A judgment lien attaches only to the interest which the debtor has in real estate, and if he has no actual interest, though possessing the legal title, then no lien attaches." 15 R. C. L. § 270, pp. 807, 808. See the same quotation in 117 Am. St. Rep. 782.

Still more to the point and controlling in this case is the language found in Hunter v. Citizens' Savings, etc., Co., 157 Iowa, 171, 138 N. W. 476, Ann. Cas. 1915C, pp. 1019, 1020, as follows: "But a judgment lien has no effect to create any property right in the judgment creditor. It does not attach to the land as distinct from the title held or obtained by the debtor. His lien simply gives him a prior right as against a general creditor to enforce his claim by levy upon and sale of the debtor's legal or equitable estate in the land, but he can not seize, sell, or acquire any greater interest than is owned by the debtor himself. If there be any equities, limitations, or conditions attaching to the debtor's title which would defeat it in the hands of the debtor himself, it would be subject to the same infirmities and liabilities in the hands of the purchaser under such levy. Even if the debtor has some real or apparent interest in land to which the lien is attached, yet if his title has been so qualified in the instrument creating it that it may be defeated or divested by a power intrusted to another, and it is in fact thereafter so defeated or divested, the lien falls with it, and the creditor can not pursue the property in the hands of a third person who has acquired it through the exercise of that power. This is not only the reasonable rule, but is we think sustained by all the authorities. The thought will perhaps be more clear if we keep in mind the fact that a judgment lien does not attach to the land, but to the judgment debtor's interest in it, and, if that interest be subject to any infirmity or condition by reason of which it is eliminated or ceases to exist, the lien attaching thereto ceases with it. (Beaver v. Ross, 140 Iowa, 154, 118 N. W. 287, 17 Ann. Cas. 640, 20 L. R. A. [N. S.] 65; Thomas v. Kennedy, 24 Iowa, 405, 95 Am. Dec. 740; Bucknell v. Deering, 99 Iowa, 548, 68 N. W. 825; Holden v. Garrett, 23 Kan. 98; Shipe v. Repass, [172] 28 Grat. [Va.] 715 [716]; Sinclair v. Sinclair, 79 Va. 40; Snyder v. Martin, 17 W. Va. 276, 41 Am. Rep. 670; Scudder v. Voorhis, 5 Sandf. [7 N. Y. Super. Ct. (N. Y.)] 271.) Applying this principle, the New York court in Moore v. Pitts, 53 N. Y. 86, where a lien was sought to be enforced against one Hall, says: 'It is obvious that the lien of Gilman's judgment could only attach to such estate as Hall had in the premises. If that estate was subject to be divested by the breach of any condition subsequent, any such breach that would divest the estate would of necessity destroy the lien.' See, also, Ackerman v. Gorton, 67 N. Y. 63; Rose v. Hatch, 125 N. Y. 427, 26 N. E. 467; Leeds v. Wakefield, 10 Gray (Mass.) 514; Smyth v. Anderson, 31 Ohio St. 144; Baker v. Copenbarger, 15 Ill. 103, 58 Am. Dec. 600; Wetmore v. Midmer, 21 N. J. Eq. 242; Morse v. Hackensack Sav. Bank, 47 N. J. Eq. 279, 20 A. 961, 12 L. R. A. 62; Mayo v. Merritt, 107 Mass. 505."

Under the doctrine of these cases, and particularly under the doctrine last above cited, whatever beneficial interest the wife may have received under this deed was subject to divestment upon her release from liability on said undertaking. This liability admittedly ceased before this action was begun; therefore any beneficial estate she may have held fell upon the happening of that event, and with it fell the lien, if any ever existed, of the judgment in question. It is therefore my view that the judgment of the court below should be reversed.

206 Cal. 424

BENNETT v. BROWN et al. (L. A. 9536.)

Supreme Court of California. Feb. 4, 1929.

1. Divorce 🔑275(1)—Evidence required finding that defendant receiving husband's property in son's name, knowingly aided husband in defrauding wife.

Evidence *held* to require finding that defendant, who received conveyance of husband's property in his son's name, received the property with full knowledge of intent on husband's part to defeat wife's recovery of alimony, and for purpose of aiding in that scheme.

2. Divorce 🔑275(1)—Neither husband, conveying property, nor father of grantee was entitled to equitable relief, where conveyance was for express purpose of defrauding wife.

In suit by husband to set aside conveyance of property transferred to defendant's son for purpose of defeating wife's recovery of alimony, neither party was entitled to any affirmative relief in equity, where original transaction was consummated by both parties for express purpose of defrauding wife, since parties came into equity with unclean hands.

3. Divorce 🔑275(1)—Denial of affirmative relief to husband, conveying property in fraud of wife, and to father of grantee, held not to prejudice wife, notwithstanding her previous quitclaim deed.

Denial, under doctrine of unclean hands, of affirmative relief to husband, conveying property for purpose of defeating rights of wife to alimony, and to defendant, taking title in his son's name with knowledge of husband's purpose, *held* not to extend to wife, or prejudice her right to have her claims to the property adjudicated in the light of the fraud, notwithstanding quitclaim deed executed by her before fraud was fully discovered.

Department 1.

Appeal from Superior Court, Los Angeles County; F. C. Valentine, Judge.

Action by Walton L. Bennett against Arthur J. Brown and Robert A. Brown, in which the two defendants first named interposed a cross-complaint, joining Sarah E. Bennett as defendant. From the judgment, plaintiff and defendant last named appeal. Reversed, with directions.

Goodwin J. Knight, of Los Angeles, for appellant Sarah E. Bennett.

James E. Fenton and Charles J. Kelly, both of Los Angeles, for appellant Walton L. Bennett.

Frank G. Tyrrell and C. W. Stahl, both of Los Angeles, for respondents.

PRESTON, J. The judgment in this cause is reversed, with directions to the court below to deny all relief on all issues between the plaintiff and the defendants, but without prejudice to the rights of the cross-defendant Sarah E. Bennett, who alone is entitled to have her costs of appeal herein as against the respondents.

This decision is made, and this direction to the court below given, because the record shows without substantial conflict that both plaintiff, Walton L. Bennett, and respondent Robert A. Brown have entered a court of equity with unclean hands asking for aid. Arthur J. Brown is the son of Robert A. Brown, who held a power of attorney from him, and all the transactions herein were made by the father so acting for the son; all acts upon the part of the son were imputable to the father, and reference will hereinafter be made in the main only to the father. Robert A. Brown had several money judgments of record against him, which fact doubtless explains the existence of these transactions in the name of the son. The truth of the observation as to unclean hands will abundantly appear from the following:

Walton L. Bennett was at all times herein, and for some years prior thereto, living in discordant relationship with his wife, Sarah E. Bennett. A state of separation and of armed neutrality was in existence at the period herein considered. Bennett had considerable separate property, a part of which was the residence and contents therein, also certain personalty within the curtilage, all the subject of this action. The wife was in the home, and refused to be ejected therefrom. She was defending her possessions against all comers, and was breathing fumes of anathemas upon the head of her husband. Bennett sought to dispose of said property so as not to lose the right thereto and to a reconveyance thereof, when he should have rid himself by divorce of the burden of said wife.

In the early part of 1921 he fell in with Robert A. Brown, a real estate broker, who had offices in connection with those of his attorney, and who immediately inclined an ear to his voice, and, with the sole intention of defeating the claims of said wife for alimony and maintenance, concocted the scheme of having Bennett deed said residence to Arthur J. Brown, the son of Robert A. Brown, and convey to him the household and kitchen contents of said building, which was accomplished by a document, consisting of many pages of items, which included everything in said home, even the crumb tray and the trusty rolling pin. This scheme was carried out on March 24, 1921. Arthur J. Brown in turn deeded to Bennett, through his father, as attorney in fact, a tract of 160 acres of Texas land of unknown and extremely uncertain value—a tract of land to which the title was in doubt, and likewise a tract which none of the parties had ever seen. Bennett also passed a check to Brown for $100, which he says was a camouflage, and the proceeds thereof were returned to him later.

Bennett, with the knowledge and connivance of the elder Brown, then journeyed secretly into Nevada, there to establish a residence and stay the period of time required to sue said Sarah E. Bennett, and thus to rid himself of the marriage tie and the concomitant obligations thereof. He reached Reno, Nev., in a few days after execution of said conveyances, from which point he conducted a continued correspondence with the senior Brown, under the name of Livingston. Brown, in writing, aided and abetted him in every way in concealing himself from his said wife and in effectuating his purpose of removal. Brown gave him repeated bulletins upon the sayings and doings of his wife, who, until ousted by court proceedings, remained in the home.

The senior Brown, in the name of his said son, brought suit against Sarah E. Bennett for possession of the property, including the items of personalty aforesaid. The expenses of this litigation were paid by an attorney on behalf of Bennett. Finally, in August, 1921, Mrs. Bennett quitclaimed to Arthur J. Brown for $350, $250 of which was paid by Bennett himself, her interest in said property. Brown thus prevailed, and the wife was ousted. The elder Brown then went into possession of the property. The correspondence between Bennett and Brown continued, and therein Brown guardedly, but nevertheless effectually, admitted a trust relationship in said property in favor of Bennett. In fact, after the quitclaim deed was executed by the wife, on one or two occasions he wrote that he had caused to be executed the necessary papers for a reconveyance of both the real and personal property to Bennett. After securing possession of said property, Brown continued in his efforts to keep Bennett's whereabouts concealed from the wife, and offered many suggestions as to the method of so doing.

In the fullness of time, to wit, in September, 1922, Bennett brought his divorce action in Reno to trial, testifying that he owned no property; that no one held the property here in controversy or any other property in trust for him, and that he had sold the property involved to the junior Brown. After the purpose of his trip to Nevada had been wrought, Bennett returned to Los Angeles to gather together the broken fragments of his former estate. He brought suit against the Browns, claiming that the trade made with them was a sham to defeat the wife. The Browns countered, claiming full title in themselves and asking affirmative relief by cross-complaint to this effect. In the meantime, the wife, suspecting perfidy on the part of both her husband and the Browns, had brought a suit against them—against the husband for desertion and separate maintenance, and against the Browns to upset the transfer here involved. Later, by amended cross-complaint of the Browns, she was made a party defendant to the present action, and showed not only her claims as a deserted wife, but also that she was a judgment creditor of her husband.

[1, 2] The court, by its findings, exonerated the Browns, and confirmed the title in them, denying relief in toto to either Bennett or his said wife. To the extent that the findings exonerate Brown, Sr., from being particeps criminis in the scheme to defraud the wife, and to the extent that they hold that Brown did not with full knowledge receive the property to aid in that scheme, said findings are without substantial support in the evidence. We need not pause to discuss the fact that the evidence is in conflict as to the extent of the interest Bennett intended to convey to Brown in said property. It is sufficient for our purposes to know that these parties were acting in concert with respect to the transaction to defraud Sarah E. Bennett. This being admitted, the law will lend help to neither party in a suit involving said transaction, but will leave the parties where it finds them.

[3] Under the above recital of facts, no authorities need be amassed to show that equity will not afford either party relief. As to Sarah E. Bennett, who has appealed, attacking the transaction as fraudulent, the situation is different. She is entitled to have her claims adjudicated in the light of this palpable fraud against her. Her quitclaim deed, under these circumstances, may not be said by this court at least to foreclose her from relief upon her independent suit against the parties to this transaction or in the issues tendered by her in the present action.

Much more might be written in disposing of this cause. Counsel for appellant, omitting to recognize that we are not sitting as a trial court to resolve conflicting evidence, has amassed a brief of some 350 pages, dealing in a partisan way with the evidence. He fails wholly to see the fraud and perjury of his client. Respondents see these shortcomings of appellant, and, while observing the mote in appellant's eye, fail wholly to see the beam in their own.

The facts of this case stir deeply the conscience of a court of equity, and none of the parties should be heard in their petitions. There is, therefore, no alternative but to give the judgment first hereinabove announced.

We concur: CURTIS, J.; SEAWELL, J.

---

206 Cal. 436

BANK OF ITALY v. E. N. CADENASSO et al.

(S. F. 11861.)

Supreme Court of California. Feb. 6, 1929.

1. Appeal and error 🔑1199—Judgment, though void for trial judge's disqualification, cannot be attacked on motion, after affirmance by Supreme Court, for first time raising question of disqualification (Code Civ. Proc. § 170, subd. 1).

Judgment, though void for disqualification of trial judge, under Code Civ. Proc. § 170, subd. 1, cannot be attacked in Supreme Court by motion to set aside judgment after affirmance of judgment by Supreme Court, where no question of trial judge's disqualification was raised in trial court or in Supreme Court on appeal until after affirmance of judgment.

2. Appeal and error 🔑169, 671(1)—Appellate courts will not assume functions of equity or nisi prius courts and hear questions of law and fact not raised at trial nor presented by record on appeal.

Courts of appellate jurisdiction will not assume functions of courts of equity or nisi prius courts and hear and decide questions of law and fact which were neither raised in trial court nor presented to appellate court by record on appeal.

3. Judgment 🔑392—Judgment affirmed by Supreme Court is not void on its face for disqualification of trial judge, and party attacking invalidity must establish it before judgment will be deemed void.

Judgment affirmed by Supreme Court is not void on its face for disqualification of trial judge by reason of his owning stock in plaintiff bank, and hence party asserting invalidity of judgment must establish it before judgment will be deemed void.

4. Appeal and error 🔑1199—Every presumption favors validity of judgment sought to be set aside after affirmance by Supreme Court.

On motion to set aside judgment of superior court after affirmance by Supreme Court, every presumption must be indulged in favor of validity of judgment.

5. Judgment 🔑403—Equity courts offer adequate relief against void judgments by injunctive relief if necessary.

Courts of equity offer plain, speedy, and adequate relief against evil effects which may flow from void judgments by injunctive relief, if exigencies of situation so require.

6. Judgment ⚷385—**Motion to set aside judgment as void because of trial judge's disqualification should be brought in trial court and not appellate court (Code Civ. Proc. § 170, subd. 1).**

Motion to set aside judgment after affirmance by Supreme Court on ground that judgment was void because of disqualification of trial judge under Code Civ. Proc. § 170, subd. 1, should be brought in superior court where action was brought or in other court of like jurisdiction, and not in appellate court.

In Bank.

Action by the Bank of Italy against E. N. Cadenasso and another, copartners doing business under the firm name and style of E. N. Cadenasso, and another. Judgment of the superior court for plaintiff was affirmed by Department 1 of the Supreme Court. On motion by defendants to set aside the judgment. Motion denied.

See, also, 274 P. 536.

Frank J. Solinsky and Edward R. Solinsky, both of San Francisco, for appellants.

Louis Ferrari and J. J. Posner, both of San Francisco, for respondent.

SEAWELL, J. This motion is before us pursuant to a notice of motion given by appellants to respondent that appellants would move thereafter, on a day certain, to vacate and set aside the judgment of the superior court appealed from, and also the decision and order of Department 1 of this court affirming said judgment made and entered some twelve days prior to the date of said notice of motion to vacate and set aside as aforesaid. Said judgment appealed from was entered more than three years before this proceeding was initiated. The ground upon which the motion was noticed to be made and upon which it was subsequently made, was that the judgment of the lower court was void because of the disqualification of the judge who tried said cause and that the department decision and order of this court were accordingly void.

The disqualification of said trial judge is based upon affidavits, which are not disputed, wherein it is averred that during all the time he presided at the trial of said cause, including the entry of judgment therein, he was, and for a number of years prior thereto had been, the holder and owner of shares of the capital stock of respondent, Bank of Italy. It is insisted that said ownership of shares of stock of said bank brings him directly and squarely within the inhibitory clauses of section 170, subd. 1, Code of Civil Procedure, as interpreted by this court in City of Vallejo v. Superior Court, 199 Cal. 408, 249 P. 1084, Adams v. Minor, 121 Cal. 372, 53 P. 815, Hall v. Superior Court, 198 Cal. 373, 245 P. 814, Lindsay-Strathmore Irr. Dist. v. Superior Court, 182 Cal. 315, 187 P. 1056, and other cases. In City of Vallejo, supra, it is said that Adams v. Minor, supra, and other cited cases are conclusive on the question that a judge who is a stockholder in a bank which is a party to an action is an "interested" party within the meaning of section 170, Code of Civil Procedure, and is therefore disqualified from sitting or acting in said case. It is further held that whatever action, orders, or judgments have been made or entered by said judge during the existence of such disqualification are and continue to be void.

[1-4] Granting, without deciding, that the judgment herein assailed is void, it may not be attacked in this court in the proceeding which appellants have adopted. No question of disqualification of the trial judge was raised in the trial court or in this court upon appeal, or at all until after the affirmance of said judgment. While it is sometimes stated in general terms that a void judgment may be attacked anywhere, directly or collaterally, this does not mean that courts of appellate jurisdiction will assume the functions of courts of equity or nisi prius courts and hear and decide questions of law and fact which were neither raised in the trial court nor presented to the appellate court by the record on appeal. Counsel quotes authority to the effect that the affirmance of a void judgment upon appeal imparts no validity to the judgment, but is itself void by reason of the nullity of the judgment appealed from. Pioneer Land Co. v. Maddux, 109 Cal. 633, 42 P. 295, 50 Am. St. Rep. 67. All that the court meant to say is that the affirmance of a void judgment by this court does not bar the right of an aggrieved party to thereafter attack it on the ground that it is void. The judgment before us is not void upon its face. Every presumption of its validity must be indulged. It is therefore incumbent upon the party asserting its invalidity to establish it before said judgment will be deemed void. This done, every act which followed as an incident of said judgment, including the order of affirmance, falls with it.

It will not be contended that this court upon a rehearing will entertain a motion to vacate a judgment regular upon its face on the ground of the disqualification of the trial judge, where no such question was raised in the trial court and the record on appeal is absolutely silent on the subject.

[5, 6] Courts of equity offer plain, speedy, and adequate relief against the evil effects that may flow from void judgments. Such courts may grant injunctive relief if the exigencies of the situation would seem to so require. The proper forum for the determination of the issues sought to be raised by the

---

⚷For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

motion herein is the superior court, where the action was brought, or another court of like jurisdiction, and not an appellate court which performed its function within its jurisdiction by passing upon questions presented to it upon the appeal.

The direct method open to appellants is so thoroughly established as not to require a citation of authority to guide them.

Motion denied.

We concur: WASTE, C. J.; RICHARDS, J.; SHENK, J.; CURTIS, J.

---

206 Cal. 428

BANK OF ITALY v. E. N. CADENASSO et al.

(S. F. 11861.)

Supreme Court of California. Oct. 18, 1928.

Hearing in Bank Feb. 6, 1929.

1. Appeal and error 🔑1010(1)—Supreme Court will not disturb judgment appealed from if there is any substantial evidence in record sustaining findings of trial court.

If there is any substantial evidence in record on which findings of trial court may be sustained, Supreme Court will not disturb judgment appealed from.

2. Appeal and error 🔑873(2)—Points raised on motion to set aside judgment for disqualification of trial judge cannot be considered on appeal from judgment.

Points raised by motion to vacate and set aside judgment on ground that judge who tried cause was disqualified cannot be considered on appeal from judgment.

In Bank.

Appeal from Superior Court, City and County of San Francisco; T. I. Fitzpatrick, Judge.

Action for money had and received by the Bank of Italy against E. N. Cadenasso and another, copartners doing business under the firm name and style of E. N. Cadenasso, and another, in which defendants filed a cross-complaint. From a judgment for plaintiff, defendants appeal. Affirmed.

F. J. Solinsky and Edward R. Solinsky, both of San Francisco, for appellants.

Louis Ferrari and J. J. Posner, both of San Francisco, for respondent.

PER CURIAM. This cause is before us for a hearing in bank upon an order granting said hearing after decision by Department 1 of this court.

[1] We have given consideration to the points made by appellants in their original briefs and also in the briefs filed since said order granting a hearing in bank was made, and we are of the view that the findings of the trial court are supported by the evidence. The rule is that, if there is any substantial evidence in the record by which the findings of the trial court may be sustained, this court will not disturb the judgment appealed from.

[2] While appellants have moved to vacate and set aside the judgment herein upon the grounds that the judge who tried the cause was disqualified by reason of the matters set forth in said motion (Bank of Italy v. E. N. Cadenasso and Mario J. Cadenasso, copartners, etc., S. F. No. 11861, this day filed, 274 P. 534), we are not to permit any point made upon the presentation of said motion to enter into the consideration of this appeal, which was taken from the judgment.

The department decision, Curtis, J., which we hereby adopt as our decision upon hearing in bank, sufficiently covers the case as made in the court below. Said decision follows.[1]

Upon the grounds set forth in the foregoing opinion, the judgment is affirmed.

---

206 Cal. 389

SENEY v. PICKWICK STAGES, NORTHERN DIVISION, Inc., et al.★

(L. A. 8601.)

Supreme Court of California. Jan. 31, 1929.

Rehearing Denied Feb. 28, 1929.

1. Appeal and error 🔑1097(3)—Judgment 🔑586(1)—Doctrines of law of case and res judicata held inapplicable to actions involving same evidence, parties, and issues but different subject-matter.

Where same evidence was involved in two actions between same parties involving same issue of negligence, but subject-matter of actions was not the same, neither doctrine of law of case nor of res judicata was applicable.

2. Appeal and error 🔑1010(1)—Appellate court may not disturb findings of trial court based on sufficient evidence except as permitted by statute (Code Civ. Proc. § 956a, as added by St. 1927, p. 583).

Appellate court may not disturb findings of trial court based on sufficient evidence, except as power to do so may have been enlarged by Code Civ. Proc. § 956a, as added by St. 1927, p. 583.

3. Appeal and error 🔑989—Supreme Court, on appeal from judgment for defendant in action for negligence, was required only to determine whether evidence supported finding of no negligence by defendant.

On appeal from judgment for defendant in action for negligent injury, Supreme Court is required only to determine whether there was evidence before trial court sufficient to support finding that there was no negligence by defendant and that accident complained of was unavoidable.

---

[1] For opinion of Department 1, adopted herein, see 270 P. 931.

★Rehearing denied.

4. Courts 🔑91(2)—Conclusions by District Court of Appeal are not binding on Supreme Court after denial of petition for transfer to Supreme Court.

Conclusions of District Court of Appeal are not binding on Supreme Court after denial of petition for transfer to Supreme Court.

5. Appeal and error 🔑931(1)—Trial court's findings are entitled to benefit of all reasonable inferences in support thereof.

Findings of trial court are entitled to benefit of all reasonable inferences and presumptions in support thereof.

6. Appeal and error 🔑1072—Denial of new trial after judgment on findings for defendant of no negligence and unavoidable accident held prejudicial error, where Supreme Court could not conclude that evidence afforded any substantial basis for findings.

In action for damages for personal injuries, where Supreme Court was unable to conclude that evidence afforded any substantial basis for finding of want of negligence or that accident was unavoidable, trial court committed prejudicial error in denying plaintiff's motion for new trial after judgment on findings for defendant.

7. Appeal and error 🔑110, 870(6)—Order denying motion for new trial, though reviewable on appeal from judgment, is nonappealable.

While order denying motion for new trial is reviewable on appeal from judgment for defendant, order is nonappealable, and appeal therefrom must be dismissed.

In Bank.

Appeal from Superior Court, Los Angeles County; Ira F. Thompson, Judge.

Action by Hattie L. Seney against the Pickwick Stages, Northern Division, Inc., and others. Judgment for defendants, and plaintiff appeals. Reversed.

Superseding opinion in 268 P. 451.

See, also, 263 P. 299.

Edwin S. Earhart, of Los Angeles, for appellant.

Warren E. Libby, B. P. Gibbs, M. Tellefson, and Wm. A. Sherwin, all of Los Angeles, for respondent.

PER CURIAM. The appellant, with her husband and five months old child, was a passenger on an autostage operated by the respondent on its line between San Francisco and Portland. The stage overturned and was wrecked. The appellant's husband and child were killed, and appellant suffered severe injuries. Alleging that the accident was caused by the stage company in the negligent operation of the stage upon which the decedents and she were passengers, the appellant instituted two suits against the Pickwick Stages. One, a suit for damages for the death of her husband, was tried by the court without a jury, and resulted in a judgment in favor of the plaintiff herein. On appeal by the defendant, the judgment was affirmed by the District Court of Appeal in an opinion which fully states the facts. Seney v. Pickwick Stages, 82 Cal. App. 226, 232, 255 P. 279. A petition by the appellant to have the case heard in this court was denied.

In the second action, the one now here, appellant again alleging the negligence of the respondent in the operation of the stage, seeks damages for the wrongful death of her minor child, as well as damages arising out of the severe personal injuries sustained by her in the overturning of the stage. The respondent, answering, alleged, among other defenses, facts on which it contended that the injuries were caused by an unavoidable and inevitable accident. This action was brought on for trial after the trial of the first cause, but before the affirmance of the judgment on appeal. It was also tried by the court, another judge sitting, without a jury. With the exception of the evidence necessary to establish the amount of damages sustained by the plaintiff, the evidence in the second trial was identical with that in the first case—the parties stipulating that the entire record and transcript of the testimony introduced in the first case be introduced and considered in evidence on the trial of the second. The trial court found in favor of the respondent and against the appellant on the issue of negligence. It found that the overturning of the stage was the result of unavoidable accident, and that there was no negligence upon the part of the respondent, its servants, agents, or employees. As a consequence of these findings, judgment was entered for the stage company. The plaintiff appeals from the judgment and from an order denying her motion for a new trial.

The appeal presents a rather unusual situation. On the same evidence in two actions, between the same parties, and involving the same issue of negligence, the same court, but with different trial judges sitting, reached opposite conclusions.

[1-3] It is at once apparent that neither the doctrine of the law of the case, nor the doctrine of res adjudicata, are applicable on this appeal, for the reason that the subject-matter of the two actions was not the same. It is also obvious, considering the fundamental difference between the function of trial courts and of appellate courts, that the latter may not disturb the findings of the trial court based on sufficient evidence except as the power to do so may have been enlarged by the provisions of section 956a of the Code of Civil Procedure, enacted by the Legislature in 1927 (St. 1927, p. 583). For the reason that a finding of the trial court on the question of the amount of damages is deemed desirable upon a reversal of the judgment, we find it unnecessary to construe the power of this court under that section in the present case.

We deem it necessary only to determine whether there was evidence before the trial court sufficient to support the finding that there was no negligence on the part of the defendant and that the accident complained of was unavoidable. In other words, we are called upon to determine the propriety of the order denying the motion for a new trial. The question of contributory negligence on the part of the appellant is not involved. This identical evidence was thoroughly considered and reviewed on the appeal in the former case, and the court arrived at the conclusion that the doctrine of res ipsa loquitur applied to the situation presented, that it was not shown that the accident was unavoidable, and that "the evidence in this case absolutely establishes the negligence of the defendants, with or without the application of the doctrine of res ipsa loquitur." Seney v. Pickwick Stages, 82 Cal. App. 226, 232, 255 P. 279, 281.

[4-7] While the foregoing conclusions of the court on the appeal in the former case are not binding on the respondent on this appeal, nor are they binding on this court after denial of the petition for transfer to this court, we have examined the evidence anew and have concluded that said evidence establishes the negligence of the respondent as matter of law. Applying the rule that the finding of the trial court is entitled to the benefit of all reasonable inferences and presumptions in support thereof, we are still unable to conclude that the evidence affords any substantial basis for the finding of want of negligence on the part of the respondent or that the accident was unavoidable. Under these circumstances, the court committed prejudicial error in denying the motion for a new trial. While the order denying said motion is reveiwable on this appeal, said order is nonappealable, and the appeal therefrom is dismissed.

The judgment is reversed, and the cause is remanded to the trial court, with directions to take evidence as to the amount of damages to which the appellant is entitled and to render judgment accordingly.

---

206 Cal. 400

COACHELLA VALLEY COUNTY WATER DIST. v. STEVENS. (L. A. 8676.)★

Supreme Court of California. Dec. 31, 1928.

Rehearing Denied Feb. 28, 1929.

1. Waters and water courses ⟹197—Complaint by water district to restrain defendant from impeding natural flow of river held to state cause of action (St. 1913, p. 1059, § 12, subd. 6, as amended by St. 1923, p. 312).

Complaint by county water district, under St. 1913, p. 1059, § 12, subd. 6, as amended by St. 1923, p. 312, to restrain defendant from preventing, obstructing, or impeding natural flow of river, except as it may be necessary for reasonable uses and purposes on lands of defendant, *held* to state cause of action.

2. Statutes ⟹117(8)—Statutes authorizing water district to prosecute actions to protect rights held not unconstitutional, because titles did not specifically mention such power (St. 1913, p. 1059, § 12, subd. 6, as amended by St. 1923, p. 312).

St. 1913, p. 1059, § 12, subd. 6, as amended by St. 1923, p. 312, authorizing water district to prosecute actions to preserve and protect rights, *held* not unconstitutional, on ground that titles of enactments did not specifically mention subject of grant of power, since, when statute provides for organization and government of such public corporations, the power to sue and be sued need not be expressed in title, because such power is incidental to general purposes of act.

3. Parties ⟹10—One may sue for benefit of all landowners in water district to protect their rights (Code Civ. Proc. § 382).

Under Code Civ. Proc. § 382, one may sue for benefit of all landowners in water district to protect their rights.

4. Judgment ⟹677—Suit by water district to restrain defendant from impeding natural flow of river binds parties for whose benefit it is prosecuted (St. 1913, p. 1059, § 12, subd. 6, as amended by St. 1923, p. 312).

Suit by water district, under St. 1913, p. 1059, § 12, subd. 6, as amended by St. 1923, p. 312, to restrain defendant from preventing, obstructing, or impeding natural flow of river, is binding on parties for whose benefit it is prosecuted.

5. Waters and water courses ⟹197—Landowner in water district cannot defeat action against him for invasion of right common to all landowners, because costs of litigation are borne from fund made up of taxes, including his contribution (St. 1913, p. 1059, § 12, subd. 6, as amended by St. 1923, p. 312).

Landowner or taxpayer within water district cannot defeat or abate an action by water district under St. 1913, p. 1059, § 12, subd. 6, as amended by St. 1923, p. 312, to restrain him from preventing, obstructing, or impeding natural flow of river, in violation of a right common to all of landowners and water users in district, merely because costs of litigation are borne from fund made up of taxes, including his own contribution thereto.

Curtis, J., dissenting.

In Bank.

Appeal from Superior Court, Riverside County; G. R. Freeman, Judge.

Action to restrain the taking of water by the Coachella Valley County Water District against Prescott T. Stevens. From a judgment of dismissal, plaintiff appeals. Reversed.

★Rehearing denied.

Rehearing denied: CURTIS, J., dissenting. Superseding opinion in 266 P. 341.

H. L. Carnahan and J. M. Stevens, both of Los Angeles, and Thomas C. Yager, of Indio, for appellant.

W. G. Irving and Sarau & Thompson, all of Riverside, for respondent.

SHENK, J. This is an appeal from a judgment of dismissal, following an order sustaining a demurrer to the complaint without leave to amend. The action was brought to restrain the defendant, Stevens, from preventing, obstructing or impeding the natural flow of the Whitewater river in Riverside county, except as the same may be necessary for reasonable uses and purposes on the lands of said defendant.

It appears from the allegations of the complaint that the plaintiff is, and since January 16, 1918, has been, a county water district duly organized and existing under the provisions of an act called in these proceedings the County Water District Act (Stats. 1913, p. 1049); that from time immemorial there has existed a natural depression or valley in the county of Riverside, extending for a distance of approximately 60 miles southeasterly from the summit of San Gorgonio pass, which is about 2,500 feet in elevation, to the westerly shore of the Salton Sea, which is 250 feet below sea level; that within said pass, for a distance of about 16 miles southeasterly from said summit, said valley is narrow, and varies from 2 to 4 miles in width, and is bounded on the northerly side by San Gorgonio mountain, 11,000 feet high, and on the southerly side by San Jacinto peak, more than 10,000 feet high; that thence southerly said valley widens, and is bounded on the northeasterly side by a chain of clay hills, and on the southwesterly side by a spur of high, rocky, barren mountains, constituting the foothills of San Jacinto peak; that within said pass the grade of the valley is steep, and generally exceeds 80 feet per mile; that from the southeasterly end of said pass, for a distance of about 24 miles, the grade is about 40 feet per mile; that thence southeasterly from its westerly boundary, which is about 50 feet above sea level, and for a distance of about 20 miles, said valley spreads into a broad and nearly level plain, commonly called Coachella valley or plain, sloping gently toward the Salton Sea; that the Whitewater river is a natural innavigable stream, flowing in a well-defined natural channel; that the stream rises in the southerly and easterly slopes of San Gorgonio mountain and other mountains adjacent thereto in the San Bernardino range, and proceeds along its course and over the land particularly described in the complaint and within the district; that regularly during the rainy season each year, and also at other times, large quantities of water fall as rain or snow upon the slopes of said mountains, within the watershed of said stream and its tributaries, and are carried thence down said stream without substantial loss to and below an underground dike existing across the channel of said stream, near the northerly boundary line of section 2, township 3 south, range 3 east, S. B. B. & M.; that said dike causes all water flowing thereto in said stream, or percolating thereto through the soil beneath, and adjacent to said stream, to rise, at and where said dike exists, and for a short distance above said dike, to within 15 feet of the surface of the ground and thereby forms a natural underground reservoir or basin above said dike, and from said reservoir said water flows over said dike to the lands below, forming a surface and also a vast underground body of water; that below said dike in the Coachella plain are lands riparian to the stream, other lands to which rights to said water have attached by appropriation, other lands benefited by the waters of said stream by percolation and subirrigation, and other lands supplied with water from wells tapping this underground supply of water; that not less than 1,400 inhabitants of said district, residing in the towns and villages of Indio, Coachella, Thermal, and Mecca, situated within said Coachella plain, require the use, and for more than 10 years prior to the commencement of the action have regularly and continuously required and used, for municipal, domestic, manufacturing, and other uses in said towns and villages, large quantities of water exceeding in amount 250,000 gallons per day; that the climate in said Coachella plain and throughout all that part of the remainder of said valley lying within the boundaries of said water district is arid, and that the average annual rainfall therein is less than 3 inches, substantially all of which is quickly evaporated from the surface of the soil on which it falls; that the soil lying within said plain and within the district is fertile, and with the application of water obtained from the subterranean supply readily responds with profitable crops of farm and garden products, and of cotton, grapes, dates, and of citrus and other fruits; that more than 13,000 acres of land within said plain have been reclaimed from its wild and arid state by the owners thereof and their tenants, and have been made productive and valuable by the use of said waters by means of irrigation, and that without sufficient water for irrigating the same said lands would be of little or no value; that the owners of said cultivated lands have likewise used waters from said subterranean supply for irrigation for more than 10 years, and that said source of water supply and the waters thereof in the quantities heretofore used are and will be necessary in order that said lands be productive; that any diminution in said underground water supply will cause great and irreparable injury and damage to each of the owners of land within said plain and to each of the inhabitants of said district.

It is further alleged that the defendant Stevens is and has been for more than 20 years the owner of lands above said dike, acquired by him or by his predecessors in interest from the United States government, and that no part of said lands is suitable for cultivation, and that no part of the water of said stream is necessary for irrigating the same or any part thereof, and that the only beneficial use that has or can reasonably be made of the waters of said stream on said lands or by said defendant is for the domestic uses and purposes of the occupants thereof, and that for said purposes a constant flow of one-fiftieth of a cubic inch per second is reasonably sufficient; that within three months prior to the commencement of the action the defendant entered upon the lands at and above said dike and over said natural reservoir, and without the consent of the plaintiff, or of any user of the waters of said stream below the lands of the defendant, and against the protest of the plaintiff and of said users, and the inhabitants of said district below said dike and natural reservoir, began to construct and will complete wells on the lands of the defendant and over and within said natural reservoir, and that the defendant intends thereby to pump or otherwise obtain all waters flowing in said stream or retained in said reservoir, and to construct dams and other works and ditches for the diversion of said waters above said dam, and by means of other works, ditches, pipe lines, and other conduits to take, divert, appropriate, and carry away from said stream, and from said natural reservoir, and from the lands below, all of the waters so impounded by said reservoir, to the amount of 60 cubic feet per second constant flow, or more, and by such means to spread and waste the waters so diverted upon other lands; that prior to the year 1922 the defendant Stevens and his predecessors in interest claimed and now claim the right to divert certain waters of said river above said reservoir, and the defendant Stevens is now threatening to proceed approximately 17,000 feet up the bed of said stream from said original point of diversion, and thereby take and remove said waters from the bed of the Whitewater river, and change the natural course thereof, and diminish the flow thereof to the said reservoir and the lands below. It is further alleged that none of the waters of said river, if taken and spread upon or otherwise used by the defendants on their lands, will return to said river or to the subterranean channels thereof running to the Coachella plain, and that by the threatened acts of the defendants all of the owners of land and users of water in said plain will be wrongfully deprived of the use of the waters of said river.

[1] In the foregoing outline of the allegations of the complaint enough has been stated to show that the controversy is not one solely between an upper riparian owner and lower riparian owners and appropriators, as contended by the defendant, but is one affecting all of the users of the waters of said river below the natural reservoir, whether such users be landowners riparian to the river, or be appropriators under the laws of the state, or be owners and operators of wells constructed on the lands overlying the subterranean and percolating waters away from the river proper, or otherwise be users of the waters from the river for irrigation, domestic or other purposes. In other words, under the allegations of the complaint, this litigation affects the rights of every landowner and every inhabitant of the district using the waters of the river, including the subterranean flow thereof, and in these classes of persons are included all of the persons residing in or owning land in the Coachella plain. Under these circumstances the complaint sets forth an alleged grievance against the defendant, which is and should be cognizable in a court of justice.

The defendant Stevens filed a demurrer to the complaint, under which it was claimed in the trial court and it is now insisted (1) that the plaintiff has not legal capacity to sue; (2) that the complaint does not state a cause of action; and (3) that there is a defect or misjoinder of parties plaintiff.

From what has been hereinbefore stated with reference to the allegations of the complaint, it is clear that sufficient has been set forth therein to constitute a cause of action. The second ground of objection to the complaint is therefore found to be without merit. The defendant Stevens concedes that "there is no question that each individual riparian owner, or owner of land overlying the alleged subterranean water body, and each appropriator can bring an action in his individual name alone to protect his indivdual and several right," and it is not contended by him that the facts alleged in the complaint are insufficient to constitute a cause of action on behalf of each individual owner and user of water. Notwithstanding the foregoing concession of counsel for said defendant, the allegations of the complaint have been referred to somewhat at length, for the purpose of disclosing the general situation of water users in the Coachella plain and the bearing which that general situation has upon the main point of said defendant that the plaintiff has not the legal capacity to sue. In this connection it is claimed that it is not shown that there are any lands or other property rights owned by the district which will be injured by the alleged threatened acts of the defendant, and that therefore the defendant is not being sued by the real party or parties in interest. It must be conceded that there is an absence in the complaint of any allegation showing that title to any land or other property is held by the district as such; consequently the authority to maintain the action must appear in the act under which the district was organized, or under that act as supplemented by other statutes bearing on the subject. Otherwise, it has no legal capacity to maintain the action.

[2] That the district was organized in all respects as provided by the act of 1913 (Stats. 1913, p. 1049) following a favorable vote of the electors residing in the territory included within the district, is not questioned. The act is entitled: "An act to provide for the incorporation and organization and management of county water districts, and to provide for the acquisition of water rights or construction thereby of waterworks and for the acquisition of all property necessary therefor, and also to provide for the distribution and sale of water by said districts."

Section 1 of the act provides that "a county water district may be organized and incorporated and managed as herein expressly provided and may exercise the powers herein expressly granted or necessarily implied." Section 12 enumerates the powers of the district. Subdivision 2 of that section provides that the district shall have power "to sue and be sued, except as otherwise provided herein or by law, in all actions and proceedings in all courts and tribunals of competent jurisdiction." Subdivision 6 of that section as originally enacted provided that the district should have power "to store water for the benefit of the district, and to conserve water for future use and to appropriate, acquire and preserve water and water rights and for this purpose to sue, intervene and compromise, in the name of the district, and assume the costs of litigation involving the ownership of waters or water rights within the district and those used and useful for the purposes of the district or of any of the lands situated therein." In 1923 said section 12 was amended. Stats. 1923, p. 312. By the amendment, subdivision 6 was re-enacted in substantially the original form, except that the following was added to the same subdivision, relating to the powers of the district: "To commence, maintain, intervene in, defend and compromise actions and proceedings to prevent interference with or diminution of the natural flow of any stream or natural subterranean supply of waters used or useful for any purpose of the district or a common benefit to the lands within the district or its inhabitants; and to commence, maintain and defend actions and proceedings to prevent any such interference with the aforesaid waters as may endanger the inhabitants or lands of the district."

The present action was commenced on July 22, 1924. At that time the amendment of 1923 was in effect, and it is not contended that the language of the amendment, taken alone, is in any way insufficient to authorize the district to commence and prosecute this action, and it may not well be so contended, for it would be difficult to find words contemplating more precisely the action sought to be authorized in the name of the district, or more direct in its application to the facts alleged in the present complaint.

But it is insisted that the original act and the amendment of 1923 are unconstitutional, in so far as those enactments purport to authorize the district to prosecute such an action as the present one, for the reason that the titles of the enactments did not specifically mention the subject of the grant of power to sue on behalf of the landowners and water users in the district. The title of the original act has been quoted. The title of the amendatory statute was made to read: "An act to amend sections, twelve, fifteen, twenty-one and twenty-two of an act entitled 'An act [here the title of the original act is repeated],' approved June 10, 1913, as amended." Certain sections of the original act were amended in 1915 (Stats. 1915, p. 26), but in no respects affecting the questions involved herein.

It is urged that there is no suggestion in the title that any subject other than the acquisition of water and water rights, and the distribution and sale of water so acquired is to be dealt with in the body of the act. The case of In re Werner, 129 Cal. 567, 62 P. 97, is relied upon as directly in point. That case involved the validity of a commitment for the alleged violation of an ordinance of the North Pasadena sewer district. The district was organized under an Act of March 31, 1891 (St. 1891, p. 223), entitled "An act to provide for the formation, government, operation and dissolution of sanitary districts in any part of the state, for the construction of sewers and other sanitary purposes," etc. In 1895 (St. 1895, p. 85) the title was amended by adding "and for empowering sanitary boards to provide in other respects for the good order and welfare of sanitary districts." Section 2 of the amendatory act amended section 5 of the act, purporting to empower the board to determine the qualifications of persons authorized to sell liquors at retail, and that no license to keep a saloon or sell liquors at retail should be operative unless approved by the sanitary board. Thereafter the board passed an ordinance making it unlawful for any person to keep a saloon or sell liquors at retail within the district, without having procured a license therefor approved by the sanitary board. It was held that there was "nothing in the title of the act under consideration. even as attempted to be amended, which in the remotest degree refers to the question of regulating the sale of liquors or prescribing the qualifications of persons dealing in the same," and that a "sanitary district, no more than an irrigation district, or a reclamation district, or a drainage district, possesses police powers properly belonging to cities and municipal bodies exercising local governmental functions. Such districts are created for the purpose generally of some special local improvement, and should exercise only such powers as may be conferred upon them by the Legislature in the line of the object of their creation."

In the present case we think it indisputable that the power conferred on a county water district to sue and be sued with respect to the preservation and conservation of the sources of water supply used and usable for the lands and inhabitants within the district is directly in line with the objects of the creation of the district and germane to the purposes for which it was organized. The power to sue and be sued has been conferred upon numerous public corporations of this character and the conferring of such power without specific mention thereof in the title of the acts has not, so far as we have discovered, ever been successfully brought into question. For example, the original Wright Irrigation Act was enacted 42 years ago and was entitled: "An act to provide for the organization and government of irrigation districts, and to provide for the acquisition of water and other property, and for the distribution of water thereby for irrigation purposes." Stats. 1887, p. 29. In section 14 thereof the board of directors was authorized "to institute and maintain any and all actions and proceedings, suits at law or in equity, necessary or proper in order to fully carry out the provisions of this act, or to enforce, maintain, protect, or preserve any and all rights, privileges, and immunities created by this act or acquired in pursuance thereof. And in all courts, actions, suits, or proceedings, the said Board may sue, appear, and defend, in person or by attorneys, and in the name of such irrigation district." Superseding the original act came the Bridgeford Act in 1897 (Stats. 1897, p. 254), with a title no more comprehensive than the original act, so far as the power to sue was concerned, and in section 15 thereof the provisions of section 14 of the Wright Act were re-enacted.

Numerous other examples could be cited. It is sufficient to say that, when the statute provides for the organization and government of such public corporations, the power to sue and be sued need not be expressed in the title, for the reason that such power is incidental to the general purposes of the act. See Islais Creek Reclamation District v. All Persons, 200 Cal. 277, 252 P. 1043; Robinson v. Kerrigan, 151 Cal. 40, 50, 90 P. 129 (121 Am. St. Rep. 90, 12 Ann. Cas. 829). It is but natural to assume that, when the creation of such a corporation is provided for and the general purpose is expressed in the title, the corporate body should possess the right to have recourse to the courts for the protection of its rights and the redress of wrongs committed in violation of those rights. We therefore conclude that the title of the original County Water District Act and the title of the amending act were fully sufficient to enable the Legislature to incorporate in the body of such acts the provisions with reference to legal proceedings to preserve and protect the rights which in reality constitute one of the main reasons for the creation of the district.

Furthermore, we find no objection in providing in the body of the act without specific mention thereof in the title for the prosecution of proceedings to prevent interference with or diminution of the natural flow of any stream or subterranean water supply used or useful for any purpose of the district or a common benefit to the lands within the district or its inhabitants. One of the express purposes of the act is to conserve water for future use and to preserve water and water rights. The fact that the district as such does not assert title in itself to any of such rights is of no consequence, if it has the power to proceed in a representative capacity to protect the rights of all of the landowners and other users of water in the district. And this power the district unquestionably possesses not only under the clear provisions of the act but under well-recognized principles of equity jurisprudence.

[3, 4] Conceding properly, as the defendant does, that an action would lie on behalf of each landowner in the district to protect his individual right, it would necessarily follow that under section 382 of the Code of Civil Procedure one might sue for the benefit of all. See Miller v. Bay Cities Water Co., 157 Cal. 256, 288, 107 P. 115 [27 L. R. A. (N. S.) 772]. It is true that section 367 of the same code provides that every action must be prosecuted in the name of the real party in interest but the same section excepts actions prosecuted as provided in section 369 of the Code of Civil Procedure. The last section referred to provides that a person *expressly authorized by statute* may sue without joining with him the persons for whose benefit the action is prosecuted. The county water district act expressly authorizes the present action and any final determination therein would necessarily bind the parties for whose benefit it is prosecuted. Furthermore, no good reason has been suggested why, under the authority of the statute, the landowners and other water users in the district may not set up such a governmental agency to act in a representative capacity in their behalf. In our opinion they have done so and having done so they will necessarily be bound by the result of the litigation.

[5] It is further contended by the respondent that by the terms of the water district act and the action of the district in prosecuting this cause, he is deprived of the equal protection of the law. Particularly the point is that as a landowner in the district he is subject to taxes or assessments levied by the district a portion of the revenue from which is devoted to the costs of prosecuting this action against him. It is argued that the respondent is thus required to assist in furnishing funds to maintain and prosecute an action against himself in which, it is claimed, no right of the district as such is involved. Assuming, as we have held, that the district has legal authority to prosecute the action, the further answer to the contention would seem to be that a landowner or taxpayer within such a public corporation should not be permitted to defeat or abate an action against himself for an alleged invasion of a right common to all of the landowners and water users in the district merely because costs of the litigation are borne from a fund made up of taxes including his own contribution thereto. To hold that a public corporation might not sue one of its taxpayers and pay the costs of the litigation out of tax moneys would be novel indeed. Reduced to the lowest terms, such is the contention, and its statement suggests it own answer.

From the nature of the problems presented on this appeal it is obvious that we are not dealing with the merits of the controversy, but only holding that the complaint states a cause of action, and that the plaintiff has legal capacity to sue, and that there is no defect in parties plaintiff.

Sufficient has been said to dispose of the appeal without a discussion of other points argued by counsel.

The judgment is reversed.

We concur: WASTE, C. J.; RICHARDS, J.; PRESTON, J.; SEAWELL, J.

CURTIS, J. I dissent from the foregoing opinion. The act under which the appellant was organized (section 12, subd. 6), in so far as it purports to authorize the organization of a district with power "to commence, maintain, intervene in and compromise, in the name of the district, and to assume the costs of any action or proceeding involving or affecting the ownership or use of waters or water rights within the district, used or useful for any purpose of the district or a benefit to any land situated therein," is unconstitutional for the reason that the title of the act does not mention this grant of power. Section 12, subd. 6, of the act purporting to invest the district with this power was amended in 1923, and by said amendment it was sought to enlarge the powers of the district, given by the original act, to sue on behalf of the landowners and water users in the district. But in the amendatory act no mention or reference is made in its title to such power or to the enlarged powers which it was sought by said amendment to confer upon said district. The titles to each the original and amendatory act are set forth in the majority opinion, and I submit that no one reading them would have any notice or intimation that a water district of the character, which the appellant claims to be, and with the broad and unusual powers with which the enactments attempt to invest said district, was contemplated or provided for in the enactments themselves.

Furthermore, from a reading of the act and the amendment thereto, as a whole, conceding the legislation to be constitutional, it seems clear that its only purpose was to enable persons residing within a compact territory, who were the owners of water rights used therein, and who desired to act in unison in protecting them, to form themselves into a district for such purpose, but it was not the intention of the act as originally passed or as subsequently amended to set up a legal entity with power to settle, compromise and litigate the several rights of said owners between themselves. This is what is being attempted in the present action. The lower owners are complaining of those residing in the upper part of the district, and owning land therein, that the latter are taking or attempting to take water belonging to the former. I agree with the views of Mr. Justice Plummer, expressed by him in an opinion in this same action, when the same was before the District Court of Appeal, in which he said:

"It certainly cannot be held that it was the intent of the Legislature to create a legal entity which might play the part of a superplaintiff or a superdefendant in settlement of mere private rights, or that such a superplaintiff or superdefendant should exercise the prerogative of settling, compromising, or adjusting mere private disputes. The different provisions of the subdivision of the section referred to must all go back and relate to the purposes for which water districts may be created, and when we go back to the title of the act and read therefrom the purpose or purposes, we find that it is for the acquisition of water rights, for the construction of water works, and for the distribution and sale of water by said districts, which includes, of course, the management of the machinery of the corporation. There is not a single intimation in the title that the Legislature had in view the creation of a legal entity which might appear either as plaintiff or defendant in disputes over private water rights between private individuals, concerning water which might be used within the territorial limits of a water district in which the district, as a district, had neither ownership nor right of possession nor any legal right to the control thereof. If the contention of the appellant is correct, that the district is a legal entity authorized to appear in actions involving only private rights, the question is immediately presented, On which side should the district appear? Should it appear as plaintiff, or should it appear as defendant? If it has a right to advance the costs of such an action, should it finance the plaintiff's side of the case, or should it finance the defendant's? In any of these situations, if the district has a right to create itself a party, either as plaintiff or defendant, in the settlement of mere private rights, then the Legislature has created a corporation with power within itself to determine the extent of the private rights of individuals in and to property in which the corporation known as the district has absolutely no ownership or pecuniary interest whatever."

---

206 Cal. 366

SAWYER v. SOUTHERN CALIFORNIA GAS CO. (L. A. 8326.)★

Supreme Court of California. Jan. 31, 1929.

Rehearing Denied Feb. 28, 1929.

1. Gas 🔑16—Gas companies cannot turn on meters connecting with uncapped pipes without incurring liability for injuries, though ordered to turn on gas.

Gas company, though not under duty to inspect house pipes after service has been established, and consequently not liable for injuries from escape of gas through defective house pipes, may not necessarily turn on meters through which gas passes into uncapped house pipes without incurring liability for injury to person or property caused thereby, even though it has been ordered by occupant of building to turn on gas.

2. Gas 🔑17—Gas company must investigate to determine that pipes are closed when turning on meters.

Gas company is under duty to make some inquiry or investigation to satisfy itself that all openings in house pipes are closed at time it turns on its meters.

3. Gas 🔑17—Gas company's duty to furnish gas indiscriminately does not require turning on of meter without assurance that no injury will result.

Obligation imposed by law on gas company, as public utility, to serve all who apply to it for gas without discrimination, does not command it to install or turn on meters without some assurance that safety of lives and property of those residing in or coming on premises will not be imperiled thereby.

4. Gas 🔑17—Plumbing inspector's certificate approving plumbing, but not certifying pipes were capped, did not free gas company from duty of ascertaining that pipes were capped before turning on meters.

Certificate of plumbing inspector approving plumbing, but not purporting to certify that all openings or pipes were capped, *held* not sufficient to free gas company from duty to make reasonably certain that all pipes were capped before turning on its meters, where it could be reasonably assumed that gas company knew of inspector's custom to leave one pipe uncapped to test plumbing and that such pipe was not capped by inspector.

5. Gas 🔑20(4)—Gas company's negligence in turning on meter connected with uncapped pipe injuring customer in store may raise question for jury.

In action for injuries to customer in store caused by explosion of gas which had escaped from uncapped pipe, question for jury may arise as to negligence of gas company which turns on meter connected with uncapped pipe.

6. Gas 🔑20(4)—Direction by owner or tenant to install meter connecting with uncapped pipe does not, as matter of law, relieve gas company from negligence causing explosion injuring third person.

Gas company is not, as matter of law, relieved of charge of negligence in installing meter connecting with uncapped house pipe, because owner or tenant of premises on which third person receives injuries by gas explosion has directed gas company to install meter.

7. Gas 🔑20(4)—That meter connecting with uncapped pipe, through which gas escaped, was turned on for curiosity or maliciously, held not shown as matter of law.

In action for injuries to customer on premises caused by explosion of gas escaping from uncapped pipe, evidence that meter might have been turned on inadvertently as result of confusion as to which of several meters served various shops, and that gas company had not prohibited patrons to turn on meter, did not show as matter of law that employé of another installing stove turned on meter from motives of curiosity or malicious desire to cause injuries.

8. Evidence 🔑21—Court may judicially notice gas company's custom of permitting others than own employés to turn on or shut meters.

In action for damages for personal injuries to customer in store caused by explosion of gas escaping from uncapped pipe, court may take judicial notice of customs of gas companies to permit their meters to be turned on and off by other persons than own employés as needs of patrons may demand.

9. Gas 🔑20(4)—Action for injuries by explosion of gas from uncapped pipe held for jury under evidence showing gas company could have determined danger when installing meter.

In action for personal injuries to customer in store caused by explosion of gas which escaped from uncapped pipe, evidence that gas company could have known that one of several meters for store on which plaintiff was injured had not been used for many months, and that leakage of gas through uncapped pipe could have been discovered by turning on meter for moment when it was set, and that accident might happen by act of third person in turning meter on, persented issue of fact for jury.

★Rehearing denied.

10. Gas ⚷20(2)—Evidence of feasibility of locking meter held relevant to gas company's liability for explosion by gas from uncapped pipe.

In action for injuries to customer in store caused by explosion of gas escaping from uncapped pipe, evidence as to feasibility of placing lock or other device on gas meter, to prevent its being turned on by others than gas company, was relevant to liability of company and should have been admitted.

In Bank.

Appeal from Superior Court, Los Angeles County; Charles Monroe, Judge.

Action by Fred H. Sawyer against the Southern California Gas Company. Judgment for defendant, and plaintiff appeals. Reversed.

Rehearing denied: WASTE, C. J., and SHENK and PRESTON, JJ., dissenting.

Superseding opinion in 261 P. 1025.

Earle M. Daniels and Julius V. Patrosso, both of Los Angeles, for appellant.

O'Melveny, Millikin & Tuller and Thomas J. Reynolds, all of Los Angeles, for respondent.

SEAWELL, J. Plaintiff, Fred H. Sawyer, appeals from a judgment of nonsuit entered in favor of defendant, Southern California Gas Company, in an action brought by him to recover damages for personal injuries sustained from an explosion of illuminating gas. Defendant is a public utility corporation supplying gas for fuel and illuminating purposes in the southern section of this state, including the city of Glendale, county of Los Angeles.

The explosion occurred on December 3, 1922, in a building containing four stores in said city of Glendale. One of the storerooms was occupied by a bakery, another by a meat market, the third by a confectionery and cigar store, and the fourth by an automobile accessories shop conducted by one Hooper, in connection with an automobile service and filling station maintained by him on adjoining premises. The building was completed during March, 1922, and before that time had been piped for gas. Four meters to register the amount of gas consumed by the respective tenants of the four stores had been ordered installed by the owner of the building in January, 1922, while it was being constructed, and were thereafter placed by defendant gas company in the bakery shop beneath the bakery display window at the front of said shop. The three meters serving the bakery, meat market, and cigar and confectionery store had been turned on to supply gas for appliances used in said stores. Hooper had occupied the room used by him as an accessories shop from the time the building had been completed. Said room contained no appliances requiring gas, and no gas had ever been conducted through the meter connecting with said room until the day of the explosion. No order to turn on said meter had ever been given to the defendant company, and said company had at no time directed or authorized anyone to turn it on.

On the day of the accident resulting in injuries to plaintiff, which was Sunday, a gas oven used by Fawkes, the baker, was removed, and a new gas oven, purchased by Fawkes from one Steen, was placed in the rear room of the bakery. Before the old stove was disconnected and moved, the meter supplying gas to the bakery was shut off. Fawkes testified that he himself turned off said gas meter soon after the arrival of Woodruff and Redfern, employés of Steen who had been sent to remove the old oven and install the new one. Said employés arrived soon after 9 o'clock in the morning. Fawkes testified that he knew at all times which was his own meter and that on said day he touched none of the four meters except his own. He further stated that he was in his shop throughout the day and that the only person who went near the meters on said day besides himself was Geisler, an employé of Steen. In some way the meter for the accessories shop was turned on, with the result that gas escaped into said shop through an uncapped house pipe leading from said meter to the accessories shop, ignited, and exploded about 4 o'clock in the afternoon, causing injuries to plaintiff, a customer, and the death of Selby T. Brengle, an employé of Hooper. The accessories shop meter, through which no gas had passed prior to the day of the accident, registered a flow of 4,500 cubic feet after the explosion. Plaintiff offered evidence proving that said pipe in the accessories shop was uncapped when defendant company installed the meter and had remained uncapped to the date of the explosion. The company made no inspection to detect the uncapped pipe when the meter was installed.

Not only was the bakery meter shut off and the accessories shop meter turned on, but there is evidence that the proprietor of the cigar and confectionery store came into the bakery and complained that the supply of gas in his premises had been cut off. Fawkes testified that he saw Geisler kneeling in front of the meters after he had shut off his own meter, and that he later told Geisler to turn on the meter for the cigar and confectionery store after complaint had been made of its having been turned off. Plaintiff herein brought a separate action against Steen, Woodruff, Redfern, and Geisler, which was consolidated for trial with the action herein. In said action against Steen et al., the court granted nonsuits in favor of Woodruff and Redfern, and the jury returned a verdict in favor of Steen and against Geisler for $10,000 damages. The judgment in said action, affirmed by the

---

⚷For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

District Court of Appeal, Sawyer v. Steen et al., 261 P. 1025, has now become final. In returning the verdict against Geisler the jury impliedly found that it was he who turned on the meter serving the accessories shop.

Plaintiff contends that the court erred in taking from the jury the case against defendant gas company for the reason that the evidence supports the conclusion that said company was negligent in failing to ascertain at the time it installed the meter whether or not the gas pipe was properly capped, and also in not guarding against the possibility of its meter being turned on by placing thereon a lock or other mechanical device. Defendant gas company contends that no duty rested upon it to inspect the pipes or to lock the meter at the time of installation, and asserts that in any event the proximate cause of the accident was not set in motion by any omission on its part in the respects urged, but that the intervening wrongful or negligent act of a third person who turned on the meter was the proximate cause of the explosion.

The meters were inclosed in the space beneath the bakery display window. They were accessible by means of a board swung on hinges, which served as a door. The installation of the meters consisted in connecting them with the gas mains of the company and the house pipes within the building, which were the property of the owner thereof, in such a manner that when the meter was turned on gas would pass from the main through the meter and into the house pipes for consumption. A wrench or other similar tool was required to turn on the gas.

Respondent's position is that a gas company, even though it turns on a meter connecting with an uncapped house pipe pursuant to the direction of an occupant of a building, cannot be held liable for the escape and explosion of gas which may thereafter ensue, and hence it cannot be held liable where, as in the instant case, it has merely installed the meter pursuant to orders of the owner of the building, and left it turned off, and it has subsequently been turned on by some person having no connection with the gas company.

It is not in all cases a sufficient answer to a claim of liability against a gas company that the cause of the escape and explosion of gas is to be found in the condition of the house pipes, which the gas company does not own or control. There are well-considered cases of other jurisdictions to the effect that a gas company may be liable where it either directs its employés to turn on a gas meter, or authorizes the person applying for gas to turn it on, and an explosion occurs by reason of an escape of gas through a house pipe connected with the meter which was uncapped or severed at the time the meter was turned on. Christo v. Macon Gas Co., 18 Ga. App. 454, 89 S. E. 532; Schmeer v. Gas Light Co., 147 N. Y. 529, 42 N. E. 202, 30 L. R. A. 653; Hayes v. Cohoes Gas Light Co., 183 App. Div. 182, 170 N. Y. S. 312; Swayzee v. City of Augusta, 113 Kan. 658, 216 P. 265; Hebert v. Baton Rouge Electric Co., 150 La. 957, 91 So. 406, 25 A. L. R. 245.

[1, 2] While it is generally held that there is no duty on the part of a gas company to inspect house pipes after service has once been established, and consequently no liability for injuries resulting from an escape of gas through house pipes which become defective in the absence of notice of a leak in the house pipes or other special circumstances creating a duty to cut off its supply of gas, such as were present in Merrill v. Los Angeles Gas & Electric Co., 158 Cal. 499, 111 P. 534, 31 L. R. A. (N. S.) 559, 139 Am. St. Rep. 134, it does not follow that a gas company may turn on meters through which gas passes into uncapped house pipes without incurring liability for injuries to persons or property caused thereby, even though it has been ordered by an occupant of the building to turn on the gas supply. Gas companies, as manufacturers and distributors of a highly explosive and inflammable substance, possess technical knowledge of the dangers to be guarded against in handling or installing gas appliances for illuminating and commercial purposes far beyond the knowledge possessed by the average person. It would appear to be the duty of a gas company to make some inquiry or investigation to satisfy itself that all openings in the house pipes are closed at the time it turns on its meters. H. P. Courtney, foreman of the defendant gas company testified that when a meter is turned on a dial registers the slightest leakage. He further testified that it was customary upon turning on meters to watch this dial for five minutes to detect any leakage, and that if a leak was observed the meter was immediately turned off. It is not imposing an obligation of undue hardship upon gas companies to require them to make use of the means readily available to them to ascertain that all pipes connected with a meter to be turned on are capped.

[3, 4] The obligation imposed by law upon a gas company as a public utility to serve all who apply to it for gas without discrimination does not command it to install or turn on meters without some assurance that the safety of the lives and property of those residing in or coming upon the premises will not be imperiled thereby. Nor would a certificate such as that given by the plumbing inspector of the city of Glendale, in the instant case, free a gas company from what we conceive to be its duty to make reasonably certain that all pipes are capped before turning on its meters. Said plumbing inspector testified that meters were not to be set until his "O. K." had been given.

He further testified that it was customary to leave one pipe uncapped in order that he might test the strength of the piping, and that said uncapped pipe would not be capped by him. It is reasonable to assume that the gas company had knowledge of this custom. The certificate of the plumbing inspector approving the plumbing did not purport to certify that all openings or pipes were capped.

[5] Having concluded that a question for the jury may arise as to the negligence of a gas company which turns on a meter connected with an uncapped house pipe, we pass now to a consideration of the instant case, where the act of the gas company did not consist in turning on the meter, but in "setting" it upon the order of the owner of the building given before the completion thereof and the commencement of the tenancy of Hooper, and thus placing it within the power of others to turn on said meter and cause gas to flow into the premises of Hooper, who had not ordered a supply of gas.

[6] In the several cases from other jurisdictions cited above, except Hebert v. Baton Rouge Electric Co., 150 La. 957, 91 So. 406, 25 A. L. R. 245, as supporting the doctrine that a gas company may be held liable where it turns on a meter connecting with uncapped or severed house pipes upon the order of an occupant of the said building, gas passed into the apartment of a tenant who had not applied for it, through a pipe in his apartment which was uncapped or severed at the time the meter was turned on upon the application of the tenant of another apartment supplied by the same meter. In said cases the courts placed some emphasis on the circumstance that the person injured was not a tenant who had applied for gas, and stated that a gas company, before turning on gas or permitting it to be turned on for the benefit of a tenant in an apartment house who has applied for it, must use reasonable precautions to ascertain that gas will not escape through uncapped or broken pipes in the apartment of tenants who have not applied for it, implying that a distinction as to the liability of a gas company might be made between cases where the tenant requesting a supply of gas is injured and cases involving injuries to an occupant of another apartment. In the instant case the gas company had neither turned on the meter itself nor authorized any other person to turn it on. It had, however, upon the direction of Turner, the owner of the building, installed the meter, and thus placed it within the power of another to turn it on and cause gas to flow into the premises of a tenant who had not directed that the gas supply be turned on. While there might be grounds for contending that if Turner, who ordered the meter installed when the pipe was uncapped, had been injured, he would be guilty of contributory negligence barring recovery, a question we need not here decide, his negligence or the negligence of Hooper, the tenant, if there were any negligence on his part, would not affect plaintiff, a stranger, who went upon the premises as a customer of the service station maintained by Hooper. We are of the view that a gas company is not, as a matter of law, relieved of the charge of negligence in installing a meter connecting with an uncapped house pipe because the owner or tenant of the premises upon which a third person receives injuries has directed the gas company to install the meter.

In its brief respondent company sets forth at length a quotation from Hale v. Pacific Telephone & Telegraph Co., 42 Cal. App. 55, 183 P. 280, which we regard as containing a proper statement of the law as to the liability of a defendant for injuries which would not have ensued but for intervening acts of a third person. A portion of said quotation is as follows: "The rule, as we understand it, applicable to such cases, is that where the original negligence of a defendant is followed by an independent act of a third person which results in a direct injury to a plaintiff, the negligence of such defendant may, nevertheless, constitute the proximate cause thereof if, in the ordinary and natural course of events, the defendant should have known the intervening act was likely to happen; but if the intervening act constituting the immediate cause of the injury was one which it was not incumbent upon the defendant to have anticipated as reasonably likely to happen, then, since the chain of causation is broken, he owes no duty to the plaintiff to anticipate such further acts, and the original negligence cannot be said to be the proximate cause of the final injury."

Other cases to the same effect are Katz v. Helbing (Cal. Sup.) 271 P. 1062; Merrill v. Los Angeles Gas & Electric Co., 158 Cal. 499, 111 P. 534, 31 L. R. A. (N. S.) 559, 139 Am. St. Rep. 134; Pastene v. Adams, 49 Cal. 87; Feeney v. Standard Oil Co., 58 Cal. App. 587, 209 P. 85; Louisville Gas Co., v. Gutenkuntz, 82 Ky. 432; Chisholm v. Atlanta Gas Light Co., 57 Ga. 29.

[7, 8] It does not appear, as a matter of law, that Geisler, against whom the jury returned a verdict in the action against Steen and others, consolidated for trial with the present action, acted either from motives of idle curiosity or a malicious desire to cause injuries to lives or property. It is highly probable that the accessories shop meter was turned on inadvertently as the result of a confusion as to which of the several meters served the different shops. The gas company had not issued any rule prohibiting its patrons from turning on and off the supply of gas at the meter after the original establishment of the service. We may take judicial notice of the custom of gas companies to permit their meters to be turned on and off by other persons than their

own employés as the needs of patrons may demand. In fact, the terms and rules of the gas company, printed on the reverse side of the applications for service signed by Turner, the owner of the building, which were introduced in evidence, contain the following provision: "No light shall be taken near an escape of gas, and as an additional precaution *the gas must be shut off at the stopcock whenever a leak is discovered.* * * *" (Italics supplied.)

[9] It might prove exceedingly dangerous if meters were not accessible and so constructed that they could be turned off without securing the services of the gas company. This is not a case where a single meter is installed in a building, but of several meters installed in one place. The accessories shop meter was installed some time after the other three meters, and after one or more of said meters had been turned on. It would be apparent, from the dials on said meters registering the flow of gas, to the employés of the gas company installing the accessories shop meter and thereafter inspecting the meters, that said other meter or meters were turned on, and the records of the company would show that for a period of about eight months no use had been made of said accessories shop meter. In the exercise of due care, the jury might have concluded that it should have occurred to the employés of the gas company, a dealer for profit in a dangerous commodity, that occasions might arise when other tenants would wish their meters turned off and on again and in so doing persons less familiar with the handling of gas and gas appliances than the agents of the company might become confused as to which of the meters served the several shops. By turning on the accessories shop meter for but a moment at the time it was set, the leakage of gas through the uncapped house pipe would have been apparent. Prudence required that it be determined whether there was an uncapped pipe before the meter was left connected with the gas mains and house pipes.

The probability of an accident happening through the acts of a third person in the manner in which it did happen, in the circumstances of the case, presented an issue of fact that may well have been submitted to the jury.

[10] Evidence excluded by the court below as to the feasibility of placing a lock or other device upon the accessories shop meter to prevent its being turned on by others than the gas company was relevant to the liability of the said company and should have been admitted.

Judgment reversed.

We concur: RICHARDS, J.; SHENK, J.; CURTIS, J.; PRESTON, J.; LANGDON, J.

206 Cal. 377

BRENGLE et al. v. SOUTHERN CALIFORNIA GAS CO. (L. A. 8661.)★

Supreme Court of California. Jan. 31, 1929.

Rehearing Denied Feb. 28, 1929.

Gas ⚷20(2)—Gas meter is presumed to have been installed on proper order, persons injured by explosion having burden of proving contrary.

In action for injuries caused by explosion of gas escaping from uncapped pipe when meter was turned on in absence of affirmative evidence that installation of meter was not authorized, it must be presumed that meter was installed on order of proper person, since burden of proving meter was installed without order would be on plaintiffs, suing for injuries, who were required to prove all facts necessary to establish liability.

In Bank.

Appeal from Superior Court, Los Angeles County; Victor R. McLucas, Judge.

Action by Helen L. Brengle and others against the Southern California Gas Company. Judgment for defendant, and plaintiffs appeal. Reversed.

Rehearing denied: WASTE, C. J., and SHENK and PRESTON, JJ., dissenting.

Superseding opinion in 261 P. 1023.

Jennings & Belcher, of Los Angeles, for appellants.

Vernon Brydolf, of Pasadena, and O'Melveny, Millikin, Tuller & Macneil, James C. Sheppard, Jr., and Thos. J. Reynolds, all of Los Angeles, for respondent.

SEAWELL, J. This action arose out of the same explosion of illuminating gas as that involved in Sawyer v. Southern California Gas Company (L. A. 8326) 274 P. 544, this day decided. Plaintiffs herein are the surviving wife and minor daughter, respectively, of Selby T. Brengle, deceased, who died from injuries received in said explosion, and the compensation insurance carrier of Hooper, the owner of the accessories shop in which the explosion took place. Brengle was an employé of Hooper. The plaintiff insurance company has paid the death benefit provided for in the Workmen's Compensation, Insurance and Safety Act (St. 1917, p. 831, as amended) to said surviving wife and minor daughter of Brengle.

A nonsuit in favor of the Southern California Gas Company was granted in the case herein, as in the Sawyer Case, and a judgment of dismissal entered thereon. The evidence is substantially similar in the two cases, except that it was not shown in the instant case that the four meters were installed pursuant to orders which Turner, the owner of the building, had given to the gas company before the completion of said building. It was shown herein that the meter

---

★Rehearing denied.

connecting with the accessories shop was not ordered turned on, but it was not affirmatively shown that the installation was made without a proper order. In the absence of affirmative evidence showing that the installation of the accessories shop meter was not authorized, it must be presumed that said meter was installed upon the order of a proper person, since the burden of proof to establish that the meter was installed without an order would be upon plaintiffs, who were required to prove all facts necessary to establish liability. However, for the reasons stated in the Sawyer Case, the evidence presented a question for the jury as to the liability of the gas company, notwithstanding the fact that the installation of the meter supplying the accessories shop had been ordered by the owner of the building.

Judgment reversed.

We concur: RICHARDS, J.; SHENK, J.; CURTIS, J.; PRESTON, J.; LANGDON, J.

GINSBERG TILE CO. v. FARAONE et al.★

(Civ. 5870.)

District Court of Appeal, First District, Division 2, California. Jan. 31, 1929.

Rehearing Granted March 1, 1929.

1. Partnership 🔑197—Statute expressly permitting partnership to be sued in firm name held to manifest intent to prohibit such practice with partnership as plaintiff (Code Civ. Proc. § 388).

Code Civ. Proc. § 388, by expressly permitting a copartnership to be sued in its firm name, manifests legislative intention to prohibit such practice, where copartnership is the plaintiff.

2. Partnership 🔑197—Defendants must object to suit by partners in partnership name at very outset, or they waive objection.

If partners sue in their partnership name, defendants must interpose their objection at the very outset, or they waive it.

3. Parties 🔑76(7)—Demurrer to complaint in partnership name on ground plaintiffs had not legal capacity to sue, held to sufficiently "specify grounds" (Code Civ. Proc. § 431).

Demurrer by defendants to complaint in action by partners in partnership name, and motion to dismiss, on sole ground that plaintiff had not legal capacity to sue, *held* a sufficient, distinct specification of the ground on which objection was taken, within Code Civ. Proc. § 431, and there was no waiver of the defect by failure to demur, on ground of defect or nonjoinder of parties plaintiff.

[Ed. Note.—For other definitions, see Words and Phrases, First, Second, and Third Series, Specify; Specified.]

Appeal from Superior Court, City and County of San Francisco; George H. Cabaniss, Judge.

Action by the Ginsberg Tile Company (a copartnership) against Salvatore Faraone and others. From an order granting defendants' motion to dismiss the action, plaintiff appeals. Affirmed.

Russell W. Cantrell, of San Francisco, for appellant.

Devoto, Richardson & Devoto, of San Francisco, for respondents.

GOODELL, Justice pro tem. This appeal was taken on the judgment roll alone from an order granting the motion of the respondents to dismiss. The action was commenced in the name "Ginsberg Tile Company, a copartnership, plaintiff," and the appeal was taken in the same name. The facts are that on May 25, 1926, a complaint was filed by "Ginsberg Tile Company, a copartnership," against Salvatore Faraone and Jennie Faraone, his wife, defendants, alleging that certain work had been done by the plaintiff upon the improved real property of the defendants, under an agreement between them whereby plaintiff was to be paid $593.75 for his work, which amount was unpaid, and that a claim of lien had been filed for record on February 24, 1926. The complaint prayed for judgment for $593.75 and for the foreclosure of the lien. There was no allegation in the complaint respecting the copartnership named in the caption, or showing who were its constituent members.

The defendants demurred upon the sole ground that plaintiff had no legal capacity to sue, and they moved to dismiss upon the same ground. Before the demurrer and motion were heard, an amended complaint was filed in the name of the same "plaintiff," and with two personal defendants (G. M. Sourich and T. A. Sourich) and four fictitious defendants added, and containing an allegation that plaintiff Ginsberg Tile Company was at all times mentioned a copartnership composed of H. Ginsberg and S. Ginsberg, and that they had complied with the provisions of sections 2466 and 2468 of the Civil Code. The amended complaint amplified in many important respects the rather sketchy averments of the original pleading, added allegations not found in the original, and changed the theory of the action from the one based upon a contract made directly with Faraone and wife to one based upon a subcontract between plaintiff and G. M. Sourich and T. A. Sourich, original contractors, for work upon property owned by the Faraones.

The respondents promptly demurred to the the amended complaint again upon the ground of plaintiff's lack of capacity to sue, and again moved to dismiss upon the same ground,

---

★Superseded by opinion 278 P. 866.

and moved to strike the amended complaint from the files upon the ground that it changed the cause of action originally set forth. The trial court granted the motion to dismiss, but took no action upon the demurrer or motion to strike. "The principal and substantial question presented for decision," to adopt the appellant's own statement of it, "is whether the filing of a complaint by a copartnership in its firm name, instead of having the individual names of the copartners appear in the caption thereof, is such a fatal defect as to render the action a nullity, legally justifying its dismissal on this ground, or whether such a defect is merely an irregularity, which may be taken advantage of by special demurrer, for nonjoinder of parties plaintiff, and, if no objection is thus specifically taken to the complaint, the defect is waived."

Bliss, in his work on Code Pleading (3d Ed.) at section 145, says: "The full names of both plaintiffs and defendants should be given as plaintiffs and as defendants—not, as at common law and in equity, by describing them in the body of the pleading, but in the form of a title to the cause, and they may be afterwards referred to, without naming them, as 'the plaintiff' or 'the defendant.' In an action by or against a partnership, the full names of all the partners must be stated."

[1] Section 388 of the Code of Civil Procedure provides that, "when two or more persons, associated in any business, transact such business under a common name, whether it comprises the names of such persons or not, the associates may be sued by such common name. * * *" The Legislature, as early as 1854, thus modified the common-law rule which permits partners neither to sue nor be sued in their partnership name. But it will be noted that the rule was relaxed with respect to defendants only. Had the Legislature intended to authorize or sanction a procedure such as that attempted here, obviously it would have been necessary simply to have provided that "the associates may *sue or* be sued by such common name." On settled and familiar principles, it is clear that by expressly permitting such practice in the case of defendants the Legislature manifested an intention to prohibit it in the case of plaintiffs.

[2, 3] "While a copartnership acting under a fictitious name may be sued in that name * * * the rule governing its prosecution of an action is that the full names of all the partners must be stated." Holden v. Mensinger, 175 Cal. 300, 165 P. 950. But it is settled that, if plaintiffs do sue in their partnership name, the defendants must interpose their objection at the very outset or they waive it (Agricultural Extension Club v. Hirsch, 39 Cal. App. 433, 179 P. 430, and Gilman v. Cosgrove, 22 Cal. 356), and it is claimed that in the instant case there has been such waiver.

The basis for this assertion of waiver is not, that the defendants made no preliminary objection at all, but that they put it on the wrong ground. The defendants promptly demurred to both complaints, and twice moved to dismiss, upon the sole ground that the plaintiff had not legal capacity to sue. The appellant contends that this was ineffective for two reasons: "First, because the demurrers did not "distinctly specify the grounds" upon which the objection was taken (Code Civ. Proc. § 431); and, second, because the demurrers should have been upon the ground of "a defect or misjoinder of parties plaintiff." It is difficult to find any real or substantial difference between the ground which was specified and that now urged as the only proper one. When it is borne in mind that waiver presupposes voluntary abandonment, and that the respondents asserted their point without any delay at all, the waiver argument loses its force.

As between the two grounds, there is authority both ways. In the Gilman Case, supra, where the defendants answered without having first objected to the suit in the firm name, it was held that they had waived the objection and "should have demurred to the complaint for a defect of parties." On the other hand, in the Agricultural Extension Club Case, supra, where in similar circumstances the defendants likewise answered, it is said that "the defect is one which may be taken advantage of upon the plea that the plaintiff has not legal capacity to sue." Dicta to the same effect are indeed found in two cases relied upon by the appellant. Thus in Los Angeles Ry. Co. v. Davis, 146 Cal. 179, 79 P. 865, 106 Am. St. Rep. 20, the court said that "the point that plaintiff was not a corporation goes only to its capacity to maintain an action, * * * and therefore it could be raised by demurrer to the complaint only under subdivision 2 of section 430, * * * which provides as a cause of demurrer 'that plaintiff has not legal capacity to sue.' * * *" And so in Fruit Cleaning Co. v. Fresno Home Packing Co. (C. C.) 94 F. 845, 847, it is said: "Nor is it a question of misjoinder or nonjoinder of parties plaintiff, but it is the legal question whether there is an actual party plaintiff in the case."

H. Ginsberg and S. Ginsberg undoubtedly had legal capacity to sue. And, had they incorporated their business, the corporation certainly would have had legal capacity to sue. But the suit was brought in the name of neither a natural nor an artificial person. The plaintiff admittedly did that which at common law cannot be done at all, and that which a *plaintiff* in this state cannot do.

As we see it, the ground that plaintiff had not legal capacity to sue was no less appropriate than the ground of defect or nonjoinder. It called the attention of the pleader directly and pointedly to the fact that he was not suing in the name of a legal entity at all; that he was using as a so-called plaintiff a mere name, instead of suing in the names of natural persons who happened to use such name or symbol in transacting their business. The bare statement of the ground in the demurrer and motion, in the statutory language, was itself a "distinct specification of the ground," and could not fail to rivet the attention of counsel upon the fact that he had no plaintiff before the court. (Parenthetically it should be said that counsel who now prosecutes this appeal was not in the case when these pleadings were drawn.) On the other hand, a demurrer for nonjoinder would concede that the plaintiff named was itself proper enough, but would suggest that *other* parties should be joined as plaintiffs, which was not, by any means, what the respondents wanted to point out. What they sought to do was to point out that there was no plaintiff at all before the court, and we think their demurrer and motion were designed fairly and effectively to accomplish this.

Counsel for appellant states the question for decision as follows: "May a complaint, filed by a copartnership in its firm name, when met by a plea of abatement, be amended?" Whether or not as a general rule a complaint filed in the name of no legal entity at all may be amended so as to insert the names of proper plaintiffs, need not be decided. The only question before us is whether the action of the trial court in dismissing *this* action was correct, after two demurrers and two motions had called the defect to counsel's attention. There is nothing in the record to show that an application to amend was made in the lower court, or that the question of amendment was discussed therein. Counsel for appellant does not *even now* seek to amend. He asks for a reversal "with instructions to the lower court to overrule the demurrer interposed to the amended complaint, with leave to the defendants to answer." Thus he stands upon the technical ground discussed above, namely, that by demurring and moving on one ground, and not on the other, the defendants waived the admitted defect and irregularity.

From the framework of both complaints it is apparent that the theory of the pleader was that a partnership, as such, is a legal entity, and, as in the case of a corporation or natural person, may sue and be sued, and not that the individuals making up the partnership are the parties plaintiff, irrespective of the name under which they operate.

The appellant contends that it is not indispensable that the copartnership relation of the plaintiffs be shown in the caption so long as, in the body of the complaint, such partnership relation is specifically averred. This, of course, is true, but it does not meet the difficulty here. The cases of Wise et al. v. Williams, 72 Cal. 544, 14 P. 204, and Fruit Cleaning Co. v. Fresno Home Packing Co. (C. C.) 94 F. 845, are cited, but neither is in point. In the first, John H. Wise and Thomas Denigan were plaintiffs, and were so named in the caption. In the caption, however, they were not described as copartners. The body of the complaint contained the allegation that they were copartners doing business under the firm name of Christy and Wise. All that the case holds is that language descriptive of the partnership relation need not be contained in the caption (the real parties, natural persons, being named therein), so long as the allegations in the body of the complaint show such relationship. The cases would be parallel if in the case at bar H. Ginsberg and S. Ginsberg appeared as plaintiffs. They do not so appear, either in the caption or in the body of the complaint. The federal case falls into the class of the Gilman and Agricultural Extension Club Cases, supra, for the reason that objection to the defect there was not taken until seven months after a replication had been filed, at which time the respondents sought to file an amended answer setting up the defect. Moreover, the names of the parties were set out in the bill of complaint sufficiently to conform to the equity rule of the federal courts.

It is conceded by the appellant "that, under the old common law, an action brought in the name of an unincorporated association or partnership is, in strictness, not a misnomer of a party plaintiff, but rather the omission of a party plaintiff, *rendering the action a nullity.*" (Italics ours.) But counsel adds that "this harsh doctrine, according to the trend of present-day authority, even in England, has been moderated," etc.

With respect to the common-law rule the Supreme Court, in the case of Holden v. Mensinger, 175 Cal. 300, 165 P. 950, says: " 'Partners cannot, at common law, sue or be sued by their partnership names, but by statute in some of the states, as in Ohio, Iowa, etc., this is allowed, and so far partnerships are treated as corporations. Elsewhere their demands are joint and personal, and must be enforced by them as individuals.' Bliss on Code Pleading, § 145; Williams v. Southern Pac. R. R. Co., 110 Cal. 457, 42 P. 974; Clement v. British-American Assur. Co., 141 Mass. 303, 5 N. E. 847."

In California the Legislature, with power to moderate the common-law rule to the fullest extent, has relaxed it only in part. Code Civ. Proc. § 388. The courts, in the cases to which we have referred, have moderated it further by holding that, unless raised at the threshold, the objection is waived. But the only implication from those cases is that, if the objection is interposed in a timely and proper manner, it is perfectly good. The objection here certainly was timely, and we are satisfied that the manner of asserting it was proper.

Counsel for appellant discusses at some length the procedural question; i. e., whether a motion to dismiss is recognized in a case such as this. However, he concedes that the effect of the granting of the motion to dismiss was the same as the sustaining of a demurrer without leave to amend, so no purpose would be served by any extended consideration of the point. The views herein expressed render unnecessary a discussion of the other points raised in the briefs on the appeal itself.

The respondents, consistently with their position in the lower court that the "plaintiff" had no legal capacity to sue, have moved to dismiss this appeal upon the ground that the "appellant" cannot, for the same reason, prosecute an appeal. No action, however, need be taken on the motion to dismiss.

The order of the lower court is affirmed.

We concur: KOFORD, P. J.; NOURSE, J.

PELLISSIER v. TITLE GUARANTEE & TRUST CO. et al. (Civ. 3630.)★

District Court of Appeal, Third District, California. Jan. 28, 1929.

Rehearing Denied Feb. 27, 1929. Hearing Granted by Supreme Court March 28, 1929.

1. Appeal and error 🔑1011(1)—Trial court's findings on conflicting evidence were conclusive, where supported by evidence.

Trial court's findings of facts on conflicting evidence were conclusive, where they were supported by the evidence.

2. Judgment 🔑580—Where appeal was still pending from judgment, such judgment could not be pleaded as bar to subsequent action (Code Civ. Proc. § 1049).

Where appeal had been taken from judgment, and action was still pending and undetermined, under Code Civ. Proc. § 1049, at time of instant action, such judgment could not be pleaded as bar to instant action.

3. Abatement and revival 🔑16—Party in whose favor judgment appealed from was rendered, may plead prior action in abatement, and lay foundation for securing continuance until final determination of first action.

Party, in whose favor prior judgment, from which appeal has been taken, has been rendered, may, in subsequent action, plead prior action in abatement, and lay foundation for securing continuance of trial of second action until final determination of first.

4. Deeds 🔑54—Deed must be delivered to effectuate passing of title.

Delivery of a deed must be made to effectuate passing of title from grantor to grantee, and, if delivery is wanting, the deed is void ab initio, and is no better than a blank form.

5. Vendor and purchaser 🔑229(1)—It was unnecessary that purchasers of lots have actual notice that title company executing sales contract held only legal title, and that approval of plaintiff, seeking to rescind contract, was necessary to consummate deal.

It was unnecessary that defendant purchasers of lots have actual notice that title company executing sales contract held only legal title to lots, and that approval of plaintiff, who was suing to rescind contract was necessary to consummate deal, but it was sufficient, if circumstances were such as to put prudent person upon inquiry.

6. Vendor and purchaser 🔑244—Evidence supported finding that purchasers of lots had notice that title company, executing sales contract, held only legal title, and that plaintiff's approval was necessary to consummate deal.

In action to rescind contract for sale of real property, evidence *held* sufficient to support finding that defendant purchasers had notice that title company, executing sales contract, held only the legal title, and that approval of plaintiff was necessary to consummate deal.

Appeal from Superior Court, Los Angeles County; Lucien Shaw, Judge.

Action to rescind a contract for the sale of real property by Marie Julie Pellissier against the Title Guarantee & Trust Company, Emma Summers, Francis W. Henry, and others. From a decree for plaintiff, the last named defendants appeal. Affirmed.

I. Henry Harris, of Los Angeles, for appellants.

Denis & Griffith, of Los Angeles, for respondent.

E. W. Sargent and J. F. Keogh, both of Los Angeles, for defendant Title Guarantee & Trust Co.

PLUMMER, J. The plaintiff's complaint in this action sets forth the incorporation of the Title Guarantee & Trust Company; that prior to the date hereinafter mentioned the plaintiff was the owner in fee simple of all that certain real property described as the west half of the northwest quarter of section 25, township 1 south, range 14 west, S. B. M., in the county of Los Angeles; that on or about the ——— day of February, 1913, the plaintiff executed and delivered to the defendant Title Guarantee & Trust Company an instrument absolute in form, conveying all of said property to the Title Guarantee & Trust Company; that upon the same date an agreement in writing was entered into between the plaintiff and the Title Guarantee & Trust Company, wherein and whereby it was agreed that said conveyance, though absolute in form, was made in trust; that no consideration was paid therefor; that the title to said property was held in trust by the Title Company for the benefit of the plaintiff; that the conveyance was made by the plaintiff to

---

★Rehearing denied. For opinion of Supreme Court adopting opinion of Court of Appeal, see 280 P. 947.

the Title Company for the purpose of enabling the Title Company to subdivide and make sales of lots in said tract, to such persons, at such prices, and upon such terms as the Title Company should be thereafter instructed by the plaintiff; that said trust agreement has, since the date thereof, remained in full force and effect, and was in full force and effect at the time of the institution of this action.

It is further set forth in the complaint that, after the execution of the instruments just referred to, the Title Company proceeded to subdivide said real property into city lots, and had a map of the subdivision thereof duly recorded; that in said subdivision and upon said map there were two lots described as lots 188 and 189 of tract No. 2189, commonly known as Pellissier Square. The complaint further alleges that on or about the 1st day of February, 1923, and while said trust agreement referred to was in full force and effect, the Title Company executed a written contract for the sale of said lots 188 and 189 to one Francis W. Henry, for the total purchase price of $27,500. It is further alleged in the complaint that the defendant Emma Summers was the real party in interest, and that the contract executed in the name of Francis W. Henry was for her uses and purposes. The complaint then alleges that the defendants Summers and Henry, and each of them, knew and had actual notice that the defendant Title Guarantee & Trust Company held only the naked legal title to said property; that it was held in trust for the plaintiff; that the plaintiff was the real owner thereof, and that her consent and approval were required before the Title Company could make any conveyance or agreement for the sale of said lots, or either of them. It is then alleged that the plaintiff never instructed the Title Company to make any sale of said property, or to execute or deliver the contract of sale therefor, and never consented to or approved the making of any such sale or such contract, and had no prior knowledge of the execution of said contract, and, immediately upon learning thereof, informed the Title Company that she did not consent to or approve the same, and forthwith caused defendants Summers and Henry to be advised of such fact, and demanded a return and cancellation of the contract.

The prayer of the complaint is for a decree declaring said contract void; that it be delivered up and canceled; that the defendants Summers and Henry be held as involuntary trustees for the benefit of the plaintiff, if any rights they have under said contract. A copy of the contract referred to is attached to the complaint, marked Exhibit A, bearing date of February 1, 1923, purporting to have been executed between the Title Guarantee & Trust Company and Francis W. Henry, whereby the Title Company agrees to convey to Francis W. Henry lots 188 and 189 of tract No. 2189, known as Pellissier Square, for the sum of $27,500, payable in installments, the first installment being the sum of $2,500, to be paid on the execution of the contract; the other installments to be paid at stated times and in the amount set forth in the contract. A number of restrictions are set forth in the contract, not necessary to be particularly referred to herein. The contract is signed by the Title Guarantee & Trust Company, by A. F. Morlan, vice president, and A. R. Kilgore, secretary, and by Francis W. Henry; approved by W. H. Taggert, assistant trust officer. The answer of the defendants Summers and Henry denies each and every of the allegations of the plaintiff's complaint. The defendant Paul M. Reidy was brought in by an amendment to the complaint, but whatever interest the defendant Reidy acquired was acquired from the defendant Francis W. Henry, after the beginning of this action, or after the controversy, relating to the contract referred to, had arisen, and is subject to, and dependent upon, any rights, if any, which the defendant Francis W. Henry may have in and to said lots, and need not be further mentioned herein. The Title Company, by its answer, admitted practically all of the allegations of the complaint, but set forth in its answer that the contract referred to was never delivered by it to either the defendant Summers or the defendant Henry, although its possession was obtained by said defendants, who declined and refused to return the same to the Title Guarantee & Trust Company when demand was made therefor.

While the plaintiff's complaint does not allege the nondelivery of the contract by the Title Company to the defendant Francis W. Henry, or to his agent, Emma Summers, the cause was tried as though delivery was one of the issues tendered for determination by the court. As a considerable portion of the testimony is directed to the question of delivery, and the argument of counsel is directed to the same subject, we conclude that the trial was had upon the theory that the issue of delivery was tendered to the court, even though not specifically set forth in the pleadings, and the decision of this cause must be had in view of the theory entertained at the trial of the action.

The findings of fact, after referring to many items which are not disputed, find in paragraph No. 5: That the contract between the Title Company and the defendant Francis W. Henry was executed in duplicate, the material part of which is in these words: "The said contract was prepared in duplicate, and one copy of it was afterwards taken away from the office of said Title Guarantee & Trust Company, without the knowledge or consent of said Company or of plaintiff, and thereafter, without the knowledge or consent of said Company, or this plaintiff, was signed and acknowledged in due form by Francis W.

Henry before said Anna C. Durkee, as notary public, and the certificate of acknowledgment was signed by her under the date of March 15, 1923, and not otherwise. Said contract was never delivered to said Henry, or to any person for her, or at all. Said Emma A. Summers obtained possession of the said copy of said contract so acknowledged by said Henry, before said acknowledgment was made, and would not return it to said Title Guarantee & Trust Company, although due demand therefor was made on her." And then further found in paragraph No. 7: "That the said defendants Summers and Henry, and each of them, knew and had actual notice that the defendant Title Guarantee & Trust Company, held only the naked legal title to said property in trust for this plaintiff, and that this plaintiff was the real owner of the property, and that her consent and approval was required before said defendant Title Guarantee & Trust Company could make any conveyance or agreement for the sale of said lots, or either of them." It may be here stated that the finding of the court that the contract was "signed" by Francis W. Henry before Anna C. Durkee, as notary public, has no support whatever in the testimony. There is no controversy whatever that both copies of the contract were signed by the defendant Francis W. Henry at the residence of the defendant Emma Summers, prior to the signing thereof by Morlan and Kilgore acting for the company. The finding as to acknowledging and recording is likewise unquestioned. The decree went in favor of the plaintiff, and from this decree the defendants Summers and Henry appeal.

Finding No. 8 is to the effect that the plaintiff never instructed the Title Company to make any sale of the lots in question, or to execute or deliver any contract of sale therefor; that she never consented to or approved of the contract, and does not now consent thereto or approve the same; that, immediately upon learning of the contract, she informed the Title Company of her disapproval, and had demand made upon the defendants Summers and Henry for the return of the contract, etc.; and, further, that the plaintiff never received any of the purchase price for said lots.

The first point made by the appellants is that findings Nos. 7 and 8 are not supported by the evidence, in that there is no evidence to show that the appellants knew and had actual knowledge that said Title Company held only the naked legal title in trust for plaintiff, or that appellants knew that plaintiff's consent and approval was required before the Title Company could make any conveyance or agreement of sale, or that plaintiff never instructed the Title Company to make any sale of the property, or execute or deliver said contract of sale, or that plaintiff had no prior knowledge of such contract, or that, immediately upon learning thereof, informed the Title Company that she did not approve.

Point 2 is based upon the denial of the appellants' motion for nonsuit.

Point 3 is based upon the fact that the evidence shows there was a previous action upon identical issues, wherein the same parties were adverse in interest, the Title Company suing in a representative capacity for Mrs. Pellissier.

Point 4 made by the appellants is to the effect that, by the terms of the trust agreement, Mrs. Pellissier is estopped from suing the defendants Summers and Henry.

Point 5: That plaintiff is bound by the acts of her agent.

Point 6 relates to the manner in which Mrs. Summers obtained possession of the contract.

The seventh ground for reversal set forth by the appellants is urged upon the theory that the plaintiff has no cause of action, and no standing in court.

Before considering the 7 assignments of why a reversal should be had, we will state that the admitted or uncontroverted facts set forth in the record are: Execution, delivery, and recordation of a deed, absolute in form, by which the plaintiff purported to convey to the Title Company the premises involved in this action, the same being included in the larger tract mentioned in the conveyance; that the trust agreement executed between said parties at the same time was not placed upon record, nor were its terms and conditions ever made known to the appellants; that for a period of some years James J. Donahue had been the real estate broker or sales agent negotiating and making sales of lots in Pellissier Square; that, while acting as such broker or sales agent, the appellant Summers interviewed him relative to the purchase of the two lots in controversy; that, following the negotiations between Summers and Donahue, Summers made an offer for the property of $27,500; that, in pursuance of this offer, Donahue executed a preliminary agreement for the sale of the lots and asked of, and received from, the appellants the sum of $500, which was to be applied as a part of the first payment to be specified in the contract of purchase; that the negotiations between Summers and Donahue resulted in an understanding between them as to the terms of payment to be set forth in the contract, and also as to other conditions to be inserted in the contract, not necessary here to mention; that, following these negotiations, a contract was drawn up in duplicate by the trust officer of the Title Company; that, after the contract was so executed in duplicate, it was delivered to Donahue, who took the same to the residence of Mrs. Summers, and there the duplicate copies of the contract were signed by the appellant Francis W. Henry, and then handed back to Mr. Donahue, who returned the contracts to the Title Company, and in a day or two thereafter

Mrs. Summers went to the office of the Title Company, having with her a cashier's check for the sum of $2,000; that Mr. Taggert, the trust officer of the company, produced the duplicate copies of the contract which had not then been signed or executed on the part of the company; that Mr Taggert took the duplicate copies of the contract, went into the appropriate offices of the company, where the name of the Title Company was affixed by, and together with, the names of the vice president, A. F. Morlan, and the secretary, A. R. Kilgore, and the seal of the company affixed, following which Mr. Taggert returned to the presence of Mrs. Summers with the duplicate contract in his possession. The subsequent history of the contract is controverted.

The trust agreement, among other provisions, contained the following paragraphs, numbered third, fifth, and seventh, to which our attention has been specifically directed: "Third: When said map has been duly accepted and recorded as required by law, the party of the second part shall issue contracts of sale and convey lots in such subdivision to such person or persons, at such prices, and upon such terms as it shall be hereafter instructed by the said party of the first part, her heirs or assigns." "Fifth: The party of the second part shall impose such restrictions, covenants and conditions in all agreements and deeds executed by it as it shall be in writing requested to do by said party of the first part, her heirs or assigns." "Seventh: Any conveyance made by the Title Guarantee & Trust Company to the purchasers of lots shall vest in such purchasers an absolute and unassailable title, and there shall be no obligation on the part of the purchasers to see to the application of the purchase money, it being expressly understood by all parties hereto that any conveyance made by the party of the second part shall be binding upon all parties hereto, and should the party of the second part violate any of the provisions hereof, then the beneficiary shall have recourse only against said party of the second part."

While many reasons have been assigned by appellants for reversal, the determination of this cause really depends upon whether material findings are supported by the testimony. It may be here stated that finding 5, to the effect that the contract was never delivered, is not assailed as being contrary to the evidence, the argument of appellants being that, after the signature of the Title Company was properly attached, the delivery of the contract by the trust officer Taggert was immaterial.

Did the appellants know that the Title Company held only the legal title, and that the approval of Mrs. Pellissier was necessary to consummate the deal, or have knowledge of circumstances sufficient to put them upon inquiry? The deed and trust agreement herein referred to covering Pellissier Square were executed in the year 1913. The negotiations relative to lots 188 and 189 involved in this action practically all took place during the latter portion of January and the month of February, 1923. The record shows that in the year 1920, seven years after the execution of the deed of conveyance by the plaintiff to the Title Company, and three years preceding the negotiations involved in this action, Mrs. Summers had and carried on negotiations with Mr. Donahue, and, also, personally, with Mrs. Pellissier, relative to the purchase of a certain other lot included in Pellissier Square, fronting on that certain street known as Western avenue. It appears from the testimony that this lot was priced by Mrs. Pellissier at $3,700, and that Mrs. Summers offered to Mr. Donahue for said lot the sum of $3,500; that Mrs. Pellissier declined to accept Mrs. Summers' offer, and Mrs. Summers finally agreed to buy the lot at the figure named by Mrs. Pellissier. The testimony of Mr. Donahue is as follows: "At that time (1920) I had some lots south on Wilshire Boulevard on the east side of Western avenue, at $3,700.00. She (meaning Mrs. Summers) asked me if I could deliver one of them for $3,500.00. I told her no, I didn't think I could deliver it because of our price of $3,700.00. Mrs. Pellissier as a rule never cut her prices. She was very firm about prices she had given on properties. She (referring to Mrs. Summers) said, 'Isn't there any way for you to go to her, or for me to go to her?' I said, 'I don't see why it would be necessary, Mrs. Summers.' But after persuading me to go down, I had Mrs. Summers go in and meet Mrs. Pellissier at her residence at the corner of Serrano and Seventh street, Los Angeles, and she spoke to Mrs. Pellissier, and Mrs. Pellissier turned her down on the $3,500.00 offer." The testimony in the record shows that a contract for the sale of the lot just referred to facing on Western avenue was executed in favor of Mrs. Summers, but our attention has not been called to, and we have not discovered in the transcript, by whom the contract of sale was executed, unless it is covered by general testimony, set out in the record, that all contracts for the sale of lots in Pellissier Square were executed by the Title Company.

In relation to the negotiations covering the lots in controversy, the witness Donahue testified, in substance that, during the month of January, 1923, Mrs. Summers came to him and offered $22,500 for the two lots. The exact words of the witness' testimony in this particular are: "I refer now back to when she made the offer of $22,500.00, and I told her that Mrs. Pellissier would not take it, I was positive of that." The witness further stated that at that time he took the $25,000 offer from Mrs. Summers to Mrs. Pellissier, and it was refused; that the first offer was made on or about the 2d or 3d of January, 1923. In relation to the different offers, the witness Donahue further testified: "I told Mrs. Summers the $25,000.00 offer was refused by Mrs. Pellissier, and again she made another offer of $27,500.00, with the terms about the same that were in the former contract. When I speak of the former contract I mean the contract for $25,000.00. At this time I drew another contract, on the evening of February 3d, at her home—(meaning Mrs. Summers' home)—for $27,500.00. At that time Mrs. Summers said she wanted to have the deal completed as fast as possible. I told her I would. Within the next two or three days I went to the Title Company. I did not get hold of Mrs. Pellissier, and I ordered the Title Company to bring down a contract showing it in Francis Henry. I drew the contract for $27,500.00, and Mrs. Summers at the time put up $500.00 in currency. This was in the reception-hall at the home of Mrs. Pellissier. Mrs. Summers took the contracts, went out in the reception-hall and had the contract signed by Francis W. Henry." The testimony of the trust officer Taggert, tending to bring home to the knowledge of Mrs. Summers the interest of Mrs. Pellissier in the lots, is as follows: "When Mrs. Summers came in I passed the copy of the contract to her to read. She objected to certain things in the contract and asked for certain modifications or amendments. I said, 'I can't grant this. I will have to call Mrs. Pellissier up and see whether or not she will permit it.' I stepped to the telephone and called Mrs. Pellissier's phone, and Mrs. de Rulet answered the phone. I explained to her what Mrs. Summers wanted, and she said she couldn't answer the question for me that she would have to see her mother, so I came back from the phone and told Mrs. Summers that I couldn't give her an answer, and that if she would come in tomorrow, I would perhaps get in touch with Mrs. Pellissier, or words to that effect. I gave her a receipt, however, for her check for $2,000.00, before she left. I think, at the time she gave me the cashier's check, I gave her the receipt, because I wasn't ready yet to deliver the contract, and the receipt for the money would be sufficient until I delivered the contract." The testimony of Mrs. Summers, called as a witness for the plaintiff, and examined under the provisions of section 2055, Code of Civil Procedure, was to the effect that three years previous to the negotiations involved in this action she went with Mr. Donahue to the residence of Mrs. Pellissier to see her about a lot in Pellissier Square situate on Western avenue; that Mr. Donahue said: "We would have to go and see her about the piece of property." The testimony of Mrs. Summers, as to the negotiations had in 1923, covering the two lots, was substantially the same as that given by Mr. Donahue, save and except that, where the witness Donahue used the name "Mrs. Pellissier," Mrs. Summers testified that Donahue used the name "owner." Appellants not having raised the question that the testimony was insufficient to support the finding of nondelivery of the contract, it is unnecessary to set forth any of the testimony further than to say there is sufficient testimony to show that the contract came into the possession of Mrs. Summers without any manual tradition from the Title Company. In other words, that, when the contract was handed to Mrs. Summers to look over or examine, she proceeded to take the contract away with her. As we read her testimony, this is not denied by Mrs. Summers, the contention of appellants being that delivery was nonessential.

[1] The record shows that at a date previous to the negotiations between Summers and Donahue, relative to lots 188 and 189, the plaintiff had substantially stated that she would sell the two lots for $27,500, but we find no testimony in the record that the plaintiff ever authorized the particular sale or execution of the particular contract now before the court. Whether the facts presented in the record were sufficient to justify the trial court in drawing the inference that such authorization had been given, rather than the finding that such authorization had not been given, was a matter exclusively for the trial court, as in all these matters there was considerable conflicting testimony, and nothing has been presented to us justifying the conclusion that the assailed findings have no support in the evidence.

The motion for nonsuit is so bound up with the other assignments of error as not to require separate consideration. The third assignment of error, and the reason why a reversal should be had, is based upon the fact that there was a previous action begun and prosecuted by the Title Company against the appellants, involving the validity of the contract now under consideration; that in such prior action the appellants had judgment against the Title Company.

[2, 3] While the record in the former action was introduced in testimony at the trial of this cause, a reference to the answer of the appellants shows that the pendency of said action was not pleaded in abatement of the present action, and that no effort was made to have the trial of this action continued until the final determination of the action between the Title Company and the appellants. The record in the case of the Title Company against the appellants showed that an appeal had been taken from the judgment of the trial court in that action, and that, under the provisions of section 1049 of the Code of Civil Procedure, it was still pending and undetermined at the time of the trial of the present action, and did not constitute a bar. Until a judgment has become final, it cannot be pleaded as a bar to a subsequent action, but, if the party, in whose fa-

vor the prior judgment has been rendered, so elects, he may in a subsequent action plead a prior action in abatement, and lay the foundation for securing a continuance of the trial of the second action until the final determination of the first. Brown v. Campbell, 100 Cal. 635, 35 P. 433, 38 Am. St. Rep. 314; Harris v. Barnhart, 97 Cal. 546, 32 P. 589; Leonard v. Flynn, 89 Cal. 335, 26 P. 1097, 23 Am. St. Rep. 500; Estate of Ricks v. Ricks, 160 Cal. 467, 117 P. 539; Howard v. Howard, 67 Cal. App. 56, 226 P. 984. By reason of the failure of the appellants to properly plead the judgment in the former action by way of abatement it is unnecessary for us to consider the cases cited to the effect that an action prosecuted by a trustee, in which the trustor does not join, is binding upon the trustor. The cases cited by the appellants state the law accurately as to the facts presented, but are not applicable here.

[4] We cannot agree with appellant's contention that delivery of the contract was not essential to its binding force and effect. The law applicable to delivery, and the necessity therefor, is very clearly stated in 9 California Jurisprudence, p. 149, § 48, and is peculiarly applicable here: "There is no better established legal principle than that the transfer of the ownership of real estate, so far as the transfer is to be made by deed, necessitates a delivery of that deed to effectuate the passing of title from the grantor to the grantee. Delivery is the force that vitalizes the instrument without which, though signed and acknowledged, it is invalid, and not effective for any purpose. If delivery is wanting, the deed is void ab initio, and it is no better than a blank form. Consequently it is recognized that prior to its actual delivery the grantor named in the instrument may change the character of the delivery originally contemplated, and has the right to destroy and nullify the instrument itself. And this operative characteristic of delivery is not peculiar to deeds, but attaches to all written contracts."

[5, 6] Whether the appellants had actual written notice is not necessary to support the finding of notice. If the circumstances are such as to put a prudent person upon inquiry, that is all that is required. See 25 Cal. Jur., page 637, § 283, where the rule is fully stated. It is argued, however, that under the terms of a trust agreement the only remedy on the part of the plaintiff is by an action against the Trust Company. This would be true if the other factors set forth in this opinion had not entered into this cause. The dealing of Mrs. Summers with Mrs. Pellissier in 1920, after the execution of the conveyance to the Title Company, unquestionably gave her knowledge of the beneficial interest and ownership of Mrs. Pellissier in the property involved. This, coupled with the fact that the finding, that the contract was never delivered, necessitates an affirmance of the judgment, and it is so ordered.

I concur: FINCH, P. J.

---

96 Cal. App. 650

SUN-MAID RAISIN GROWERS OF CALIFORNIA v. JONES, Sheriff. (Civ. 6416.)★

District Court of Appeal, First District, Division 2, California. Feb. 6, 1929.

Rehearing Denied March 1, 1929. Hearing Denied by Supreme Court April 1, 1929.

1. Sales ⟹200(1)—Title to grapes purchased under raisin contract was in buyer at time crop was in sweat boxes undergoing final curing process.

Under raisin contract providing for sale of all raisin grapes to be produced during certain years and evidencing intention of parties to pass to and vest in buyer a present title and right of possession, the title to raisins covered thereby was in the buyer at time of levy by attachment on a portion of the crop while in sweat boxes undergoing final curing process, in that title passed thereunder when grapes first became property which could be subject of ownership and sale.

2. Sales ⟹199—Parties may agree when title shall pass under contract of sale, even though subject-matter has only potential existence.

Under a contract of sale, parties may agree when title shall pass, and, if they expressly do so, their contract controls, even though the subject-matter has only a potential existence.

3. Sales ⟹201(3)—Transfer of grape crop by means of raisin contract was not void because not capable of delivery (Civ. Code, § 3440).

Transfer of grape crop under a raisin contract providing for sale of all raisin grapes to be produced during certain years was not void under Civ. Code, § 3440, on ground crop was not capable of delivery, such section only declaring transfers without delivery void if made by a person having at the time possession or control of property.

4. Attachment ⟹374—Evidence held to sustain finding as to value of raisins seized by sheriff under writ of attachment.

Evidence in action in conversion *held* to sustain finding as to value of raisins seized by sheriff acting under writ of attachment.

5. Appeal and error ⟹176—Stipulation as to assignment of raisin contract dispensed with proof of facts showing valid assignment, and point was not available on appeal.

Where defendant in action for conversion did not raise the point that assignee of raisin contract was not proven to come within contract clause prohibiting assignment by the buyer except to nonprofit co-operative association, and on the contrary stipulated without reservation that said contract was assigned, the stipulation dispensed with proof of facts showing valid assignment, and point was not available on appeal.

★Rehearing denied. Hearing denied by Supreme Court.

Appeal from Superior Court, Fresno County; Charles R. Barnard, Judge.

Action by the Sun-Maid Raisin Growers of California against W. F. Jones, as Sheriff of the County of Fresno. Judgment for plaintiff, and defendant appeals. Affirmed.

B. M. Benson, of Fresno, for appellant.

Harry M. Creech, of San Francisco, and Harris, Johnson, Willey & Griffith, of Fresno, for respondent.

KOFORD, P. J. Action in conversion. Plaintiff claimed to be the owner of 14 tons of raisins grown during 1926 on land owned by one George Betel. These raisins were seized by the defendant sheriff while they were in sweat boxes on the land of Betel. Defendant was acting under a writ of attachment in an action entitled Dauer v. Betel, and the raisins were seized as the property of Betel. In April, 1923, Betel had signed a contract with plaintiff's assignor, commonly known as the "raisin contract."

[1] The first and chief point raised by appellant is that under this instrument the title to the raisins attached by appellant was at that time in Betel, the grower and defendant in the attachment suit, and was not in the plaintiff who recovered judgment for conversion in the trial court.

The contract commenced, "Witnesseth: That the buyer (Sun-Maid Raisin Growers, a corporation) does hereby purchase and the seller (Betel) does hereby sell all of the raisin grapes to be produced during the years 1923 to 1937 inclusive. * * *" It specified how the raisin grapes should be cured and delivered, how and when they should be paid for by the familiar pooling, marketing, and dividend scheme. It contained a provision for liquidated damages and other relief in case of breach of the agreement. It also contained other provisions which are much discussed by the parties in their argument upon this appeal. A paragraph greatly relied upon by respondent reads as follows: "This instrument is intended by the parties to pass to and vest in the buyer a present title and right of possession to all of the crops of raisin grapes covered hereby. The buyer shall at all times have the right to enter upon said premises and remove the said crops therefrom; but the right of the buyer to so enter and remove said crops shall not affect the obligation of the seller to pick, cure and deliver the same as above provided."

Appellant concedes that the first part of the paragraph last quoted imports an executed contract of sale, under the terms of which a present title passes, but contends that this is overcome by many other provisions in the contract manifesting an intent that title should not pass until delivery. These provisions of the contract include the following: The grapes must be grown, dried, and cured and graded at time of delivery as to quality. Upon delivery an account payment was to be made, the amount thereof to be discretionary with the buyer. The price was to be slightly raised by a bonus for extra quality and reduced for inferior quality. It provides for liquidated damages. It provided "that, if at the time of such delivery there stands of record a crop mortgage covering the crop so delivered, such payments or advances shall be made as directed by request in writing signed by both mortgagor and mortgagee." The buyer could enter and take possession. Crops not to be in existence for thirteen years were sold. Contract terms were to be modified as required by the federal court.

[2] Appellant has cited a large number of cases in which one or more of the last-mentioned contract provisions, or similar ones, have been used by the courts to ascertain that the contracting parties did not intend that title to sold goods should pass at a given time. But none of these cases, nor counsel for appellant, questions that the intention is the guiding rule. Consideration of such contract provisions for the purpose of ascertaining the intention of the parties is resorted to when that intention is not manifested in a clear and more definite way. None of the authorities relied upon by appellant contain, as here, a clear, direct, and express statement to the effect that the parties intend by their writing to pass to and vest in the buyer a present title. Rules of construction are designed and used for the purpose of ascertaining the intent and meaning of the writing as a whole where the intention is not clearly expressed. Where a certain clause is said to indicate a given meaning of the whole contract, the courts are merely stating that such clause reveals that such was the intention of the parties. Here the intention is so clearly expressed as to leave no excuse or reason for construction. If any rules of construction were needed, then the first one requires that all parts of the document be given force and meaning, if that is possible. The contract provisions which appellant points to as showing the intent that title remains in the seller are not all more consistent with title being in the seller than with title being in the buyer, and we do not find that any one of them is so inconsistent as to be entirely irreconcilable. Further construction is not justified until a provision is found impossible of being reconciled with the direct and clear expression of what the parties intended. Therefore, whatever controlling force these various contract provisions might have in the construction of an executory agreement of sale which contained no directly expressed intention, they are not controlling here. In Turner, Kuhn & Fraser, Inc., v. Jones, 61 Cal. App. 732, at page 734, 215 P. 1033, 1034, relied upon by appellant, it is said: "Under a contract of sale the par-

ties may agree when title shall pass. If they expressly do so, their contract controls, even though the subject-matter has only a potential existence." See, also, Hogue-Kellogg Co. v. Baker, 47 Cal. App. 247, 190 P. 493; Farmer v. Leaf, 46 Cal. App. 542, 189 P. 735; Hamilton v. Klinke, 42 Cal. App. 426, 183 P. 675; Arques v. Wasson, 51 Cal. 620, 21 Am. Rep. 718. McLaughlin v. Piatti, 27 Cal. 451, is not to the contrary, nor does it deal with such a clause directly expressing the intent of the parties that title shall pass immediately. There the instrument stated that sellers "granted, bargained and sold" 500 head of cattle to be selected by buyer out of a certain large herd, The court held the instrument to be executory, because the chattels were not identified. This is no more than the rule of Civil Code, § 1140. "Not too great stress must be laid upon the use of the words 'sell' or 'buy' or 'sold' or 'bought' by the parties. These words are constantly used as meaning or including contract to sell or contract to buy." Williston on Sales (2d Ed.) vol. 1, § 262; Wance v. Thomas, 75 Cal. App. 238, 242 P. 509. The use of the word "sold" in McLaughlin v. Piatti, supra, may be compared with the words "does hereby sell" in the beginning of the raisin growers' contract, but it by no means has any similarity to the clause directly expressing the agreement of the parties that a present title to the raisin grapes shall pass and vest.

We need not in the present case determine the exact time the title passes, so long as it was before the attachment. Title passed when first the raisin grapes became property which could be the subject of ownership and sale. A potential existence of the grapes seems to answer this requirement. Arques v. Wasson, supra. This, of course, was long before the attachment which was levied upon a portion of the crop while in "sweat boxes" undergoing the final curing process. When the grower's creditor, therefore, attached the raisin grapes or the raisins, whichever they were at the time of the levy, they belonged to respondent.

[3] This transfer was not void under Civil Code, § 3440, because the crop was not capable of delivery. The section only declares transfers without delivery void "if made by a person having at the time the possession or control of the property." "At the time" in this case means when Betel signed the raisin contract in April, 1923. He was not then in possession or control of the raisins or raisin grapes attached in 1926 within the meaning of the section. The section does not require the delivery of growing crops. Globe Grain & Mill Co. v. Drenth, 36 Cal. App. 156, 171 P. 821, and cases therein cited.

[4] The value of the raisins was sufficiently proven by the evidence to sustain the finding and judgment on that issue. The valuation arrived at by the court was based on the lowest price named by the expert testimony, which means that it was based upon the assumption that the raisins were of the lowest quality within the rather detailed description given them in the questions bringing out this testimony. Appellant cannot complain of this.

[5] Appellant raises in this court for the first time the point that respondent, the assignee of the original buyer, Sun-Maid Raisin Growers, a corporation, was not proven by the testimony to come within the contract clause prohibiting an assignment by the buyer "* * * except to a nonprofit co-operative association, * * * etc., * * * or any corporation or organization of a co-operative nature. * * *" This point is not available to appellant because not raised in the trial court. On the contrary, appellant at the trial stipulated without reservation that said contract was assigned by the original buyer to respondent. This stipulation dispensed with proof of facts showing a valid assignment. Otherwise we should be disposed to permit the fact to be proven in this court.

The judgment is affirmed.

We concur: NOURSE, J.; STURTEVANT, J.

---

96 Cal. App. 655

In re HOLLAND. (Civ. 6148.)

District Court of Appeal, Second District, Division 2, California. Feb. 7, 1929.

1. Attorney and client 🔑48—Jurisdiction was acquired in proceeding to cancel license to practice law by publication of citation for 30 days (Code Civ. Proc. § 187).

Under Code Civ. Proc. § 187, together with inherent power of court over its officers, jurisdiction, in proceeding to cancel license to practice law, was acquired over person of respondent by publication of citation for period of 30 days, after it appeared by affidavit that he could not, after due diligence, be found within state.

2. Attorney and client 🔑40—Conduct of applicant, for admission to practice law, in concealing prior convictions, constituted fraud requiring revocation of license.

Conduct of applicant, for admission to practice law, in withholding information relative to prior conviction of offenses, and averring that he had never been charged with offense involving moral turpitude, *held* to constitute fraud upon the court, which authorized and compelled it to revoke the license theretofore granted.

Original proceeding to revoke and cancel the license of Albert W. Holland to practice law. License revoked and canceled.

R. H. Purdue, of Los Angeles, for petitioner State Bar of California.

THOMPSON, J. [1, 2] Albert W. Holland was admitted to practice in all of the courts of California by an order made by this court on the 8th day of November, 1926. The present proceeding is one to revoke and cancel his license to practice law, on the ground that the order was procured by fraud and the concealment of facts establishing a bad moral character. Jurisdiction over the person of the respondent has been acquired by the publication of the citation for the period of 30 days, for the reason that it appeared by affidavit that he could not, after due diligence, be found within the state. Ample authority for this procedure is found in the inherent power of the court over its officers, coupled with section 187 of the Code of Civil Procedure. The time fixed is that established for the publication of citations in disbarment proceedings. The verified petition of the state bar discloses that respondent sought admission to the bar of California on August 29, 1925, upon the representations that he was admitted to practice before the highest court in the Philippine Islands; that he had never been charged before any court with crime amounting either to a felony or misdemeanor involving moral turpitude; and that he had been engaged in actual practice for a period of at least 3 years within a period of 7 years immediately preceding the filing of his application. The proof establishes that the respondent appeared September 21, 1925, before John E. Biby, one of the state board of bar examiners, to whom the matter was referred by this court, and testified that he was admitted to the profession in Manila in 1915, and there engaged in practice until 1925; that he had never been charged with conduct involving moral turpitude; and that there was nothing adversely affecting his character which ought to be revealed. The testimony also developed the fact that prior to 1920 the respondent had been convicted of a number of offenses, including attempted rape, embezzlement of money, and falsification of public records, and sentenced to a term aggregating better than 20 years; and that he was finally pardoned on condition that he leave the Islands, never to return. The proof indicates, but fails to establish, that the certificate, which respondent presented, that he was an attorney in good standing before the courts of the Philippine Islands, was forged. This circumstance can make no difference to the outcome of this proceeding. Nor is it necessary to comment at any great length upon the situation. It cannot be doubted that an obligation rested upon the respondent to reveal to this court at the time of his application the several convictions of offenses against the law instead of concealing the same and averring that he had never been charged with an offense involving moral turpitude. Nor can it be questioned that such conduct constitutes a fraud upon this court which upon principle and precedent (see In re Mash, 28 Cal. App. 692, 153 P. 961, and In re Wells, 174 Cal. 467, 163 P. 657) authorizes and compels us to revoke the license granted.

The license to practice law in this state heretofore granted to Albert W. Holland by this court is revoked and canceled, and his name is ordered stricken from the roll of attorneys and counselors at law.

We concur: WORKS, P. J.; CRAIG, J.

---

96 Cal. App. 657

PEOPLE v. SNELL. (Cr. 1714.)

District Court of Appeal, Second District, Division 2, California. Feb. 7, 1929.

1. Forgery ⚷44(½)—Evidence held to authorize conviction for forging note (Pen. Code, § 21).

Evidence *held* sufficient to warrant conviction for forgery of note secured by deed of trust, under Pen. Code, § 21.

2. Forgery ⚷48—Instruction that one signing another's name without authority is guilty of forgery held not misleading.

Instruction that any one who with intent to defraud, signs another's name, knowing that he has no authority to do so, or forges a note, or passes or attempts to pass it as true and genuine, knowing it to be false or forged, with intent to prejudice, damage, or defraud any person, is guilty of forgery, *held* not misleading on issue of authority.

3. Forgery ⚷48—Instruction to acquit of forgery if defendant signed note believing he acted merely as dummy to accommodate codefendant in obtaining loan held properly refused under evidence.

In prosecution for forgery of note and deed of trust securing it, defendant's requested instructions that, if jury believed from evidence defendant signed note and deed of trust with no knowledge of fraudulent motive or criminal intent on part of codefendants, and believing that he acted merely as a dummy in accommodating codefendant in obtaining a loan on property described, they should find him not guilty, *held* properly refused under evidence.

4. Criminal law ⚷406(4)—Trial court's examination of defendant respecting admission of guilt by his plea of guilty previously withdrawn held not error (Pen. Code, § 1018).

Where, prior to trial, defendant pleaded guilty and thereafter withdrew such plea and entered plea of not guilty, action of trial court in examining him concerning such admission of guilt when he took the stand in his own behalf *held* not error, under Pen. Code, § 1018.

Appeal from Superior Court, Los Angeles County; Charles S. Burnell, Judge.

William G. Snell was convicted of forgery, and he appeals. Affirmed.

George E. Stoddard, of Los Angeles, for appellant.

U. S. Webb, Atty. Gen., and Louis G. Campbell, Deputy Atty. Gen., for the People.

CRAIG, J. The appellant was jointly charged by information with two other defendants with having committed forgery and grand larceny in the county of Los Angeles on or about July 5, 1927. One of appellant's codefendants pleaded guilty to the crime of forgery, and as to the other the charges were dismissed. Snell was tried by a jury, and on April 19, 1928, was found guilty of having forged the names of Ella E. Thurin and C. J. Thurin upon a promissory note for $3,200.

[1] The principal ground upon which a reversal is sought is the contention that the evidence is wholly insufficient to warrant or to support the verdict and judgment, although appellant admitted before the jury that he signed the name "C. J. Thurin" to the note in question, and to a deed of trust purporting to secure it. Numerous authorities are cited which hold that intent is the essence of the offense charged, whereas, it is claimed, Snell signed another's name merely while acting as a "dummy," under the instructions of his codefendant, L. M. Cunningham, who represented to him that Mrs. Thurin's husband's signature could not be obtained at the time.

It appears that Cunningham visited the home of the Thurins in Los Angeles while they were in Denver, Colo., and thus obtained the address and description, and that neither C. J. Thurin nor his wife knew either of the defendants, nor did they sign or authorize the signature of their names to the note in controversy. A deed of trust was signed "C. J. Thurin" by appellant in the presence of a notary public to whom he acknowledged the same to be his signature, and Cunningham sold the note and deed of trust to the Billingsley Mortgage Company, and one Irene Haskins testified that she visited the Thurin home with both Snell and Cunningham. Snell was thereafter apprehended in Chicago and returned to Los Angeles for trial, whereupon he wrote certain exemplars. A handwriting expert swore that the exemplars and the signatures "C. J. Thurin" on the note and deed of trust were all written by the same hand. Appellant testified that he had been acquainted with Cunningham for some time, and had had other business dealings with him, that he knew his own name was not "Thurin," but that he gave it as his own to the notary, knowing that he was not telling the truth. His only attempted justification for the forgery of Thurin's name to the instruments was that to accommodate Cunningham he "sat in" as the real owner of the property, and that for the purposes of the transaction in hand he believed himself to be Thurin, and that he owned the realty described in the trust deed.

The Penal Code, by section 21, provides that the "intent or intention is manifested by the circumstances connected with the offense, and the sound mind and discretion of the accused." The jury were thoroughly instructed at the request of both parties upon the law of intent, presumption of innocence, credibility of witnesses, and as to the crime of forgery. Under the facts and circumstances presented by the record before us, we are unable to say as a matter of law that there was not ample justification for the conclusion at which the jury arrived.

[2] Another ground urged as error in appellant's briefs is that the jury were misled by instructions which were given upon the "authority" which legally entitles a person to sign the name of another, and that certain offered instructions illustrating the application of this term were improperly refused. The instruction complained of recites that every person who, with intent to defraud, signs the name of another person, knowing that he has no authority so to do, or forges a promissory note, or passes or attempts to pass it as true and genuine, knowing it to be false, or forged, with intent to prejudice, damage, or defraud any person, is guilty of forgery. It is contended that appellant's guilt was of no greater or different degree than that of Irene Haskins, one of his former codefendants, as to whom the charges were dismissed; that the jury should have been informed that there was no evidence tending to show that at the time of signing the note and deed of trust Snell believed that he was authorized in writing by Cunningham or the subsequently discovered true owner to execute them. It is argued that Mrs. Haskins signed the trust deed "Ella E. Thurin" at or about the same time, and for the same reason, that it was appellant's theory during the trial that she was not an accomplice, and that, the trial court having so determined, the same would be true of appellant unless the jury found and had evidence from which to find that appellant knew and had reason to know that his authority for the signing of the name, as he testified, was in fact false. The evidence adduced as to Mrs. Haskins tended to show that, after a brief acquaintance with appellant and Cunningham, whom she had no reason to distrust, she was asked by the latter to write the name "Ella E. Thurin," that she did so with no knowledge of the fact that she was signing the name of another person to a conveyance of property as security, and that, upon inquiry as to why she could not have signed her own name, Cunningham said "it didn't matter what name was signed to the paper; as it didn't belong to anybody it didn't matter what name was on the paper." Hence it appears that, while appellant knowingly and with intent to defraud forged Thurin's name to the documents in question as to which he

later falsely represented himself as owner, Mrs. Haskins' act was accompanied by none of these elements of forgery. We think the rulings were not in this respect improper.

[3] The defendant offered instructions stating as the law of the case that, if the jury should believe from the evidence that Snell signed the note and deed of trust with "no knowledge of a fraudulent motive or criminal intent upon the part of any of his codefendants, and that he signed the same believing that he acted merely as a dummy in accommodating the defendant Cunningham in his obtaining a loan upon the property described," they should find him not guilty. Several instructions of this general character were refused, and it is insisted that the trial court erred in giving these and in failing to give other instructions heretofore mentioned upon the question of authority. We are cited to no decision supporting this novel theory. On the other hand, the testimony was not such as to warrant it in any event. Appellant did not attempt by his evidence, nor does he indicate by his briefs, any legal or moral excuse for signing the name "C. J. Thurin," which was not his own, to an incumbrance upon real property in which he had no interest. Although he argues that he received nothing for so signing, and that the paper may have been at that time thought to be worthless, he admits in the next breath that in some manner he was trying to accommodate a confederate, which it is obvious worthless paper would not accomplish. The rejected instructions also assume that Cunningham was the owner of the property and that appellant so believed. However, he, by his own testimony, stated to the jury that, acting as a dummy, he "supposed" that he owned the premises described in the deed of trust. There is no merit in this contention.

[4] Prior to the trial, appellant pleaded guilty, but thereafter withdrew such plea and entered a plea of not guilty. He took the stand as a witness in his own behalf, and at the conclusion of his redirect examination, wherein he swore that he did not at the time of the transaction in question know that there was any such person as Ella E. Thurin or C. J. Thurin, that he did not inquire nor learn of their existence until about a week after his arrest in Chicago, the trial court propounded questions, to which he answered, as follows:

"Q. Mr. Snell, have you at any time stated that you were guilty of the crime under the count of grand larceny? A. Guilty of it?

"Q. Yes. A. Yes, sir.

"Q. You pleaded guilty, didn't you, on the 4th of April in this case to the third count charging grand larceny? A. Yes, sir.

"Q. And were afterwards permitted to withdraw your plea and change it? A. Yes, sir."

It is contended by appellant that the plea of guilty having been withdrawn, it was prejudicial error to examine him concerning such admission of guilt, and that the trial court in so doing expressed bias, and created an impression in the minds of the jury which could not be cured by an instruction to disregard the evidence. Authorities cited by appellant relate to much different circumstances wherein the rule has been so applied in this state to remarks of the trial court, and those cited from other jurisdictions are not in accord with the more recent rule established by our Supreme Court. In People v. Ryan, 82 Cal. 617, 23 P. 121, it was held that the Legislature did not intend to say, by the language of section 1018 of the Penal Code, that "notwithstanding such substitution and doing away with the first plea, it may be given in evidence and sometimes serve as the only conclusive proof of a man's guilt under the plea of not guilty." In People v. Boyd, 67 Cal. App. 292, 227 P. 783, it appeared that the defendant, having been charged with several offenses, offered through his counsel to plead guilty to obtaining money under false pretenses, if the court would grant him a continuance, but, notwithstanding the fact that such continuance was granted, he thereafter pleaded not guilty. Upon the trial the record of the conversation between Boyd's counsel and the judge relating to the offer to plead guilty was read to the jury, over the defendant's objections. Upon the authority of People v. Ryan, supra, this court held upon appeal from a judgment of conviction that such offer was not admissible. The Supreme Court denied a hearing in the case, and in so doing said, in part: "The action of the defendant in that regard was an admission on his part of the truth of the charge that he obtained money under false pretenses, which, with the other evidence, was properly left to the consideration of the jury. People v. Jacobs, 165 App. Div. 721 [151 N. Y. S. 522]. Such an admission was not, of course, conclusive evidence against the defendant. It was competent evidence merely, its weight and sufficiency being proper subjects for consideration by the jury. State v. Bringgold, 40 Wash. 12, 17 [82 P. 132, 5 Ann. Cas. 716]. When the fact was established that the admission had been made by the accused, the admission was not before the jury as testimony by him establishing the truth of all or any part of the allegations of the information, but the fact that he had made it was before them, and was relevant as being inconsistent with his claim to the jury that he did not obtain any money under false pretenses from the complaining witnesses and was not guilty. State v. Carta, 90 Conn. 79 [96 A. 411, L. R. A. 1916E, 634]. The defendant's own admission, voluntarily made, was clearly competent evidence against him. That he made the admission in court can detract nothing from its relevancy or its competency. Ehrlick v. Commonwealth, 125 Ky. 742 [128 Am. St. Rep. 269, 102 S. W. 289, 10 L. R. A. (N. S.) 995]; People v. Gould, 70

Mich. 240 [14 Am. St. Rep. 493, 38 N. W. 232]."

The opinion further points out that, as is true of the instant case, unlike People v. Ryan, supra, the court was dealing with a case in which there could have been a conviction without the plea of guilty being considered as a "confession."

Although appellant did not at the time of the trial take exception to certain remarks of the trial court, nor assign them as grounds of appeal, he quotes them in his brief, and contends that they were prejudicial. A careful reading of the court's examination of the defendant, and of the language quoted, fails to disclose any evidence of bias or prejudice upon the part of the judge, or inclination to influence the jury in any way. The judge asked the defendant while on the stand if he knew he was lying when he represented himself as Thurin before the notary public, to which Snell answered "Yes"; and we think from the other evidence in the case that in this latter instance the witness was truthful, and that the jury must have so concluded had the question not been propounded. While the query was quite blunt, it was at least to the point, and the defendant offered no objection to frankly replying thereto.

The judgment and order appealed from are affirmed.

We concur: WORKS, P. J.; THOMPSON, J.

---

96 Cal. App. 523

ANTHONY v. VAN et al. (Civ. 6559.)★

District Court of Appeal, First District, Division 2, California. Jan. 31, 1929.

Rehearing Denied March 1, 1929. Hearing Denied by Supreme Court April 1, 1929.

1. Brokers ⟾4—Broker's bond does not cover conversion of securities by broker, in absence of violation of Corporate Securities Act (St. 1917, p. 677, § 5, par. 3, as amended by St. 1923, p. 90, § 2).

Surety on broker's bond, given pursuant to Corporate Securities Act (St. 1917, p. 677, § 5, par. 3, as amended by St. 1923, p. 90, § 2), is not liable for loss suffered by reason of conversion of securities by broker, where such conversion did not arise from violation of Securities Act.

2. Brokers ⟾4—Surety on broker's bond, by failing to cancel bond on statutory amendment changing conditions of bond, did not assume new obligations (Corporate Securities Act, § 5, par. 3, as amended by St. 1923, p. 90, § 2, prior to its amendment in St. 1925, p. 967, § 3).

That surety on broker's bond, executed pursuant to Corporate Securities Act, St. 1917, p. 677, § 5, par. 3, as amended by St. 1923, p. 90, § 2, prior to its amendment in 1925 (St. 1925, p. 967, § 3), which amendment prescribed new conditions for broker's bond, did not cancel bond after amendment was adopted, and file new bond or affix rider to meet new statutory requirement, did not result in bond being automatically enlarged to cover such new conditions and assumption by surety of new and different obligation by the amendment.

Appeal from Superior Court, City and County of San Francisco; Louis H. Ward, Judge.

Action by George L. Anthony against Jac. F. Van and others, copartners doing business under the firm name and style of Cary & Co., and another. From a judgment entered on sustaining of a demurrer to the complaint, plaintiff appeals. Affirmed.

Dunne, Dunne & Cook, A. B. Dunne, and Clifton R. Gordon, all of San Francisco, for appellant.

Hartley F. Peart, Gus L. Baraty, and Charles V. Barfield, all of San Francisco, for respondent.

GOODELL, Justice pro tem. [1] This appeal is from a judgment entered upon the sustaining of the demurrer of the respondent Indemnity Company to the complaint, without leave to amend, in an action upon a bond for $5,000, executed on January 1, 1925, by the defendants Jac. F. Van and others, as principals, and the respondent, as surety.

The bond was given pursuant to paragraph 3 of section 5 of the Corporate Securities Act (St. 1917, p. 677), as amended in 1923 (Stats. 1923, p. 90), which, as a prerequisite to the issuance of a broker's certificate by the commissioner, called for the filing of a bond for $5,000, payable to the state of California, "conditioned upon the faithful compliance with the provisions of law" by the applicant, and containing the further provision "that, upon failure to so comply, the applicant shall be liable to any and all persons who may suffer loss by reason thereof."

The complaint alleges the filing of the bond, the issuance of the certificate, and a breach of the condition of the bond, in that the defendants, while acting as appellant's brokers, converted securities entrusted to them for sale, resulting in the loss to appellant of upwards of $5,000. But there is no allegation to connect the conversion with a violation of the Securities Act, and, because of the absence of such allegations, the trial court held that the complaint stated no cause of action against the surety.

Counsel for appellant contend that the legislative intent in requiring such bond was to safeguard persons dealing with licensed brokers against any and every actionable wrong or defalcation of the character sued upon, whether denounced by the "Blue Sky" law

---

★Rehearing denied. Hearing denied by Supreme Court.

or not; and they argue that the words, "provisions of law," are broad enough to include not only written or statute law, but also general rules or principles established by judicial decision.

In the case of Blumenthal v. Larson, 79 Cal. App. 726, 248 P. 681, which was an action on a broker's bond executed under the same act, there was the same absence of allegation showing the transaction to be in any way related to, or in violation of, the Securities Act. In affirming the judgment in favor of the surety, it was held that liability upon such bonds cannot be fastened upon the surety, unless the loss arises from a violation of the Securities Act itself. The court there says: "While the phrase 'provisions of law' is a very broad and general one, we are of the opinion that it only refers to the provisions of the Corporate Securities Act" and, further, "It is clearly apparent from a reading thereof that the section is confined solely to sales of worthless securities and that it has no application to transactions between brokers and their clients generally. * * * The bond required under the act was never intended to be a contract of credit insurance."

The recent case of Mitchell v. Smith (Cal Sup.) 267 P. 540, was likewise an action against brokers and their surety for loss arising out of dealings in securities, but the securities were not alleged to have been worthless, or issued or sold under, or otherwise subject to, the Securities Act. The court, referring to the language "provisions of law," there says: "That provision has been construed in the recent case of Blumenthal v. Larson * * * to mean that a surety is liable for a failure on the part of the broker to comply with the provisions of law set out in the Corporate Securities Act of 1923, and not upon his failure to comply with all the general laws," and adds that that case is "conclusive against plaintiff's right to recover."

The bond sued on herein was in the same form as the bonds in both cited cases; all three bonds were given for the same purpose, and were drawn so as to comply with the same statute. The broker's default which gives rise to this action was no more a violation of the Securities Act than were the losses sued on in the Blumenthal and Mitchell Cases, and those authorities, therefore, would seem definitely to settle the question.

Counsel for the appellant point out, however, that in neither of those cases was attention drawn to certain features of the Securities Act which, they claim, furnish strong intrinsic evidence supporting the construction for which they contend. They show that the act has two distinct purposes, (1) the regulation of the issuance and sale of securities, and (2) the regulation of investment brokers; that in that part of the statute dealing with the issuance and sale of securities the words "contrary to the provisions *of this act*" were used, while, in that part having to do with the licensing and bonding of brokers, the expression, "contrary to the provisions *of law*," was employed. From this they argue that the use of the broader language in the latter part evinces, by contrast, a studied intention to subject the surety to liability for any and every defalcation or wrong, however unrelated it might be to the other purposes of the act. But in the Blumenthal Case the act in question was considered and analyzed with great care; a rehearing was granted, and therein the court had the additional aid of briefs filed by numerous amici curiæ. We are satisfied that in the searching examination to which the act was then subjected no part of its language was overlooked. Moreover, when it is borne in mind that in the Mitchell Case the Supreme Court reaffirmed the principle of the Blumenthal Case, the meaning of the statutory language is no longer open to any question.

[2] Finally, appellant's counsel seek to distinguish this case from the Blumenthal and Mitchell Cases, because in both of them the losses were suffered before the 1925 amendment, while here the losses were after, as well as before, the change. The amendment went into effect about July 23, 1925 (Stats. 1925, p. 967), and it changed paragraph 3 of section 5 to read: "Said bond shall be conditioned upon the strict compliance with the provisions *of this act*" (instead of "faithful compliance with the provisions of law") "and the honest and faithful application of all funds received and the faithful and honest performance of all obligations and undertakings in the purchase or sale of securities, by said broker. * * *"

The bond here involved was executed on January 1, 1925, some months before the amendment, and it was drafted, as is usual in such cases, in language designed to bind the surety to the obligation which the statute *then* prescribed. It reserved the right of cancellation on 15 days' notice. When the law was amended no new bond was filed, nor was anything in the nature of a "rider" affixed showing an intention to alter the obligation, theretofore assumed by the surety, to meet the new statutory requirement. The bond, conforming to the old statute, simply remained on file, and the broker's certificate remained outstanding. The respondent Indemnity Company was, of course, charged with knowledge of the change in the law, as was its principal, the broker. From these premises the appellant seeks to draw the conclusion that, as the respondent surety did not cancel the bond after the amendment was adopted, it elected, by its inaction, to suffer the bond to remain in full force, and that consequently, when the amendment prescribed new conditions for brokers' bonds, it automatically enlarged the obligation of this bond. Their contention, in other words, is that the amendment, by itself, and without the scratch of a pen by the surety, revitalized the instrument sued upon.

The Blumenthal Case holds (as must be obvious anyway) that such a bond "is strictly a statutory bond and liability thereon does not extend beyond the terms of the act." We adopt what was said in that case respecting the meaning of the amendatory language, i. e., that "the extent of the liability of a bond given under the law as it now stands is a question we are not called upon to consider or discuss," but it is sufficient to say that the amendment, requiring a broker's bond to be conditioned also upon "the honest and faithful application of all funds received and the faithful and honest performance of all obligations and undertakings in the purchase or sale of securities, by said broker, * * *" introduced a material change not contained in or contemplated by the 1923 act, as construed in the Blumenthal and Mitchell Cases.

The rule is a familiar one that "the law in force at the date of a public bond, fixing a certain condition for it, and saying what its obligation shall be, is a part of it as effectually as if such obligation were in words inserted in it." State v. Nutter, 44 W. Va. 385, 30 S. E. 67, quoted with approval in Milliron v. Dittman, 180 Cal. 443, 181 P. 779. The appellant cites the Milliron Case and others to the same effect in support of its argument, but this line of decisions goes no further than to hold that it is the law *at the time the bond is written*—when the surety's contract is made—that "enters into and becomes a part of the agreement." Hub Hardware Co. v. Ætna Acc. & Liability Co., 178 Cal. 267, 173 P. 81. "The bond should be read by the light of the law under which it was required and received." Macready v. Schenck, 41 La. Ann. 456, 6 So. 517. "Sureties engage with eyes open to that law." (State v. McGuire, 46 W. Va. 328, 33 S. E. 313, 76 Am. St. Rep. 822. To the same effect are Town of Mill Valley v. Massachusetts Bonding & Ins. Co., 68 Cal. App. 372, 378, 229 P. 891, and Malachowski v. Varro, 76 Cal. App. 207, 213, 244 P. 936. No case is cited which goes so far as to hold that in a bond of this character, not only the statute in force when the bond is written, but amendments not then contemplated, enter into the surety's contract.

To hold that the surety intended to assume the new and different obligation created by the 1925 amendment, by its mere passiveness in omitting to "cancel" the bond, with nothing in the bond itself, or supplied subsequently, to show that it so intended, and with no new or fresh consideration to support it, would have the undoubted effect, as said in the Milliron Case, 180 Cal. 443, 181 P. 779, of imposing "a liability necessarily and absolutely inconsistent with the unequivocal intent of the parties as disclosed by the express terms of the bond itself." To so hold would extend beyond all reasonable bounds the doctrine just discussed, and would render a bondsman liable to having obligations, unthought of at the time he signed, legislated into his contract without his consent. Brandt, in his work on Suretyship and Guaranty (3d Ed.) at section 666, sums the matter up in the language used by Baron Pollock in the case of The Mayor, etc., v. Oswald, 3 El. & Bl. 665, 118 English Reports, Reprint, 1286, 1296, as follows: "Every contract (which does not expressly provide to the contrary) must be considered as made with reference to the existing state of the law; and, if, by the intervention of the Legislature, a change is made in the law, which in any degree affects the contract, such contract, made without some clear and distinct reference to the prospect or possibility of a change, does not hold, with reference to the state of things as altered by the new law."

If, upon the adoption of the 1925 amendment, the commissioner had revoked the broker's certificate (on the ground that no new bond had been filed), it is perfectly clear, we think, that he could not have been compelled by mandate or otherwise to reinstate it upon the bond, in the form now before the court, drawn under the old law. Moreover, the appellant, as well as the brokers and their surety was chargeable with knowledge of the change in the law, and it cannot be that in his dealings with the brokers appellant could have placed any reliance upon the protection of the bond as originally drawn without any new writing showing an intention to become bound under the terms of the amendment. We see no element of estoppel in the case.

As already stated, it is not necessary for us to comment on the effect of the new language. If, however, appellant's losses were within its purview, we are of the opinion that the bond sued upon, given pursuant to the old statute, and with the old but not the new statutory language a part of it, is not broad enough, and was not intended to cover such losses. In our opinion the action of the trial court in sustaining the demurrer was correct, and its judgment should be affirmed.

Judgment affirmed.

We concur: KOFORD, P. J.; NOURSE, J.

96 Cal. App. 455

GIBSON et al. v. MAILHEBUAU.★
(Civ. 6552.)

District Court of Appeal, First District, Division 1, California. Jan. 29, 1929.

Rehearing Denied Feb. 28, 1929. Hearing Denied by Supreme Court March 28, 1929.

1. Executors and administrators 🔑444(2)—Allegation in complaint, of plaintiff's representative capacity, must be denied positively; denial thereof, on ground of lack of information and belief, being insufficient.

Allegation in complaint, of plaintiff's representative capacity, is matter of public record, and must be denied positively in answer; denial thereof, on ground of lack of information and belief, being insufficient.

2. Executors and administrators 🔑450—Probate of will and issuance of letters testamentary raises presumption of testator's death.

Fact, that a man's will has been probated and letters testamentary have been issued, raises presumption of death, which must be indulged, in the absence of any conflicting evidence.

3. Executors and administrators 🔑451(2)—Issue of testator's death was removed from jury in action by executors under uncontradicted evidence of issuance of letters testamentary (Code Civ. Proc. § 1961).

In suit by executors no question was raised for consideration of jury as to testator's death, where witness testified to his death, and defendant admitted probate of will and issuance of letters testamentary, and failed to introduce any contradictory evidence; jury being required to find, according to uncontroverted presumption, under Code Civ. Proc. § 1961.

4. Evidence 🔑474(14)—Opinion of bank teller, as to genuineness of signature claimed to be that of deceased, held competent, where witness had quite often paid out money on deceased's signature (Code Civ. Proc. § 1943).

In action against estate to recover on note claimed to have been signed by deceased, genuineness of his signature *held* properly proved, under Code Civ. Proc. § 1943, by testimony of bank teller who stated he had paid out money on deceased's signature quite often, and that, in his opinion, the signature to the note was that of deceased.

5. Appeal and error 🔑179(2)—Defendant who failed to introduce evidence in suit on note could not complain on appeal that note was without consideration (Civ. Code, § 1615).

Defendant who failed to introduce evidence at trial could not complain on appeal that note sued on was not supported by consideration, since burden of want of consideration is upon person seeking to avoid the contract, under Civ. Code, § 1615.

6. Trial 🔑141—Direction of verdict for plaintiffs was justified where they made out prima facie case, and defendant failed to introduce any evidence.

Where plaintiffs, in suit on note, made out prima facie case, and defendant failed to introduce any evidence, court was justified in directing jury to return verdict for plaintiffs.

Appeal from Superior Court, City and County of San Francisco; Franklin A. Griffin, Judge.

Action by Walter D. K. Gibson and others, as executors of the last will and testament of Adolph B. Spreckels, deceased, against Eugenie Bouscal Mailhebuau, as executrix of the last will and testament of Camille Mailhebuau, deceased. Judgment for plaintiffs, and defendant appeals. Affirmed.

J. J. Dunne, of San Francisco, for appellant.

Morrison, Hohfeld, Foerster, Shuman & Clark, of San Francisco (C. Coolidge Kreis, of San Francisco, of counsel), for respondents.

NEEDHAM, Justice pro tem. This is an appeal from the judgment of the superior court of the state of California, in and for the city and county of San Francisco. The action was upon a rejected claim, which claim was presented to the defendant executrix, and which was based upon a promissory note alleged to have been given by Camille Mailhebuau, defendant's testator, to Adolph B. Spreckels, plaintiffs' testator.

The amended complaint alleges that the promissory note was for the principal sum of $15,000, and was executed and delivered on the 21st day of December, 1922, and that no part of said note has been paid, except the interest up to December 21, 1923. It is also alleged that Adolph B. Spreckels, the plaintiffs' testator and the payee named in said promissory note, died on the 28th day of June, 1924, leaving a last will and testament, and appointing the plaintiffs executors; that said will was admitted to probate in the superior court of the city and county of San Francisco; that letters testamentary were issued to plaintiffs, and that they duly qualified as such executors. Then follow allegations of the death of Camille Mailhebuau, the appointment of the defendant as executrix, and the presentment and rejection of plaintiffs' claim.

The answer admits the presentment and rejection of the claim; also the appointment of defendant as executrix, as alleged in the amended complaint, by failure to deny the same. The defendant, basing her denial on lack of information and belief, denied all the other allegations of the amended complaint.

The case was tried before a jury. At the conclusion of plaintiffs' case the defendant made a motion for a nonsuit, which was denied. The defendant declined to offer any evidence whatsoever, and a motion by the plaintiffs for a directed verdict was granted by the court.

★Rehearing denied. Hearing denied by Supreme Court.

Appellant claims the evidence was not sufficient to support the judgment, and to justify the direction of the verdict, in many particulars, it being claimed that the proof offered in support of the plaintiffs' amended complaint failed to show, among other matters, the plaintiffs' title to the note, the death of Adolph B. Spreckels, and the genuineness of the signature of Camille Mailhebuau on the promissory note.

[1] As stated above, the amended complaint alleged the death of Adolph B. Spreckels, the probate proceedings, the issuance of letters testamentary, and the appointment of plaintiffs as executors. Defendant's denial of these allegations was based on her alleged lack of information and belief. We think it is well settled that representative capacity, being a matter of public record, must be denied positively. There are so many cases in this state holding such to be the law that it is only necessary to cite a few of such cases where this point has been determined. The law is well stated in the case of Montgomery v. Fidelity & Deposit Co., 69 Cal. App. 251, at page 254, 230 P. 993, 994, as follows: "In paragraph 6 of plaintiff's complaint the plaintiff alleged the death of Nora A. Knobloch, the commencement of probate proceedings in San Francisco, the issuance of Letters Testamentary, and the formal appointment of this plaintiff as executrix of the last will and testament of Nora A. Knobloch. The defendant alleged that it had no information or belief on the subject and therefore denied the allegations of that paragraph. The denial should have been positive."

It has also been held in numerous cases in this state that a denial based only on lack of information or belief of a matter of public record is no denial at all, and the matter is deemed admitted. We cite only a few cases. See Santa Barbara Lumber Co. v. Ross, 183 Cal. 657, at page 659, 192 P. 436; Art Metal Construction Co. v. A. F. Anderson Co., 182 Cal. 29, at page 33, 186 P. 776; Mullally v. Townsend, 119 Cal. 47, 50 P. 1066; Saylor v. Taylor, 42 Cal. App. 474, page 477, 183 P. 843.

[2, 3] The appellant claims that the death of Adolph B. Spreckels was not proved; that no presumption of the death of Spreckels is raised, and that the evidence was not insufficient to overcome the presumption of the continuance of human life. The witness Blackie testified: "I knew Spreckels. He died in June, 1924, the 28th of June." Appellant contends that this testimony should have been ignored, because it is not shown that Mr. Blackie spoke from his personal knowledge. However, it nowhere appears that the witness Blackie did not speak from personal knowledge. The answer of Blackie was a positive statement of the fact of the death of Spreckels. Counsel for the defendant could have cross-examined the witness concerning the source of his knowledge, if the witness appeared to have spoken from hearsay, but this was not done.

There was, however, other testimony than that of the witness Blackie that was amply sufficient to prove the death of Spreckels, in this, that the defendant admitted the probate of the will of Spreckels and the issuance of letters testamentary to the plaintiffs, and we think this principle was announced in the case of Garthwaite v. Bank of Tulare, 134 Cal. 237, at page 242, 66 P. 326, 328, where the court uses the following language: "The introduction of the letters testamentary to the plaintiffs was sufficient evidence of the death of Smith."

The fact that a man's will has been probated and letters testamentary have been issued raises a presumption of his death. This presumption must be indulged in the absence of any conflicting evidence. In this last-cited case the plaintiffs, as executors of one Smith, were suing on a check drawn by the defendant, payable to the order of Smith. The court held that plaintiffs had sufficiently proved their title to the check by showing the issuance of letters testamentary to them.

If the fact of issuance of letters testamentary was presumptive evidence of the death of Spreckels, since no conflicting evidence was offered, this question was removed from the consideration of the jury. Section 1961 of the Code of Civil Procedure: "A presumption (unless declared by law to be conclusive) may be controverted by other evidence, direct or indirect; but unless so controverted the jury are bound to find according to the presumption."

[4] As to the genuineness of the signature of Camille Mailhebuau, as maker of the promissory note sued on, it is proved by the testimony of the witness Stahner, an employee of the San Francisco Bank for 16 years, the paying teller of such bank for over 4 years. The witness Stahner said that he knew the signature of Camille Mailhebuau, and had known it for "a full ten years." He admitted that he had never seen Mr. Mailhebuau sign his name, but he stated that he had paid out money on Mailhebuau's signature "quite often." He said that in his opinion the signature was that of Mailhebuau.

We think this mode of proving a signature falls within the provisions of section 1943 of the Code of Civil Procedure, which reads as follows: "The handwriting of a person may be proved by anyone who believes it to be his, and who has seen him write, or has seen writings purporting to be his, upon which he has acted or been charged, and who has thus acquired a knowledge of his handwriting."

[5] The defendant set up, as an independent defense, the absence of consideration for the note. As stated, the defendant offered no evidence at the trial of the case whatever. Section 1615, Civil Code, reads: "The burden of showing a want of consideration

sufficient to support an instrument lies with the party seeking to invalidate or avoid it." Therefore the appellant and defendant is in no position to complain.

[6] As the appellant offered no evidence at the trial, we are only required to ascertain from the record if a prima facie case was made by plaintiffs and respondents. The evidence was amply sufficient. Such being the case, there was no error in denying the motion for a nonsuit.

The court directed the jury to return a verdict for the plaintiffs, the defendant having failed to introduce any evidence, and we think the trial court was clearly justified in so doing. The only question left for the jury to determine would have been the amount of the attorneys' fees recoverable, and this question was by stipulation of the attorneys left to the determination of the court.

No other grounds urged for reversal require discussion, although we have carefully considered all of them.

The appeal is without merit, and, therefore, the judgment is affirmed.

We concur: TYLER, P. J.; CASHIN, J.

---

96 Cal. App. 478

LIBERTY BANK v. NONNENMANN et al.★ (Civ. 6526.)

District Court of Appeal, First District, Division 1, California. Jan. 30, 1929.

Rehearing Denied March 1, 1929. Hearing Denied by Supreme Court March 28, 1929.

1. Bills and notes 🔑64—Where conditions prescribed by maker of note are fraudulently disregarded by payee bank, or cashier, there is no binding delivery.

Where conditions prescribed by maker of note are fraudulently disregarded by payee bank, or by cashier, its agent, there is no binding delivery, since there is no meeting of minds.

2. Banks and banking 🔑109(3)—Cashier, in taking notes payable to bank for purpose of purchasing automobiles, was agent of bank.

Where bank cashier persuaded defendant to buy half interest in automobile business, and cashier agreed to supervise such interest, and cashier thereafter fraudulently represented that motor company was solvent, and induced defendant to sign notes, representing that proceeds would be used to purchase automobiles, cashier, in receiving notes payable by their terms to bank, was agent of bank.

3. Banks and banking 🔑109(3)—Where cashier, taking note to bank, promised maker he would not be required to pay notes, maker could not be held liable; notes being transferred after maturity.

Where bank cashier, taking notes payable to bank for purpose of purchasing automobiles for motor company, promised maker that he would not be called on to pay notes, maker could not be held liable, where notes were transferred after maturity, and no rights of innocent third parties were involved, since, in case principal seeks to recover on contract in which agent exceeds his authority, he must take contract as a whole.

4. Bills and notes 🔑502—In action on notes payable to bank, admitting evidence that cashier had taken notes to purchase automobiles for motor company in which maker was interested held not error.

In action on notes payable to bank, transferred to plaintiff after maturity, admitting evidence that notes were taken by cashier for particular purpose, viz. to purchase automobiles for motor company, in which maker had purchased interest through cashier, *held* not error.

5. Evidence 🔑135(1)—Where issue was whether bank cashier practiced fraud in inducing defendants to sign notes, evidence of cashier's other frauds practiced on defendants was admissible.

In action on notes payable to bank, where issue on question of fraud was whether bank cashier practiced fraud in inducing defendants to sign notes, evidence concerning fraud in inducing defendants to purchase half interest in automobile business, which occurred while cashier was assistant cashier of another bank, and before he became connected with payee bank, and that name of defendant, signed to articles of incorporation of motor company two months after making of notes sued on, was forged by cashier, *held* admissible on question of cashier's intent or motive.

6. Bills and notes 🔑538(3)—Evidence warranted instruction that, if prior notes were paid before notes sued on were executed, prior notes formed no consideration for notes sued on.

In action on notes, instruction that, if jury found from evidence that prior notes were fully paid and cashed before notes in controversy were executed, and that notes in controversy were not executed for purpose of paying and canceling prior notes, such prior notes formed no part of consideration for giving of notes in controversy, *held* warranted by evidence.

7. Banks and banking 🔑109(3)—If bank cashier received proceeds of notes to bank to purchase automobiles for motor company, he, as bank's representative, was bound to do so.

Where cashier of bank became possessed of proceeds of notes payable to bank, and as cashier received proceeds to purchase automobiles for motor company, he as representative of bank was bound to so use proceeds, and, where he did not do so, transferee of notes could not recover on notes.

8. Appeal and error 🔑1060(1)—Attorney's improper reference to jury's verdict in another case held harmless.

In action on notes, defendant's attorney's improper reference, during cross-examination of payee bank's cashier, to fact that jury in another case failed to see matter in light that witness stated the facts were, *held* harmless, where evidence amply supported verdict.

★Rehearing denied. Hearing denied by Supreme Court.

Appeal from Superior Court, San Mateo County; George H. Buck, Judge.

Action upon promissory notes by the Liberty Bank against Elwood Nonnenmann, also known as Elwood Nonnenman, and another. From a judgment for defendants, plaintiff appeals. Affirmed.

Ross & Ross, of Burlingame (Maurice T. Dooling, Jr., and F. A. Devlin, both of San Francisco, of counsel), for appellant.

Fletcher A. Cutler, of Burlingame, for respondents.

CAMPBELL, Justice pro tem. This is an action upon two promissory notes in the principal sum of $2,500 each, executed by the defendant Elwood Nonnenmann and by his father, Charles L. Nonnenmann, since deceased, as makers, in favor of the California Bank of San Mateo County, as payee, and transferred after maturity to the plaintiff Liberty Bank. The defendants Elwood Nonnenmann and Emma Adelaide Nonnenmann, as administratrix of the estate of Charles L. Nonnenmann, deceased, filed answers, in which they denied the execution of the notes and that there was anything due thereon; that plaintiff acquired the notes after maturity and is not a holder in due course; that the notes were executed without consideration and were not delivered to the payee, and the proceeds thereof were not deposited to the credit of the makers nor paid to them; and a special defense of fraud, which is in the main as follows: That for many years prior to September, 1, 1923, the Nonnenmanns, father and son, were intimately acquainted with and reposed confidence in one Ray Falvey; that Falvey was on that date assistant cashier of the Peninsula Bank in Burlingame, where all the parties resided; that on or about September 1, 1923, Falvey conceived a fraudulent scheme to defraud Charles L. Nonnenmann of various sums of money, including the proceeds of the notes here sued upon; that in pursuance of such scheme Falvey represented to Charles L. Nonnenmann that a certain automobile business was of the value of $6,000, free of debt, and being conducted at a profit; that, if the elder Nonnenmann would advance $3,000, Falvey would purchase a one-half interest in this business for the other Nonnenmann, and would supervise and manage such interest; that such representations were false, and known to be false; that the elder Nonnenmann, in reliance on these representations, paid the sum of $3,000, and it was deposited in the Peninsula Bank to the credit of the Mann-Nonnenmann Motor Company, under which name the business was conducted; that Falvey, as cashier of the Peninsula Bank, wrongfully and without the knowledge of the Nonnenmanns appropriated said money to his own use and that of the Peninsula Bank; that thereafter Falvey became cashier of the California Bank of San Mateo County, payee of the notes in suit, and continued to manage and superintend the affairs of the Mann-Nonnenmann Motor Company, and the accounts of the motor company were transferred to the California Bank of San Mateo County; that pursuant to such fraudulent scheme Falvey, on or about October 10, 1924, fraudulently induced Nonnenmann, Sr., to advance $2,500 to purchase new automobiles, which amount was deposited in the California Bank of San Mateo County to the credit of the motor company; that Falvey at this time was cashier and manager of such bank, manager and superintendent of the Mann-Nonnenmann Motor Company, and secretary and manager of the Peninsula Acceptance Corporation, and had control of the books of all three institutions, and so kept the accounts of the bank with the motor company as to show a fictitious indebtedness, on October 10, 1924, of $2,500 from the motor company to the bank; that such fictitious indebtedness was caused by Falvey diverting the money of the motor company to his own use and that of the Peninsula Acceptance Corporation; that Falvey appropriated the $2,500 to his own use and that of the bank; that on or about November 1, 1924, Falvey was managing the automobile business under the name of Nonnenmann Motor Company, defendant Elwood Nonnenmann having become the sole owner thereof; that Falvey, on or about November 30, 1924, fraudulently represented to Nonnenmann, Sr., that the motor company was solvent, free of indebtedness, and was being conducted at a profit, and requested Nonnenmann, Sr., to sign the two promissory notes in suit, representing the proceeds would be used to purchase automobiles for the motor company, and, relying on such representations, the notes were signed; that Falvey had so manipulated the books of the three institutions as to show a fictitious indebtedness from the motor company to the bank of $5,000, and that the proceeds of the notes were not used to buy new automobiles, but were appropriated to their own use by Falvey and the bank.

Plaintiff proved the execution of the notes by Charles L. Nonnenmann and Elwood Nonnenmann, the transfer of the notes to plaintiff, that they constituted a part of plaintiff's assets and remained unpaid, introduced the notes in evidence, proved the appointment of Emma Adelaide Nonnenmann as administratrix of the estate of Charles L. Nonnenmann, deceased, and the presentation of the claim upon the notes.

Defendants, in support of their claim of fraud, introduced testimony that in 1923 Walter J. Mann was engaged in the business of selling automobiles; that in September of that year Ray Falvey, who was an intimate friend of the Nonnenmanns, and in whom they reposed confidence, and who was at the time connected with the Peninsula Bank, suggested to the Nonnenmanns that Nonnenmann, Sr., buy a half interest in the automobile business of Mann for $3,000 for young Nonnenmann, who was then 23 years of age, which business Falvey represented to be free from debt and agreed that he would keep the books and take care of everything; that, acting upon such representations Nonnenmann, Sr., gave his check for $3,000; that at the time Mann owed the Peninsula Bank a note of $1,500, and that this note was paid out of the $3,000 check given by Nonnenmann, Sr.; that Mann was offering his business for sale for $3,000, and Falvey told him he could get $3,000 for a half interest; that Mann never got any of that money; that, when Falvey became cashier of the California Bank of San Mateo County, the account of the automobile business was transferred to that bank; that at the time of the purchase of the half interest in Mann's business Falvey was assistant cashier of the Peninsula Bank; that with respect to the notes in suit, according to the testimony of Elwood Nonnenmann, Falvey told Nonnenmann, Sr., that "he was short in the finance company, and he needed the money to buy automobiles; that, if my dad would sign the notes, the bank would give the finance company the money and he would never hear of it thereafter. * * * Q. What did your father say to Mr. Falvey? A. He asked him, he said, 'Mr. Falvey, I will never be called upon to pay this note?' and Mr. Falvey said, 'You won't; everything will be taken care of.' * * * Mr. Falvey said he would never be called upon to pay this note, that he would cancel it right out and everything would be all right."

The case was tried before a jury, which rendered its verdict for defendants, and from the judgment entered upon such verdict plaintiff has appealed.

[1-4] Appellant urges that defendants should not have been permitted to offer evidence in support of their defense that the notes were given for a particular purpose, viz. to purchase automobiles, because they did not show that Falvey was authorized to make such an agreement, and that it was not in the ordinary course of the bank's business; that, while Falvey, as cashier, had authority to do everything necessary or proper and usual in the ordinary course of business for the purpose of effecting his agency (Civ. Code, § 2319), the buying of automobiles was neither necessary nor proper, nor in the usual or ordinary course of the bank's business, nor was it for the effecting of the purpose of his agency; and that the cashier had no authority to promise Nonnenmann, Sr., that he would never be called upon to pay the notes—and cites State Bank v. Forsyth, 41 Mont. 249, 108 P. 914, 28 L. R. A. (N. S.) 501, as holding that officers of banks have no power to excuse or limit the legal obligations of persons to banks or to excuse or limit such obligations by agreeing that they shall not be called upon to pay obligations which they make, and Magee on Banks and Banking (2d Ed.) p. 156, announcing the rule to be "that beyond the ordinary business of the bank his [cashier's] acts must be authorized and directed by the board of directors."

In this state it is held that, if conditions prescribed by the maker of the note are fraudulently disregarded by the bank or by the cashier, its agent, there is no binding delivery, as there is no meeting of minds. National Bank of San Mateo v. Whitney, 40 Cal. App. 281, 180 P. 845, Williams v. Hasshagen, 166 Cal. 386, 137 P. 9. Here Falvey was the agent of the bank in receiving the notes payable by their terms to the bank, and comes, we think, within the rule laid down in First National Bank v. Reed, 198 Cal. 259, 244 P. 371: "In the situation presented here the sole representative of the bank was the cashier and acting manager. The bank cannot claim anything except through him, and therefore, if it claims through him, it must accept his agency with its attendant notice of his knowledge of the facts as they actually existed. The bank cannot in one breath be heard to say that the cashier was without authority to bind itself as its agent and accept the note upon condition that it was an accommodation note for which the defendant should not be liable, and in the next breath insist that it can avail itself of his act in taking the note. It cannot avail itself of only so much of the transaction as was beneficial to it and repudiate the rest. If it relies upon the note, it must take it with the terms upon which the cashier took it, namely, that the defendant should not be responsible. The bank must take the burden with the benefits and by demanding performance of the contract, the bank assumes responsibility for the instrumentalities—that is to say, the representations, promises and conditions—through which the act was induced. The law is well settled that, in case a principal seeks to recover upon a contract in which the agent exceeds his authority, he must take the contract as a whole. * * * It follows, from what we have said, that Reed having given his note with the express understanding with the cashier and manager of the bank that he would not be called upon to pay the note, he cannot now in a suit wherein the bank is plaintiff, and no rights of innocent third parties intervene, be held liable." Here, as in the case just quoted from, the notes were assigned after maturity and the question of innocent purchasers for value is not involved.

[5] Appellant contends that permitting the defendants to offer evidence concerning the fraud alleged in inducing the Nonnenmanns to purchase the half interest in Mann's automobile business, which occurred while Falvey was assistant cashier of the Peninsula Bank and before he became connected with the California Bank of San Mateo County and further permitting testimony that the name

of Charles L. Nonnenmann signed to the articles of incorporation of the Nonnenmann Motor Company, executed on February 21, 1925, something over two months subsequent to the making of the notes in suit, was forged by Falvey, all of which testimony was received over appellant's objection, prejudiced its case and was error.

Appellant urges that as Falvey, at the time he induced Charles L. Nonnenmann to advance $3,000 to buy a half interest in Mann's automobile business, was not the agent of plaintiff's assignor, the California Bank of San Mateo County, but was the agent of the Peninsula Bank, his representations at that time were not binding upon the California Bank of San Mateo County, and consequently not upon plaintiff, and that the evidence offered to establish the fact that Falvey forged the name of Charles L. Nonnenmann to the articles of incorporation of the Nonnenmann Motor Company shows this act, if it occurred to have occurred subsequent to the execution of the notes in suit, citing in support of its contention the familiar rule that an agent can bind his principal only when his acts are within the scope of his authority, and that the acts of an agent beyond his authority are the acts of a stranger. 1 Cal. Jur. 827.

We do not question this principle, but here the testimony was not received to bind the California Bank of San Mateo County, but to show the motive and intent of Falvey in securing the signatures of the Nonnenmanns to the notes in controversy. "Where the fraudulent intent of a party in the performance of an act is in issue, proof of * * * similar fraudulent acts is relevant and admissible to establish his intent or motive in the performance of the act in question, when it appears that there is such a connection between such other acts and the act in question as to authorize the inference that both are parts of one scheme or plan, in which the same motive is operative, and it is immaterial whether such other fraudulent acts occurred before or after the act in question as remoteness in point of time affects only their weight." Marlatt v. Couture, 41 N. D. 127, 169 N. W. 582; Albrecht v. Rathai, 150 Minn. 256, 185 N. W. 259. Cases of fraud are exceptions to the general rule that other offenses may not be shown. Where fraud is charged, therefore, evidence of other frauds or fraudulent representations of like character, committed by the same parties at or near the same time, is admissible. Bone v. Hayes, 154 Cal. 767, 99 P. 172; Kornblum v. Arthurs, 154 Cal. 248, 97 P. 420; Thompson v. Modern School, 183 Cal. 112, 190 P. 451.

As the issue here on the question of fraud is whether Falvey practiced a fraud in inducing the Nonnenmanns to sign the notes in question, evidence of other frauds practiced upon them at the times alleged is relevant on the question of his intent or motive. "Although a party litigant cannot be concluded, or his rights affected, by the acts or statements of strangers, yet in so far as such acts or statements furnish circumstantial evidence of relevant facts, or have any legal operation material to the subject of inquiry, evidence thereof is admissible." Liberty Bank v. Ernst (Cal. App.) 269 P. 959.

[6] Appellant complains that the following instructions were not directed to any evidence in the case: "I instruct you that, if you find from the evidence that said prior promissory notes were fully paid and canceled before the promissory notes in controversy were executed, and that the notes in controversy were not executed for the purpose of paying and canceling said prior notes, then said prior notes form no part of the consideration for the giving of the notes in controversy," and, "if you find from a preponderance of the evidence that Falvey, as cashier of said bank, withdrew and took said money from said bank, and used said money for any other purpose than for the purchase of automobiles for said Nonnenmann Motor Company, then I instruct you that the said bank was liable to the said Charles L. Nonnenmann for the wrongful diversion of the money, and your verdict must be for defendants."

As to the former instruction, it may be said that the testimony of Mann and Nonnenmann is to the effect that all notes executed to the bank were accompanied by sales contracts as security; that Falvey was intrusted with the collection of the proceeds and that these proceeds, together with the income of the business collected by Falvey, were ample to extinguish all notes that had been executed to the bank; that, when Mann withdrew from the firm, there was a final settlement between the bank and the motor company; that there was no claim that Nonnenman's name remained on any unpaid note. Mrs. Nonnenmann testified that, when the notes in question were executed, nothing was said by Falvey of any unpaid notes, and the records produced do not show any credit of $5,000 to the Mann-Nonnenmann Company.

[7] As to the latter instruction, there is no evidence that the proceeds of the two notes were deposited to the credit of the motor company. There is evidence, however, that the notes were delivered to Falvey, the cashier of the bank; that the money was not used to purchase automobiles, for which testimony shows the notes were given, and the records of the bank show no transaction involving the renewal of any notes, and the jury could, if it thought such facts justified, draw the inference that Falvey appropriated such money to his own use. Falvey having become possessed of the proceeds of the notes as cashier of the bank—and if he received the proceeds, as the testimony supporting defendants' claim shows that he did—to purchase automobiles for the motor company, he as the

representative of the bank was bound to so use the proceeds. National Bank of San Mateo v. Whitney, supra.

[8] Appellant assigns the conduct of counsel for defendants in referring to the verdict of the jury in Liberty Bank v. Ernst, supra, in which the judgment was reversed, as error, asserting that it was highly prejudicial to bring before the jury the reference to this other case, with the innuendo that another jury had found Falvey guilty of fraud. The conduct complained of occurred during the cross-examination of Falvey, while he was being interrogated concerning $1,500 involved in a stock sale; the witness stating that Mr. Ernst borrowed the money from the bank to give to Mr. Nonnenmann. Counsel for defendants then asked of the witness: "Didn't the jury decide that was not so?" This being assigned as misconduct, and the court stating that this could not be gone into, counsel for respondent reiterated his reference to the verdict in the other trial as follows: "He made the same contention before another jury, and the other jury failed to see it in that light." Neither in his oral argument nor in his brief has counsel offered any justification for this improper reference to the verdict of the jury in the other case, nor do we attempt to justify it. However, as the evidence so amply supports the verdict, we feel the same result would have obtained, had this reference to the verdict of the jury in the other trial not have been made, and that the error, therefore, was not prejudicial.

The judgment is affirmed.

We concur: KNIGHT, Acting P. J.; CASHIN, J.

TITLE GUARANTEE & TRUST CO. v. HENRY et al. (Civ. 3629.)★

District Court of Appeal, Third District, California. Jan. 30, 1929.

Rehearing Denied March 1, 1929. Hearing Granted by Supreme Court March 28, 1929.

1. Vendor and purchaser 🔑44—Plaintiff's attempt to write something into contract for sale of land after its execution does not lessen effect of testimony or court's right to conclusion after inspecting contract.

In action to quiet title to land claimed by defendant under contract of purchase, fact that plaintiff attempted to write something into contract by way of interlineation or red ink entry after its execution does not lessen force and effect of testimony before trial court and right of court to come to conclusion after inspection of contract.

2. Vendor and purchaser 🔑22—Omission from contract for sale of land to name street on which residence was to face held immaterial.

Where contract for sale of land provided that residence to be erected shall face front line of premises, leaving blank space for name of street, omission of name of street was wholly immaterial, since street on which premises fronted would not be changed by omission.

3. Appeal and error 🔑882(17)—Plaintiff, in action for unlawful detainer, alleging ownership in fee simple of premises, could not object to finding in accordance with allegation that defendant knew of no other interest in property.

In action to quiet title to land claimed by defendant under contract of purchase, plaintiff, alleging it was owner in fee simple of premises, could not object to finding that defendants had no notice that another had any interest in property, which finding was in accordance with plaintiff's allegations, even though finding was outside issues, since finding was equivalent that defendants had no notice that allegations of complaint were untrue.

4. Appeal and error 🔑882(17)—Pleader cannot claim that finding that allegations of complaint are true is prejudicial error, regardless whether true or not.

Whether true or untrue, a pleader cannot be heard to say that finding that allegations of his complaint are true constitutes prejudicial error.

5. Vendor and purchaser 🔑6—Trust company, claiming ownership in fee when contracting to convey premises, could not elect to disaffirm contract for violation of its agreement with its vendor.

Trust company contracting to convey property, alleging it was owner in fee simple of property, could not elect to disaffirm its contract on ground that it has violated its agreement with person from whom it obtained title so as to relieve itself from its own wrong.

6. Quieting title 🔑44(2)—Trust agreement requiring another's approval to sales by plaintiff held properly excluded in action to quiet title against purchaser from plaintiff having no knowledge of agreement or of another's interest.

In action to quiet title to property claimed by defendant under contract of purchase from plaintiff, alleging in complaint that it was owner in fee simple of property, court did not err in excluding from evidence agreement of trust entered into between plaintiff and another from whom it received title to property, whereby such other was to approve sales by plaintiff, where contract further provided that contracts by plaintiff should vest in purchaser absolute and unassailable title, and court found that defendants had no knowledge of such other person's interest in property nor of trust agreement.

7. Appeal and error 🔑837(2)—Case can be determined on its own record only without considering contrary findings of different judge in different case.

Case can only be determined on pleadings and facts and findings of trial court disclosed by record in case, and contrary findings by different trial judge in another case between different parties cannot be considered.

★Superseded by opinion of Supreme Court 280 P. 959.

8. Trial 🔑396(2)—Finding is unnecessary unless issue is appropriately presented by pleading or treated as issue.

Unless an issue is appropriately presented by pleadings or treated as an issue, finding is unnecessary.

9. Appeal and error 🔑1071(5)—Finding outside issues which is not prejudicial cannot be complained of.

If finding outside issues is not prejudicial, no cause of complaint is given.

10. Vendor and purchaser 🔑44—Contract of purchase sought to be canceled held properly found to have been delivered to purchaser, under evidence showing completion of transaction for purchase.

In action to quiet title to real property and to cancel contract of purchase, testimony by plaintiff's agent that he handed contract to defendants for inspection and not as delivery thereof, and evidence that defendants had previously had duplicate copies which they signed, and that check was given by defendant to plaintiff's agent as deposit on property, and receipt taken by defendant, and that plaintiff's officers signed contract, and that few days later defendant questioned plaintiff concerning blank in contract, which plaintiff stated was immaterial, *held* sufficient to support finding that contract was delivered to defendant.

11. Appeal and error 🔑837(2)—Finding, if supported by record in case, must be supported on appeal, irrespective of results in another case.

If record before District Court of Appeals is sufficient to support finding of trial court in case, finding must be supported irrespective of results reached in some other case.

12. Parties 🔑84(1)—Plaintiff seeking to quiet title and cancel contract of purchase cannot for first time on appeal object for failure to make its grantor and trustor party to action (Code Civ. Proc. § 369).

Plaintiff seeking to quiet title and cancel contract of purchase, not applying for permission to bring in as party its grantor and trustor of property, cannot on appeal raise objection that its grantor was not made party, under Code Civ. Proc. § 369.

13. Vendor and purchaser 🔑11—Plaintiff, not showing defendants' knowledge that it was only trustee when executing contract of purchase, held bound by its contract (Civ. Code, § 869).

Plaintiff seeking to quiet title in property and cancel contract of purchase, standing on its title and not showing that defendants had knowledge that it was only trustee prior to execution of contract, is bound by its contract, under Civ. Code, § 869.

14. Specific performance 🔑115—Defendants in action to quiet title and cancel contract of purchase could counterclaim for specific performance (Civ. Code, § 3367, subd. 3; Code Civ. Proc. § 1060).

In action to quiet title and to cancel contract of purchase, defendants, counterclaiming for specific performance of contract, had right to decree upholding validity of contract and declaring that, if complied with, they were entitled to conveyance under Code Civ. Proc. § 1060, and Civ. Code, § 3367, subd. 3.

15. Specific performance 🔑97(1)—Vendor and purchaser 🔑93—Specific performance of contract of purchase could not be compelled without payment of balance due, nor could contract be forfeited until due.

In action to quiet title and to cancel contract of purchase, defendants could not obtain immediate specific performance or immediate conveyance, where contract had some period to run without payment of balance due, and plaintiff could not accelerate or declare forfeiture of contract until time of payment on part of defendant had arrived.

16. Vendor and purchaser 🔑6—Plaintiff, seeking to avoid result of own wrongdoing, could not quiet title and cancel contract against bona fide purchaser under rule protecting defrauded owner.

Rule that bona fide purchaser from vendor who obtained title to property by fraud from his vendor is entitled to protection only to extent of money paid before receiving notice of fraud is not applicable to case where plaintiff, seeking to cancel contract of purchase and quiet title, was not defrauded owner, but sought to avoid results of own wrongdoing and pass burden thereof to purchaser.

Appeal from Superior Court, Los Angeles County; Charles S. Burnell, Judge.

Action by the Title Guarantee & Trust Company against Francis W. Henry and another, in which defendant named filed a cross-complaint. Judgment for defendants, and plaintiff appeals. Affirmed.

E. W. Sargent, E. J. Vaughn, G. B. Colby, and Tanner, Odell & Taft, all of Los Angeles, for appellant.

I. Henry Harris, of Los Angeles, for respondents.

PLUMMER, J. Plaintiff instituted this action to obtain a decree quieting its title to certain city lots hereinafter mentioned, and to have canceled and delivered up a certain contract of purchase bearing date of February 1, 1923. The defendants had judgment, and the plaintiff appeals.

The amended complaint, which sets forth two causes of action, after alleging certain preliminary facts, pleads, in its second paragraph of its first cause of action, as follows: "That plaintiff, Title Guarantee & Trust Company, is the owner in fee simple of all that real property described as follows: Lots 188 and 189 of Tract number 2189 (otherwise known as Pellissier Square), in the city of, and county of Los Angeles, State of California, as per map recorded in book 22 at page 57 of Maps, in the office of the County Recorder of Los Angeles County." The second paragraph of plaintiff's second cause of action, so far as material here, is as follows: "That on or about February 5, 1923, the defendant Emma Summers was proposing to purchase the above-described real estate and to place the same in the name of Francis W. Henry, above mentioned as a defendant, for the sum of $27,500.00, on terms and conditions to be contained in a written contract and to be approved by one Marie Julie Pellissier. That plaintiff caused to be prepared contracts for the sale of said real estate in duplicate, a copy of which is hereto annexed marked Exhibit 'A,' and had signed the same, but said contracts were not complete or ready for delivery and had not been approved by said Marie Julie Pellissier. That on or about said date the defendant Emma Summers had deposited with plaintiff checks in the sum of $2,500.00, which said checks would be accepted and applied on account of said contract as soon as said contract should be ready for delivery. * * * That said defendant Emma Summers surreptitiously and without the knowledge or consent of the plaintiff or its said employee took one of said duplicate copies of said alleged contract and departed from the office, and is now claiming that said contract was delivered to her."

The answer of the defendants denies generally the allegations of the complaint that the defendant Francis W. Henry has no right, title, or interest in or to the property, etc.; and also denies the proposal to purchase the property referred to on terms and conditions to be inserted in a contract to be approved by one Marie Julie Pellissier; also denies that the contract was not completed, and denies the nondelivery thereof; and further denies that possession of the contract was surreptitiously taken by the defendant Emma Summers. The answer also contains a cross-complaint by the defendant Henry, setting forth the execution of the contract of sale and purchase, and asks that the plaintiff take nothing by reason of this action, that the defendant Henry have specific performance, and, generally, for such other and further relief as to the court may seem proper.

The findings of the court are to the effect that on the 1st day of February, 1923, and at the time of the execution of the contract referred to, the plaintiff (which we will hereafter call the title company) was the owner in fee simple of lots 188 and 189 in tract No. 2189 referred to in plaintiff's complaint; that on or about the 1st day of February, 1923, the plaintiff and the defendant Francis W. Henry made and entered into and executed the contract referred to in plaintiff's complaint; that thereafter, and on or about said 1st day of February, 1923, said contract having been duly executed by the plaintiff, by and through its duly authorized officers, was by the plaintiff delivered to the defendant Emma Summers as agent for defendant Francis W. Henry; that, at the time of the execution of said contract and delivery thereof, the defendant Henry paid to the plaintiff the sum of $2,500, being the amount specified as the first payment of the purchase price for said lots; that thereafter, and on or about the 17th day of March, 1923, the defendant Francis W. Henry tendered to the plaintiff the further sum of $2,500 as the second payment on said contract of purchase; that the plaintiff wrongfully repudiated said contract and refused to receive the said sum of $2,500 so tendered as the second payment on said contract. The court further found that the sum of $27,000 was an adequate consideration for the purchase of the lots referred to. The court further found, in finding No. 11, that it was not true "that on or about the 5th day of February, 1923, or at any other time, the defendant Emma Summers was proposing to purchase the above-described real estate, and to place the same in the name of defendant Francis W. Henry, for the sum of $27,500, on the terms and conditions to be contained in a written contract, and to be approved by one Marie Julie Pellissier." The court further found: "That it is true that the defendant" (evidently a misprint for 'plaintiff') "caused to be prepared contracts for the sale of said real estate, in duplicate, a copy of which is annexed to the complaint and marked Exhibit 'A,' and had signed the same." The court further found "that it is not true that said contracts were not complete or ready for delivery; but that it is true that the plaintiff made and executed said contracts with the intent to deliver the same upon the terms and conditions set forth therein, and that in truth and in fact did deliver said contract and did receive payment as provided in said contract, in the sum of $2,500; that at the time of the execution of said contract the plaintiff was the record owner in fee simple and that neither the defendant nor his agent Emma Summers were informed, had or received any notice that Marie Julie Pellissier had any interest in said property or that it was necessary for her to approve the contract between the plaintiff and the defendant Henry." Other portions of the plaintiff's complaint, including the allegation that the defendant Emma Summers surreptitiously obtained possession of the contract, are found against the plaintiff.

[1, 2] Appellant's opening brief states that the only controverted issues tendered by the pleadings are as follows: (1) Character of the ownership of the title company; (2) whether Marie Julie Pellissier had to approve the contract before it was delivered; (3) whether the contract was complete and ready for delivery; (4) whether there was a delivery of said contract; (5) whether Henry or Mrs. Summers was the true purchaser. The allegations of the complaint as to the ownership of the premises in fee simple by the title company were found to be true by the trial court. There are no allegations in the complaint

that approval of the contract on the part of Marie Julie Pellissier was necessary prior to its delivery. As stated herein, the allegations contained in paragraph 2 of the plaintiff's second cause of action sets forth simply that the contract had not been approved by said Marie Julie Pellissier. It is nowhere alleged in the complaint that such approval was necessary. An inspection of the contract as tendered to the trial court was sufficient, we think, to justify the trial court in coming to the conclusion that the instrument upon its face appeared to be complete. That the plaintiff attempted to write something into the contract by way of an interlineation or red ink entry after its execution, does not in any particular lessen the force and effect of the testimony produced before the trial court, and its right to come to a conclusion after an inspection of the instrument. It is true that there is one blank space left in the contract, but the testimony introduced in the transcript shows this to be wholly immaterial. It is in the fifth paragraph of the contract where, after providing that the residence to be erected shall face the front line of the premises, namely, on (here a blank space is left for the name of the street). It is readily seen that this omission is wholly immaterial, as whether the name of the street on which the premises fronted was given or not given would not change the street upon which the premises actually fronted. And the contract itself also shows that it was approved by W. H. Taggert, assistant trust officer, following the signatures to the contract of the Title Guarantee & Trust Company, by its officers, A. F. Morlan, vice president, A. R. Kilgore, secretary, and the signature of the defendant Francis W. Henry. The seal of the corporation is also attached. The testimony of the trust officer was to the effect that Mrs. Pellissier did not O. K. all of the contracts, but that she would write a letter of approval to the title company, and that the officers of the title company would execute a contract upon the approval of the witness.

[3, 4] While the amount of the first payment stipulated in the contract of purchase was made in the way of checks, it does not appear that the plaintiff at any time objected to that form of payment or raised any objections whatever to the contract, other than, after the date of its execution and delivery thereof to the defendants, as found by the court, it sought to recall said contract for the asserted reason that it had not been approved by Mrs. Pellissier, and had not been delivered. It is also argued by appellant that the finding of the court that the defendants had no notice that Marie Julie Pellissier had any interest in the property was a finding outside of the issue; that in the language of the brief "no issue was presented, as we have before pointed out, on which a finding could be based. Without such finding, no judgment for defendants could have been entered." If no issue was tendered by the plaintiff as to whether the purchasers had notice of any interest of Mrs. Pellissier in and to the property, it is certainly not injured by the finding referred to. The plaintiff itself alleged that it was the owner in fee simple of the premises, and a finding in accordance therewith is in line with plaintiff's allegations, and the further finding that the defendants had no notice that any other person claimed an interest therein would simply be equivalent to a finding that the defendants had no notice that the allegations of the plaintiff's complaint were untrue. It hardly lies in the mouth of the plaintiff to complain of the finding of the trial court, which is simply in effect that the plaintiff's allegation of ownership in fee simple is true and correct. Whether true or untrue, a pleader cannot be heard to say that a finding that the allegations of his complaint are true constitutes prejudicial error.

[5, 6] It appears from the transcript that during the course of the trial, without any request whatever to amend its pleadings, the plaintiff attempted to introduce in evidence an agreement of trust entered into between the plaintiff and Marie Julie Pellissier in the year 1913, at the time the said Marie Julie Pellissier conveyed to the plaintiff, by an instrument of conveyance absolute in terms, the premises involved in this action. This attempt appears to have been for the purpose of showing that the agreement of trust contained a clause to the effect that the title company "should issue contracts of sale and conveyance to such person or persons, at such prices and upon such terms as it shall be hereinafter instructed by the said party of the first part," etc. And further, "that the party of the second part shall impose such restrictions, covenants and conditions in all agreements and deeds executed by it as it shall be, in writing, requested to do so by the said party of the first part." An inspection of the agreement shows further that the parties executing the same agreed as follows: "Any conveyance made by the Title Guarantee & Trust Company to the purchasers of lots shall vest in such purchasers an absolute and unassailable title, and there shall be no obligation on the part of the purchasers to see to the application of the purchase money, it being expressly understood by all parties hereto that any conveyance made by the party of the second part shall be binding upon all parties hereto, and should the party of the second part violate any of the provisions hereof, then the beneficiary shall have recourse only against the party of the second part." The trial court refused to admit this agreement in testimony, and the appellant alleges error in such ruling. There is no claim made, and there is nothing in the record indicating that any persons had knowledge of this agreement prior to its production in court, other than the title company and Mrs. Pellissier. The deed referred to conveying the premises to the title company was recorded. The trust agreement was withheld from record, and knowledge thereof was possessed only by the parties executing the same, at least so far as the record discloses. Had this agreement been admitted in testimony, we do not readily perceive that it could have influenced the judgment of the trial court in view of the seventh provision contained therein which we have quoted, whereby the parties covenanted and agreed that any conveyance made by the title company should vest in the purchaser an absolute and unassailable title. By that very provision the trustor agreed to look to the title company only in the event it violated any of the terms of the agreement. After alleging that it was the owner in fee simple of the premises contracted to be conveyed to the defendant Francis W. Henry, it did not lie in the mouth of the title company to elect to disaffirm its contract on the ground that it had violated its agreement with the person from whom it obtained title. That Mrs. Pellissier might have an action against one who had obtained either a contract of purchase or a deed of conveyance from the title company with knowledge that the title company was violating the terms of an agreement under which it was acting, is an entirely different matter. Also, that Mrs. Pellissier might maintain an action against one obtaining a contract of purchase or conveyance from the title company with knowledge that she (Mrs. Pellissier) was the beneficial owner, and that the contract was being executed or the conveyance made in violation of the terms of the trust agreement, does not aid the plaintiff in any particular. That the plaintiff had rendered itself accountable to Mrs. Pellissier does not entitle it to proceed against an innocent purchaser with whom it has entered into a contract of purchase and sale, and thus recoup itself and relieve itself from its own wrong by passing the penalty on to the intending purchaser. In view of the findings of the court that the defendants had no knowledge of the interest of Mrs. Pellissier, nor of the trust agreement, what we have stated in relation to the attempt of the appellant covers the gist of the appellant's argument.

[7] The supplemental brief filed by the appellant, showing that in an action prosecuted by Mrs. Pellissier against Francis W. Henry, Emma Summers, Paul M. Reidy, and the title company, a different trial judge had arrived at different conclusions upon conflicting testimony, cannot be considered in this case. This case can only be decided upon the pleadings and facts and the findings of the trial court disclosed by the record in this case.

[8, 9] While, as stated in the case of Frascona v. Los Angeles Ry. Corp., 48 Cal. App. 135, 191 P. 968, and the numerous cases there cited, it is not necessary that the findings follow the precise language of the proceedings, "it is essential that they be so drawn that the truth or falsity of every material allegation can be demonstrated therefrom." But, unless an issue is appropriately presented by the pleadings or treated as an issue, a finding is unnecessary, and, as heretofore stated, if a finding outside of the issues is not prejudicial, no cause of complaint is given.

[10, 11] There is testimony in this case, shown by the record, justifying the trial court in finding that for some time prior to the 1st day of February, 1923, Mrs. Emma Summers applied to one Donahue, the real estate broker having charge of the sale of the two lots in controversy, to make purchase thereof; that, after some negotiations had been carried on, Mrs. Summers offered for the premises the sum of $27,500; that this offer was accepted by Mr. Donahue; a preliminary contract of purchase was executed, which contract did provide that it was subject to the approval of the owner, without naming the owner; that the agent Donahue advised the title company of the contemplated sale of the two lots; that the title company had prepared, in duplicate, a contract for the sale of said lots, and delivered the contract to Donahue, who took the duplicate copies to the residence of Mrs. Summers, where it was signed by the defendant Francis W. Henry; that at the time of the execution of the preliminary contract $500 was paid by the defendants to the agent Donahue; that, a day or two after the contract of purchase had been signed in duplicate by the defendant Henry, Mrs. Summers went to the office of the title company with a letter of introduction to the title company, given her by Mr. Donahue, and at that time tendered and delivered to the title company a cashier's check for the further sum of $2,000; that at said time the trust officer Taggert stated the contract had not been executed, proceeded to get said duplicate contract from the place where it was kept, took it to the appropriate officers, and had it signed by the title company, by its vice president and secretary, and the seal of the company attached, his own approval being indorsed upon both of the duplicate copies, the contract being signed by all parties in duplicate. The testimony of Mrs. Summers is that the contract was handed to her. The testimony of Taggert is that he handed the contract to Mrs. Summers only for inspection. The fact that Mrs. Summers and the defendant Francis W. Henry had theretofore had the duplicate copies of the contract at the residence of Mrs. Summers, where it was signed, was a fact to be taken into consideration by the trial court in weighing the testimony of whether Taggert did or did not hand the contract to Mrs. Summers simply for the purpose of inspection.

The question of delivery is the main bone of contention in this case, and, even though another trial judge has held the contrary on this question, where the testimony was conflicting, we think the following is sufficient to sustain the finding of the trial court in this case. Mrs. Emma Summers testified in this particular, in substance, as follows: Mr. Taggert was on the second floor of the Title Guarantee & Trust Company Building, in the trust department. I gave him a letter from Mr. Donahue. He said, "All right, I'll get the contract," and he got the contracts; I don't know where he got them from; he left me to go and get them; he got them right away and brought them immediately back to the desk. I gave him Mr. Henry's check for $2,000. They were not signed yet when I got in. He said (referring to Taggert), "Sit down and wait and I'll go and have the proper officers sign." I don't know whether he said the president and secretary or just "proper officers" sign, execute the contract, and finish it. I sat down in a chair and waited until he came back, and presently he came back. Mr. Morlan and Mr. Kilgore had signed the contract. The witness also testified in answer to the question: "Did he give you anything" (referring to Mr. Taggert)? "Well, I just said he handed me the contract." The witness' attention was then directed to a certain receipt, and the witness testified to the execution and delivery to her of a receipt for the $2,000. The witness further testified that at that time no one said to her that the contract had to be approved by Mrs. Pellissier. This witness testified that she went back to the office two or three days after the receipt of the contract and had a conversation with Mr. Keogh as to the blank in the contract which we have heretofore referred to, where the name of the street on which the premises fronted was not written, and was informed by Mr. Keogh that that was immaterial. From the transcript it is somewhat uncertain whether the contract was handed to Mrs. Summers before or after it was signed by the officers of the company, but what we have set forth we think is amply sufficient to sustain the finding of the court that the contract was delivered. It is true that Mr. Taggert testified that he handed the contract to Mrs. Summers only for inspection. It is true that Mr. Taggert testified that there were some questions asked by Mrs. Summers about the contract at that time relative to the street on which the lot should face, and also relative to the number of houses which should be built upon the lots, but the testimony of Mr. Keogh, Mr. Donahue, and Mr. Taggert, taken together, in relation to this might very well lead the court to the conclusion that this conversation took place two or three days after the contract was executed and delivered, and that it was then that Mr. Taggert made an interlineation in the copy of the contract in possession of the title company, and sought afterwards to obtain possession of the copy of the contract from the defendants in order that he might make the same changes therein. It is not for us to say which version is correct, but, if the record before us is sufficient to support the finding of the trial court in this case, it must be supported, irrespective of the results reached in some other case.

[12, 13] In view of section 369 of the Code of Civil Procedure, we do not think that it now lies in the mouth of the appellant to raise the objection that Mrs. Pellissier was not made a party to the action. If the appellant had thought that Mrs. Pellissier was a necessary party to the action, it should have made application for permission to bring her in as a party either as plaintiff or defendant. By the section of the Code of Civil Procedure to which we have referred, the appellant could have set up all the facts relating to the transaction, but it preferred to stand upon its naked title, and not having established to the satisfaction of the trial court that the defendants had knowledge that it was only a trustee prior to the execution of the contract, it cannot complain that so far as the title company is concerned, it must be held bound by its own contract. See, also, 25 Cal. Jur., p. 351, sec. 197, as to the right of the trustee to amend an action in his own name. Again, section 869 of the Civil Code comes to the aid of the defendants in view of the findings of the trial court. That section reads: "Where an express trust is created in relation to real property, but is not contained or declared in the grant to the trustee, or in an instrument signed by him, and recorded in the same office with the grant to the trustee, such grant must be deemed absolute in favor of purchasers from such trustee without notice, and for a valuable consideration."

[14-16] Subdivision 3 of section 3367 of the Civil Code we think a complete answer to the appellant's contention that the relief granted to the defendants is wholly void. It is there provided that the relief may be by "declaring and determining the rights of parties otherwise than by an award of damages." This is in line with section 1060 of the Code of Civil Procedure on the subject of declaratory relief. The respondents, under the two sections referred to, had a right to a decree of the court in this case upholding the validity of their contract and declaring that, if complied with, they were entitled to a conveyance. As the contract had some period of time to run, immediate specific performance or immediate conveyance could not be compelled without payment of the balance due, and, under the terms of the contract executed and delivered by the plaintiff to the defendant Henry, time was given for the payment of the balance of the purchase money, and this time appellant could not accelerate or declare a forfeiture of the contract until the time of payment on the part of Henry had arrived; nor could Henry demand conveyance until he had fully paid the purchase price of $27,500. The appellant cites a number of cases relating to the rights of a bona fide purchaser where one not having a title conveys property, which cases follow the rule "that the vendee of real es-

tate who has received a conveyance of the title and has paid a part of the purchase money, but who, before he pays all of it, receives notice of the fact that his vendor obtained the real estate by fraud from the previous owner, is not, under ordinary circumstances, entitled to protection as a bona fide purchaser, except to the extent of the money paid by him before receiving such notice, and that the defrauded party can obtain the land from such vendee, but that he can do so only upon the condition that the vendee is reimbursed what he had paid before notice." See Henry v. Phillips, 163 Cal. 135, 140, 141, 124 P. 837, 839 (Ann. Cas. 1914A, 39). These cases are not applicable because the appellant is not in the position of a defrauded owner. It is simply in the position of a party who, according to its own argument, seeks to avoid the result of its own alleged wrongdoing and pass the burden on to the parties with whom it had contracted. Under the findings of the trial court, this does not appeal to us a good cause for the interposition of a court of equity.

Being of the opinion that the record before us in this case contains sufficient testimony to support the findings of the trial court, and that the issues material to be found have been passed upon, the judgment of the trial court must be, and it is hereby, affirmed.

I concur: FINCH, P. J.

---

96 Cal. App. 607

GORDON et al. v. PFEIFFER et al.
(Civ. 6580.)

District Court of Appeal, First District, Division 2, California. Feb. 4, 1929.

1. Chattel mortgages 🔑243—Lessee's assignment of lease, to which lessors consented on conditions indorsed thereon, held not equivalent to new lease discharging chattel mortgage securing it.

Lessee's assignment of lease subject to consent of lessors, on which assignment lessors indorsed their consent on condition of assignee's agreement to pay rental called for by lease as modified, to be bound by terms and conditions thereof, that term of lease should be extended for certain period, that rental should be reduced in specified sum, that assignee should carry elevator insurance, and that assignee, as purchaser of personalty in premises, should take them subject to chattel mortgage securing lease, *held* not in legal effect to constitute a new lease so as to extinguish old lease and discharge first chattel mortgage.

2. Appeal and error 🔑169—Contention raised for first time on appeal is too late.

Contention raised for first time on appeal will not be considered.

3. Chattel mortgages 🔑235—Burden of proving payment of chattel mortgage was on defendant in foreclosure action.

In action to foreclose chattel mortgage, burden of proving payment of mortgage was on defendant.

Appeal from Superior Court, City and County of San Francisco; Louis H. Ward, Judge.

Action by Philip Gordon and another against Elsie Pfeiffer and others. From the judgment, named defendant appeals. Affirmed.

Gerald C. Halsey and Frederic T. Leo, both of San Francisco (Stanley A. Weigel, of San Francisco, of counsel), for appellant.

Jacob Samuels and Oscar Samuels, both of San Francisco (A. Dal. Thomson, of San Francisco, of counsel), for respondents.

KOFORD, P. J. [1] Plaintiffs and respondents by this action foreclosed a chattel mortgage upon hotel furniture. The mortgage was executed by Reynaud and wife as security for the faithful performance of a lease under which they operated the hotel. The appellant, Elsie Pfeiffer, held a second chattel mortgage upon the same furniture, and upon this appeal claims that, by virtue of an assignment of the lease to defendant Rawlinson by the lessee and by virtue of the consent to the said assignment given by the lessors adding certain conditions, in legal effect the original lease secured by the said first chattel mortgage was entirely canceled and a new one took its place which was not secured by the first chattel mortgage. For this reason appellant claims that her mortgage should rank first instead of second as decreed by the trial court.

The term of the lease was from March 23, 1925, to October 31, 1930. Reynaud, the original lessee, assigned to Moore after executing the first chattel mortgage. Moore then executed the second mortgage to appellant, Elsie Pfeiffer. About six months later Moore assigned the lease to defendant Marie Rawlinson, and the plaintiffs and respondents, being then the owners of the hotel premises as well as the owners and holders of the first mortgage, consented to said assignment in writing with conditions.

Appellant's argument is divided into three parts, the second and third depending upon the first, which is supported by no citation of authority: First, that the assignment and consent was in reality a new lease. Second, that the effect of the new lease was necessarily to extinguish the old one. Third, that with the old one extinguished and a new one made, the first mortgage, which was given as security for the old lease, was thereby discharged. There are three things in the consent to the assignment which appellant states makes of it a new lease. First, the new tenant took until December 31, 1931, instead of October 31, 1930. Second, the monthly rental was reduced. Third, a definite amount of elevator insurance was required of the new tenant.

The assignment was in the usual form. In effect it was, I, Leo. P. Moore, do hereby assign subject to the consent of respondents herein. At the end of this document respondents indorsed their consent, reading in part as follows: "We, Philip Gordon and Sylvia Gordon, do hereby consent to the foregoing assignment subject to the following terms and conditions: That the said Marie Rawlinson shall agree to pay the rental called for by said lease, as hereinafter modified, and agree to be bound by all the terms, conditions and agreements in the said lease contained on the part of the lessee to be kept and performed with the same force and effect as if she were named therein as lessee; * * * that the term of said lease shall be extended to and including the 31st day of December, 1931, and the rental therefor shall be as follows (follows reduction of rent); * * * that she shall carry elevator insurance in the amount of five thousand ($5,000.00) dollars, etc., * * * and that said assignee, as the purchaser of the personal property in said premises, shall take the same subject to the chattel mortgage given to secure the terms of said lease with the same force and effect as if she were named therein as mortgagor." To this was attached the acceptance of the new tenant: "I, Marie Rawlinson, do hereby accept the foregoing assignment subject to all the terms and conditions contained in said assignment and the consent of the said lessors, * * * and agree to perform all the terms, conditions and agreements in said lease set forth and contained and the modifications thereof in said consent set forth, and all the other terms in said consent specified."

Appellant's statement, unsupported by the citation of any authority, that this transaction amounts to an execution of a new lease, seems to be entirely refuted by a bare statement of the evidence. There is no new lease, but only an assignment of the old one with the consent of the landlord. The additional term given the assignee is not claimed to be secured by the first mortgage. The reduction of rent, of course, cannot harm the second mortgagee nor make a new lease. The provision requiring elevator insurance which was added at the time of the assignment must be considered in the light of the fact that the lease already had this provision, except that the blank space provided in the document for the amount was left unfilled.

[2, 3] Appellant also advances the point that the evidence fails to show that the sums which respondents' mortgage secures have not been paid. This point is raised for the first time on appeal, and for that reason alone is not entitled to consideration. The burden of proving nonpayment, however, is not upon the plaintiffs, but on the defendant. This is the general rule for actions based upon debt, and it has not been confined in its application to a defendant who is the principal debtor. In Blinn Lumber Co. v. McArthur, 150 Cal. 610, 89 P. 436, the burden of proving payment of a mortgage was put on an intervener who had purchased the mortgage premises. The appellant here was defendant and cross-complainant. In Barrett-Hicks Co. v. Glas, 14 Cal. App. 289, 111 P. 760, the burden of proving payment of a subcontractor's lien claim was held to be upon the defendant who was owner of the building. The rule has also been often applied to the representative of a deceased debtor. Dyer v. Minturn, 47 Cal. App. 1, 189 P. 1046; Light v. Stevens, 159 Cal. 288, 113 P. 659. In this case there is no better reason to except appellant from the general rule of burden of proof of payment than existed in the cited cases.

The judgment is affirmed.

We concur: STURTEVANT, J.; NOURSE, J.

---

96 Cal. App. 422

WECK v. SUCHER et ux. (Civ. 6535.)

District Court of Appeal, First District, Division 1, California. Jan. 26, 1929.

1. Appeal and error 🔑957(1)—Appellate courts may disturb trial court's action in relieving defendant from default judgment only in plain cases of abuse of discretion.

Appellate courts may disturb action of trial court in relieving defendant of default judgment only in very plain cases of abuse of discretion, especially where relief is granted after having been promptly sought, and it does not appear that plaintiff sustained any prejudice thereby.

2. Judgment 🔑143(3)—Trial court has great latitude in relieving defendant having substantial defense from default inadvertently permitted (Code Civ. Proc. § 473).

Default inadvertently permitted in cause by defendant having substantial defense presents case in which great lattitude should be extended the trial court in setting default aside, under Code Civ. Proc. § 473.

3. Judgment 🔑143(12)—Where defendants having meritorious defense filed answer one day late because of mistake regarding date of service, and promptly applied for relief, court properly set default aside (Code Civ. Proc. § 473).

In action to recover sum received by defendants as plaintiff's agents which they agreed to return on demand, where defendants, having meritorious defense, in that full and final settlement had been made, filed their answer one day late because of mistake as to date of service of summons, and on same day default was entered defendants moved to set default aside, and motion was speedily heard and determined, and slight delay did not affect plaintiff's opportunity to establish his case, trial court did not abuse discretion in setting aside default judgment, under Code Civ. Proc. § 473.

4. Judgment ⚷151, 173—Moving papers and order relating to vacating judgment rendered by court were sufficient to vacate default entered by clerk (Code Civ. Proc. § 473).

Moving papers and order relating to matter of vacating judgment rendered by court were sufficient to vacate default judgment entered by clerk, where terms of motion and contents of documents attached adequately apprised plaintiff that defendants were seeking to obtain complete relief under Code Civ. Proc. § 473.

Appeal from Superior Court, City and County of San Francisco; John J. Van Nostrand, Judge.

Action by Walter Weck against Gustave Sucher and wife. Plaintiff recovered a default judgment, and, from an order granting the defendant's motion to be relieved of default, plaintiff appeals. Affirmed.

Carl W. Mueller, of San Francisco, for appellant.

H. M. Anthony, of San Francisco, for respondents.

KNIGHT, J. Plaintiff appeals from an order granting defendants' application to be relieved from a default in failing to answer plaintiff's complaint. One of the grounds urged for reversal is that in granting said application the trial court abused its discretion.

The facts set forth in the affidavits filed by defendants in support of their application were not controverted, and may be stated as follows: The summons in the action was served on defendants on March 11, 1927, and consequently the statutory ten-day period within which they were required to appear and answer the complaint expired on March 21, 1927. The answer was in fact filed the following morning about 10:30 o'clock by defendants' attorney, but default had already been entered. The answer had been prepared and verified, and was ready to be filed within the statutory time, but was not presented for filing until the day following because of a mistaken belief on the part of defendants that the summons had been served upon them on March 12, 1927; and said attorney did not learn of the mistake until he called at the county clerk's office on the morning of March 22, 1927, to file said answer.

In Brasher v. White, 53 Cal. App. 545, 200 P. 657, and Reidy v. Scott, 53 Cal. 69, the facts were substantially the same as those presented here, and in each case the trial court refused to vacate the default; but on appeal the order of refusal was reversed, the court holding that the defaulting party was entitled to have the default set aside.

Plaintiff in support of his position has cited a number of cases to the effect that forgetfulness and like instances of inexcusable neglect on the part of a defaulting party or his attorney are insufficient grounds upon which to base an order vacating the default, but we do not deem those cases in point for the reason that here the facts show that within three days after being served with the summons, defendants consulted their attorney and laid before him all of the facts of the controversy, and thereupon said attorney prepared an answer, had it verified, and was ready to file the same before the end of the ten-day period; but, as stated, owing to the fact that he had been mistakenly misinformed by his clients as to the date of the service, he believed that the statutory period for filing the same did not expire until March 22, 1927. Therefore, as held in the two cases hereinabove cited, the failure to answer within the period fixed by the statute cannot be said to be the result of indifference or lack of diligence on the part of the defendants or their attorney, but was due solely to the mistake on the part of the defendants as to the date of the service of the summons.

[1, 2] Aside, however, from the controlling effect of the two cases above mentioned, the law in this state is well established that only in very plain cases of abuse of discretion may the courts of appellate jurisdiction disturb the action of a trial court in a matter of this character; and especially is this so where the relief is granted after having been promptly sought, and it does not appear that the plaintiff has sustained any prejudice thereby. County of Los Angeles v. Lewis, 179 Cal. 398, 177 P. 154; Berri v. Rogero, 168 Cal. 736, 145 P. 95. The policy of the law is, say the courts, that every case should be heard on its merits, and finally decided in consonance therewith, and that therefore a broad discretion is vested in courts of original jurisdiction in removing such obstacles and impediments as tend to prevent a full and fair hearing, and that a default inadvertently permitted in a cause by a party having a substantial defense presents a case in which great latitude should be extended to the trial court in setting the default aside. Hitchcock v. McElrath, 69 Cal. 634, 11 P. 487. The case of Brasher v. White, supra, restates the rules as follows: "In Mitchell v. California, etc., S. S. Co., 156 Cal. 576, 578, 579 [105 P. 590, 592], the court, in reversing an order denying defendant's motion for relief under section 473, said: 'The tendency of this court has always been to relieve parties from their defaults and mistakes, upon proper showing, to the end that matters may be heard upon the merits. Treating of this subject and particularly of the interpretation of section 473

of the Code of Civil Procedure, the following language was used by this court in Nicoll v. Weldon, 130 Cal. 667 [63 P. 64]: "Section 473 * * * is a remedial provision, and is to be liberally construed so as to dispose of cases upon their substantial merits, and to give to the party claiming in good faith to have a substantial defense to the action, an opportunity to present it. (Buell v. Emerich, 85 Cal. 116 [24 P. 644]; Harbaugh v. Honey Lake, etc., Water Co., 109 Cal. 70 [41 P. 792]; Melde v. Reynolds, 129 Cal. 308 [61 P. 932].) It is for this reason that we more readily listen to an appeal from an order refusing to set aside a default than where the motion has been granted, since in such case the defendant may be deprived of a substantial right, whereas it may be assumed, if nothing to the contrary is shown, that the plaintiff will be able at any time to establish his cause of action. If, for any reason, he will be unable to do so, that fact should be made to appear; but if he is merely subjected to delay or inconvenience by having the default set aside, he can be compensated therefor by the terms which the court would impose as a condition to granting the motion."' In addition to the authorities above mentioned, we cite the following upon the proposition in hand: Vinson v. Los Angeles Pac. R. R. Co., 147 Cal. 479, 483 [82 P. 53]; O'Brien v. Leach, 139 Cal. 220 [72 P. 1004, 96 Am. St. Rep. 105]; Watson v. San Francisco & Humboldt Bay R. R. Co., 41 Cal. 17; Grady v. Donahoo, 108 Cal. 211 [41 P. 41]; Jergins v. Schenck, 162 Cal. 747, 748 [124 P. 426]."

[3] The record in the case before us discloses that on the very day the default was entered defendants served and filed the necessary moving papers to set the default aside, and that the motion made in that behalf was speedily heard and determined, and defendants were required to pay the costs. Moreover, there is no claim made that the slight delay caused by the proceeding in any way affected plaintiff's opportunity to establish his case on trial. The record also shows that defendants are not seeking to defeat plaintiff's action upon technical grounds, but are interposing a meritorious defense. With respect thereto, it appears that plaintiff is suing to recover $2,500; the complaint alleging in two counts that defendants, as plaintiff's agents, received from plaintiff $2,000 and household furnishings of the value of $500, which, the complaint alleges, they agreed to return on demand, but failed so to do. The answer reveals that said claim grows out of the sale of an apartment house business, and the substance of the defense pleaded therein is that a full and final settlement has been had between the parties, and that consequently there is nothing whatever due plaintiff. In the foregoing state of the record it is evident that no substantial grounds exist upon which to base a conclusion that the trial court abused its discretion in allowing the case to be tried on the merits.

[4] Further contention is made that the moving papers and the order based thereon relate exclusively to the matter of vacating the judgment rendered by the court, and consequently do not affect the default entered by the clerk. Plaintiff did not question the scope of the motion at the time it was presented and determined; the bill of exceptions reciting merely that he appeared and opposed the granting of the motion upon the grounds of an insufficient showing under section 473 of the Code of Civil Procedure. However, even assuming that he may do so now, we find no merit in the point because the terms of said motion and the contents of the documents attached thereto adequately apprised plaintiff that defendants were seeking to obtain complete relief under section 473 from the effect of their default, and in our opinion the order subsequently made by the court pursuant to said motion is legally sufficient, in form and substance, to grant such relief.

The order is affirmed.

We concur: TYLER, P. J.; CASHIN, J.

---

96 Cal. App. 472

CHANDLER et al. v. HOLLINGSWORTH et al. (Civ. 3638.)

District Court of Appeal, Third District, California. Jan. 29, 1929.

1. Specific performance 🔑28(1), 31—Incomplete, uncertain, or indefinite contract will not be specifically enforced (Civ. Code, § 3390).

A contract that is incomplete, uncertain, or indefinite in its material terms will not be specifically enforced in equity, as recognized by Civ. Code, § 3390.

2. Specific performance 🔑13—Parties cannot be ordered to convey property to which they hold no title.

Defendants in action for specific performance cannot be ordered to convey property to which they hold no title, though liable at law in damages for breach of contract to convey free and clear of all incumbrances.

3. Specific performance 🔑28(2), 31—Contract by part owners of beneficial interest to convey entire tract to trustee to operate under trust agreement not yet drawn, with understanding that property was to be improved, held too indefinite and incomplete for specific enforcement.

Contract by part owners of beneficial interest in land to convey entire tract, "free and clear of all incumbrances," to named trustee, who was to operate under trust agreement to be drawn, with understanding that property was to be improved with streets, water system, etc., and tunnel running into it, if satisfactory arrangements could be made to purchase, or acquire right of way over another's property, out of proceeds of sale and bond issue, *held* too indefinite and incomplete to permit of its specific enforcement, in view of Civ. Code, § 3390.

4. Specific performance 🔑75—Court will not enter specific performance decree, necessarily so general and vague as to require superintendence and direction, with many appeals.

A court of equity will not enter a decree for specific performance, which must necessarily be so general and vague as to commit court to course of superintendence and direction, with many appeals thereto for interpretation.

Appeal from Superior Court, Los Angeles County; John L. Fleming, Judge.

Action by Harry Chandler and others against W. I. Hollingsworth and others. Judgment for defendants, and plaintiffs appeal. Affirmed.

Charles R. Morfoot and J. M. McCroskey, both of Los Angeles, for appellants.

J. Wiseman Macdonald, of Los Angeles, for respondents.

SHIELDS, Justice pro tem. This is an action for specific performance of an agreement set forth in Exhibit A and attached to and made a part of plaintiffs' amended complaint.

It appears that the defendants Hollingsworth and Miles were part owners of a tract of about 1,000 acres of land in the city of Los Angeles. At the time of the execution of the writing known as Exhibit A, the legal title to this tract of land stood in the name of Title Guarantee & Trust Company, as trustee. The beneficial interest in the property stood, an undivided one-half in W. I. Hollingsworth and Hattie G. Hollingsworth as joint tenants, a one-quarter such interest in J. H. Miles and Sue A. Miles as joint tenants, and the remaining one-quarter interest in Marion O. Hooker. Later, and after the execution of this writing, the Hooker interest was acquired in equal shares by W. I. Hollingsworth and J. H. Miles. The plantiffs, designated in the writing as "the syndicate," were, as stated in appellants' brief, "well-known subdividers" who had "been successful in the marketing of various subdivisions in and around Los Angeles."

The contract or writing known as Exhibit A was executed April 12, 1923. It was entitled "Hollingsworth-Miles-Hooker Deal," and was signed by all of the plaintiffs and by defendants Hollingsworth and Miles. It outlined a plan by which Hollingsworth and Miles were to convey the 1,000-acre tract to a trustee, who was to hold it and to perform certain offices for the benefit of the parties to the agreement. The trustee was to hold the property and to execute its authority under a "trust agreement to carry out the within provisions," and such provisions should be "the instructions to the trustee to draw the trust agreement." The property was to be subdivided, improved in a substantial way, and resold by the plaintiffs. The work of such subdivision and improvement was to be done under the direction of plaintiffs Shoults and Woodruff. The improvements were to be paid for by a bond issue upon the property. General provisions were made for the payment of all sums realized from sales of the property, to the trustee, and the payment out of such sums, of expenses of the conduct of the business, by the trustee. References were made to releases of the several parcels as they might be sold and acceptance by the defendants Hollingsworth and Miles of trust deeds "on short terms" in lieu of money, for such releases. The beneficial interest in the trust to be created is stated to be 75 per cent. in the plaintiffs and 25 per cent. in the defendants Hollingsworth and Miles. Further details of this agreement need not here be recited.

Upon appropriate issues raised by the answer to the plaintiffs' complaint, the cause went to trial, and judgment was rendered for the defendants. The court found that the defendants Hollingsworth and Miles were not the sole owners of the land mentioned in Exhibit A, but that the ownership thereof was as hereinabove stated. It was further found that this writing was not intended to be a contract of purchase or sale, but a mere memorandum of a scheme to be later worked out provided the parties could agree; that plaintiffs never at any time requested defendants to carry out the provisions of the contract; that plaintiffs never kept or performed any of the terms or conditions of the contract by them to be performed; that plaintiffs abandoned the contract, and that defendants accepted such abandonment; that plaintiffs paid no consideration for the contract; that it was not just or reasonable as to defendants. Other findings need not be recited. Indeed, the above are referred to only to indicate the broad foundation upon which the judgment rests.

Among its conclusions of law the court found "that said memorandum agreement dated April 12, 1923, is so indefinite and uncertain, that the exact terms and conditions thereof cannot be ascertained."

If this conclusion was correctly reached, it would finally dispose of the case. It would support the judgment of the court denying the plaintiffs' plea for specific performance, and render unnecessary any discussion of other questions presented by this appeal. About its correctness and the propriety of the judgment herein, it would seem that there can be no question.

[1] Section 3390 of the Civil Code, in enu-

---

merating contracts which cannot be specifically performed, specifies as one of them "an agreement, the terms of which are not sufficiently certain to make the precise act which is to be done clearly ascertainable." The law to this effect is as well settled, as is any principle within our jurisprudence.

In Klein v. Markarian, 175 Cal. 37, 165 P. 3, the court say, quoting abundant authority: "It is an old and unquestioned rule of equity that, whatever right there may be to maintain an action at law for damages, a contract will not be specifically enforced unless it be complete and certain in its terms." "A contract that is incomplete, uncertain or indefinite in its material terms will not be specifically enforced in equity." Beal v. United Properties Co., 46 Cal. App. 287, 189 P. 346. Amplification of this rule and illustrations of its application are countless, and readily found. See Buckmaster v. Bertram, 186 Cal. 674, 200 P. 610; Stanton v. Singleton, 126 Cal. 657, 59 P. 146, 47 L. R. A. 334; Andersen v. Charles, 52 Cal. App. 290, 198 P. 641; Dillingham v. Dahlgren, 52 Cal. App. 330, 198 P. 832; Pomeroy's Specific Performance (3d Ed.) § 145.

[2, 3] Tested by this rule, the contract in question falls far short of the definiteness and detail which would permit of its specific execution. In the first place, it might be noted that under the contract Hollingsworth and Miles are to convey all of the 1,000 acres of land to the trustee named in the contract, "free and clear of all incumbrances." This part of the contract clearly cannot be enforced, as these defendants are without title to a substantial interest in the property. At law they might be held to liability under such a provision and assessed in damages for its breach. But, in an action in specific performance, they cannot be ordered to convey property to which they hold no title. Appellants contend that they should be made to convey such interest as they do hold to the trustee. The answer to this is that, if they were required to do this in performance of their contract, the appellants would be wholly unable to perform their reciprocal obligations. They could not lay out streets, subdivide acreage, or sell lots on property in which other parties owned substantial interests; they could not record maps or plats of their subdivisions, nor dedicate streets or highways.

The contract or memoranda provides that the property is to be conveyed by the defendants to a trustee who is to operate "under a trust agreement." What is this agreement to contain? This is a matter of supreme importance to the defendants, who are asked to convey a very valuable property to the trustee. The trust agreement should define their rights and specify and limit the powers of the trustee.

This agreement has not been drawn. Several drafts of proposed agreements were drawn by plaintiffs and submitted to defendants and rejected by them as not satisfactory. Under the contract, the only specification with reference to what the trust agreement should contain is that it is provided that such agreement should "carry out the within provisions" and the further statement that "the within shall be the instructions to the trustee to draw the trust agreement." If the "within" were sufficiently definite, the plaintiffs need not have submitted to defendants their several drafts of a proposed trust agreement, but could have made the agreement to express the covenants of Exhibit A and demanded its acceptance.

They submitted no form of proposed trust agreement with their pleading, and, had the court desired to order specific performance herein, it would have been impossible for it to frame such an agreement from the vague and indefinite terms of the contract.

The contract, Exhibit A, provided that "it is understood that this property is to be developed and improved with streets, water system, electricity, gas, paved boulevards, a tunnel running through the extension of Beachwood Drive into the property, provided satisfactory arrangements can be made with Mack Sennett either to purchase his property or for a right of way over the same, possibly a sewer system and schools." It must be remembered that these improvements are to be made on property alleged to be owned by defendants, and to be paid for out of the proceeds of its sale. Where were the streets to run? What was to be their number and the area covered by them? How were they to be improved, and of what material to be constructed? Where was the tunnel to be dug, and who was to make the "arrangement" with Mack Sennett, and upon what terms? "Possibly" there were to be schools and a sewer system. Who was to determine this?

The contract further provides "it being understood that the above mentioned improvements are to be put in and paid for by a 7% serial bond issue upon the property. This syndicate is to arrange for the financing and disposing of same."

[4] Omitting any question as to the issuance of bonds on such undivided interest in the land as the defendants own and could convey, what is to be the amount of the bonds, their denomination, their period of maturity? When is the interest on the bonds to be paid, and, in case of default, what are to be the conditions upon which the bondholders might foreclose upon the property? Some of these objections might be obviated by a reasonable construction, but together they constitute such an absence of agreement by the parties to the contract as a court of equity would not undertake to supply. Beal v. United Properties Co., 46 Cal. App. 287, 189 P. 346. Other omissions might be stated as the amount and cost of improvements to be made, when payments are to be made to the owners

of the land, and how lots are to be sold, and upon what terms. The court should well hesitate to commit owners of a great property to the hazards of such an agreement. If any decree were to be entered herein in favor of the plaintiffs, it would have to be so general and vague as to commit the court to a course of superintendence and direction, with many appeals to the court for its interpretation; and this a court of equity will not undertake. Stanton v. Singleton, 126 Cal. 657, 59 P. 146, 47 L. R. A. 334; Crane v. Roach, 29 Cal. App. 584, 156 P. 375; Pomeroy on Specific Performance (3d Ed.) § 312; Poultry Producers of Southern California v. Barlow, 189 Cal. 289, 208 P. 93.

We see no error in the rulings rejecting evidence offered to "explain" the contract.

The judgment is affirmed.

We concur: FINCH, P. J.; PLUMMER, J.

---

96 Cal. App. 512

LYNCH et al. v. GAGNON et al. (Civ. 3658.)

District Court of Appeal, Third District, California. Jan. 30, 1929.

1. Appeal and error 🔑882(5)—Defendant, filing cross-complaint raising issues sufficient to support judgment, cannot complain that complaint did not state cause of action (Code Civ. Proc. § 1060).

Defendant, filing a cross-complaint in which among other things he asked for declaratory relief under Code Civ. Proc. § 1060, and which raised issues sufficient to support judgment, cannot complain after judgment that the complaint did not state a cause of action and was therefore no support for the judgment without regard to whether the filing of an answer after a general demurrer had been sustained operated so as to revive the complaint.

2. Brokers 🔑10—Employment of member of syndicate as exclusive sales agent for sale of syndicate property held not coupled with interest and therefore irrevocable.

Employment of member of syndicate, transferring option for an interest in syndicate, as exclusive sales agent for sale of syndicate property was not an employment coupled with an interest and therefore irrevocable; it being necessary to constitute power irrevocable that terms of its grant must be so clear as not to require interpretation.

3. Master and servant 🔑8(1), 20—Employment for no specified length of time is ordinarily only at will of employer, and is not irrevocable.

An employment for no specified length of time is ordinarily only at the will of the employer, and, even where based upon a consideration, is not irrevocable; the employer in such case having the power to discharge the agent at any time, although right to revoke depends upon circumstances.

4. Brokers 🔑10—Employers applying to court of equity in aid of power to discharge sales agent must show right to discharge.

Employers, in applying to a court of equity in aid of their power to discharge exclusive sales agent, must show more than a mere power, in that they must show a right to discharge.

5. Master and servant 🔑30(1)—Employment based on consideration can be terminated only where reasonably just and proper.

An employment based upon a consideration can only be rightfully terminated under conditions which render it reasonably just and proper to do so.

6. Brokers 🔑10—Execution of bond by exclusive sales agent as member of syndicate rather than by reason of sales agency did not prevent his removal.

Where bond executed by exclusive sales agent for syndicate property to trustee and to county, saving them harmless against charges for improvement of land and other purposes, was as a member of the syndicate rather than because of sales agency, the fact that he had so executed the bond would not prevent his removal, since, in case of any promises by remaining members of syndicate in relation to execution of such bond, the promises could be enforced in any appropriate form.

Appeal from Superior Court, Los Angeles County; Bertin A. Weyl, Judge.

Action by Thomas R. Lynch and others against Ernest E. Gagnon and others, wherein defendant named filed a cross-complaint. Judgment for plaintiffs, and defendant named appeals. Affirmed.

Leonard S. Barnes, of Los Angeles, for appellant.

Thomas R. Lynch, Gibson, Dunn & Crutcher, and Phillip C. Sterry, all of Los Angeles (William R. Dennis, of Los Angeles, of counsel), for respondents plaintiffs.

H. L. Carnahan and J. M. Stevens, both of Los Angeles, for respondents defendants.

SHIELDS, Justice pro tem. This is an appeal from a judgment growing out of facts of which the following is a sufficient statement: In July, 1924, the defendant Gagnon, doing business under the name of Affiliated Enterprises, secured an option on a tract of about 13½ acres of land in the city of Los Angeles. To exercise the option and purchase the land, he proceeded to organize a "syndicate," to which he transferred his option, and which proceeded to purchase the property. The plaintiffs were members of the syndicate as was Gagnon; his interest being given to him as part of the consideration for the transfer of his option. The parties purchased the land with a view to its subdivision, improvement, and resale. The title to the property was to be conveyed to the Bank of America, as trustee, to hold for the beneficiaries, and to perform for their benefit the countless duties connected with conducting the business of the syndicate, collecting its money, paying its debts, and similar details. To effect all of these purposes and to define the rights and duties of the parties, the members of the syndicate executed among themselves a "syndicate agreement," in which among other things, it was provided that the property should be conveyed to the Bank of America, which was thereupon to execute a "trust agreement," defining the details of the trust.

The syndicate agreement contained as one of its many provisions subdivision 8, which read, "The said Trustee shall appoint Affiliated Investment Co. (operating under a declaration of trust) sole and exclusive selling agent for the said property at a commission of twenty-five (25%) per cent." Upon the conveyance of the property to the Bank of America, it proceeded, on the 12th day of March, 1924, to execute the "declaration of trust" provided for in the syndicate agreement.

Following the instruction contained in this latter agreement, the trustee included in its declaration the following: "It is understood by and between all of the parties hereto, that Ernest E. Gagnon, doing business under the name of Affiliated Enterprises, shall be and he is hereby appointed the sole and exclusive selling agents for the property, hereinbefore described."

Another provision of the declaration of trust was that "for all of the purposes of this trust a managing committee shall be chosen from among the syndicate members, consisting of three persons, of which Ernest E. Gagnon, or his successors, shall be one, and a notice in writing of the names of the persons chosen for said committee, or any change thereof, shall be deposited with the trustee by Ernest E. Gagnon, or his successor, and * * * the trustee may take the written instructions of a majority of said committee in all matters pertaining to this trust." This declaration of trust was signed by the trustee, and by the members of the syndicate, including the defendant Gagnon. Differences arose between some of the members of the syndicate and their selling agent, Gagnon, and, growing out of this condition, the two members of the managing committee above referred to, other than Gagnon, notified in writing the trustee Bank of America, that on May 4, 1925, the agency of Ernest E. Gagnon was rescinded, effective May 12, 1925. The trustee was instructed to consider the agency as "rescinded and terminated." Gagnon denied the power of the syndicate to discharge him, and, the trustee bank refusing to appoint a successor to him, this action was begun June 5, 1925.

The complaint prays for an injunction against Gagnon preventing him from exercising his previous agency rights, and for a mandatory injunction compelling the Bank of America to cancel the appointment of Gagnon, and to appoint such other broker as a majority of the managing committee should name. To this complaint defendant Gagnon filed a general and a special demurrer. These demurrers were sustained July 20, 1925. Plaintiffs did not amend their complaint, and on the 29th day of October, 1925, defendant Gagnon filed an answer to the complaint, to which his demurrer had previously been sustained, and filed as well a cross-complaint in which he asked for independent relief.

The action in due time went to trial, and the judgment appealed from was rendered. The judgment followed the prayer of the complaint, and directed the bank to appoint as selling agent the nominee of a majority of the managing committee, and to remove the defendant Gagnon from his employment as such.

Appellant's first contention is that the complaint does not state a cause of action, and that there is therefore no support for the judgment. It will be recalled that a general demurrer had been sustained to the complaint prior to the filing of defendant's answer. Did defendant's answer revive the complaint?

If defendant had filed his answer prior to the decision on his demurrer, it would have operated as a waiver of all grounds of demurrer, except that the complaint did not state facts sufficient to constitute a cause of action. Booth v. Chapman, 59 Cal. 149; Bancroft's Code Pleading § 721; Id., § 732. We can see no reason why answering after such decision should not have the same effect. "In order to take advantage of the ruling sustaining a demurrer or motion, the party must stand upon his pleading." Bancroft's Code Pleading, § 723. Appellant does not go so far as to contend that, because a general demurrer had once been sustained to the complaint, there was thereafter no valid existing complaint remaining in the case. He seems to concede that in the circumstances the question of its sufficiency as stating facts was before the trial court, but insists that the court erred in holding it to be sufficient, or in receiving evidence upon it, upon the assumption that it was sufficient. We think that the complaint did state facts sufficient to justify the relief asked and the particular judgment rendered. But such a determination is not necessary to the proper support of the judgment. Defendant with his answer filed a cross-complaint, in which, among other things, he asked for declaratory relief, under section 1060 of the Code of Civil Procedure. Plaintiffs answered this cross-complaint, and later the action went to trial on the issues growing out of both the complaint and the cross-complaint.

The complaint is undoubtedly confusing and uncertain as to the theory upon which it proceeds, and defendant could safely have stood upon the judgment sustaining his special demurrer. Apparently irrelevant matters were pleaded and issues raised which were not appropriate to the action.

At the trial, over the objection of the defendant, evidence was heard upon all of these matters, and findings were made thereon. But admitting such irrelevant matter, and findings to have been made upon irrelevant issues, the defendant Gagnon was not injured thereby. The complaint did state Gagnon's employment, the appointment and existence of the "managing committee," the neglect of his duties by Gagnon, and his inattention thereto, the termination of his employment by the "managing committee," and the further statement that the trustee and Gagnon failed to act upon such dismissal, and, finally, the prayer for a judgment enforcing such dismissal. There was evidence in support of these allegations, and appropriate findings thereon. As the judgment rendered was clearly the proper one upon this evidence, and these findings alone, evidence and findings upon other, even irrelevant issues which could not have affected this judgment, may be disregarded.

But defendant's vigorous objection to the complaint herein, and to its imperfections, would avail him nothing, even if sustained.

[1] Disregarding the complaint, the action still subsisted as to the issues raised by the cross-complaint and the answer thereto. Mott v. Mott, 82 Cal. 413, 22 P. 1140, 1142; Warner v. Darrow, 91 Cal. 309, 27 P. 737; Bancroft's Code Pleading, § 740. As the judgment was well within the issues, and was supported by findings directly thereon, defendant cannot complain of its lack of foundation.

He asked that his contract of exclusive employment be interpreted. The matter was heard, evidence was taken, and the court found that "the exclusive sales agency held by defendant Gagnon, is for no specified period of time," and as a matter of law that such sales agency "was and is a revocable agency."

The court further found that Gagnon had not properly discharged his duties as such sales agent and that the "managing committee" had discontinued his employment and had notified the trustee to so discontinue the same; and the court thereupon decreed that the trustee act in pursuance of the direction of the managing committee. Defendant, by his plea for declaratory relief, raised these issues, and he cannot now claim that they were not before the court, nor that the court had no jurisdiction to decide them. San Joaquin Brick Co. v. Mulcahy, 58 Cal. App. 295, 208 P. 351.

[2-4] Defendant's next contention is that his employment was coupled with an interest and was therefore irrevocable. It will be recalled that defendant obtained an option for the purchase of the tract of land involved herein, and effected the organization of a syndicate to purchase it. Upon certain payments made by the syndicate, the owner of the property conveyed it to the Bank of America to hold in trust for the members of the syndicate. In consideration for his services in purchasing the property for the syndicate, or in consideration of his option, defendant was given an interest in the syndicate and a beneficial interest in the trust, and was given employment as the exclusive sales agent for the sale of the syndicate property. Such an employment is not coupled with an interest. 1 Cal. Jur. 707; 2 Cor. Jur. 531. The writings out of which the agency grew do not purport to create an irrevocable employment. To constitute a power irrevocable, the terms of its grant must be so clear as not to require interpretation. Barr v. Schroeder, 32 Cal. 609. It might be noted in passing that defendant's whole beneficial interest as a selling agent was contingent. Section 9 of the syndicate agreement provides that the members of the syndicate might at any time sell any unsold lots belonging to the syndicate. Gagnon's employment, or, at least, any reward growing out of it was wholly contingent upon the failure of the other members of the syndicate to make sales under this section. The employment was for no specified length of time. Such an employment is ordinarily only at the will of the employer. San Joaquin, etc., Co. v. West, 94 Cal. 399, 29 P. 785; Easton v. Millington, 105 Cal. 49, 38 P. 509; 1 Cal. Jur. 702. Even where the employment is based upon a consideration, it is not irrevocable. 1 Cal. Jur. 708. In such a case the employer has the *power* to discharge the agent at any time, but the *right* to revoke depends upon circumstances. Roth v. Moeller, 185 Cal. 415, 197 P. 62; Boehm v. Spreckels, 183 Cal. 239, 191 P. 5. So, in the case before us, the managing committee and the syndicate had the power to discharge defendant as they did, and with the exercise of such a power the courts have no authority to interfere. But, where the employment is based upon a consideration, as in this case, and the plaintiffs apply to a court of equity in aid of their power to discharge, they must show more than a mere power; they must show a *right* to discharge.

[5, 6] An employment based upon a consideration can only be rightfully terminated under conditions which render it reasonably just and proper to do so. Boehm v. Spreckels, 183 Cal. 239, 191 P. 5. Here the court found neglect and inattention to duty on the part of the defendant. This finding justifies the judgment of the court, and the determination that the act of the managing committee and of the syndicate in terminating defendant's agency, was a rightful exercise of their power. Appellant contends further that his removal after he had given bonds to the trustee and to the county of Los Angeles, saving them harmless against charges for the improvement of the tract of land, and other purposes, would be unjust. But the giving of these bonds was a thing apart from his sales agency. He was not required to give the bond to the trustee as sales agent. He

gave it as a member of the syndicate. He still remains a member of the syndicate. The provision of the declaration of trust under which it was given was that "the beneficiaries herein shall furnish to the trustee a bond," etc. If any promises were made to defendant and his fellow surety, McNamee, to induce them to assume the full burden of these bonds, instead of their being joined in by all the remaining members of the syndicate, these promises may be enforced in any appropriate form. But the giving of these bonds no more affected the status of Gagnon as a sales agent, or changed the nature of his tenure, than they served to confer such a status upon his fellow surety, McNamee. As to defendant's rights to damages asked for in his cross-complaint, he clearly was not entitled to recover, because of the execution of the bonds upon which he had become a surety, as he had not at the time been held to liability thereunder. As to the other damages asked for and denied him, the adverse finding had evidence to support it. Under such circumstances, we will not disturb it.

The judgment is affirmed.

We concur: FINCH, P. J.; PLUMMER, J.

DYER v. McCORKLE et al.★ (Civ. 6353.)

District Court of Appeal, First District, Division 1, California. Jan. 11, 1929.

As Modified on Denial of Rehearing Feb. 9, 1929. Hearing Granted by Supreme Court April 9, 1929.

1. Appeal and error 🔑755—Appeal of one in whose behalf no points and authorities nor briefs were filed will not be considered.

Appeal of one of two defendants, in whose behalf no points and authorities nor briefs were filed, will not be considered by appellate court.

2. Automobiles 🔑244(28)—Evidence held not to show any knowledge or acquiescence on part of dairy company in driver's permitting boys to ride on milk truck.

In action against dairy company for injuries sustained by 12 year old boy while assisting driver of defendant's electric milk truck, plaintiff's testimony that driver had told him that he did not want "too many kids" on truck *held* no evidence of knowledge or acquiescence by defendant in driver's permitting boys to ride on truck or to assist in deliveries.

3. Courts 🔑106—Opinions of appellate tribunals are intended to reflect court's opinion on case presented.

The opinions of appellate tribunals are not intended to serve as questionnaires or monographic treatises, nor to catalogue the divergent views of opposing counsel, but are intended to reflect opinion of court on case presented.

4. Automobiles 🔑193(4)—Master and servant 🔑366—Boy assisting milk truck driver in making deliveries held not employé, but mere trespasser, entitled only to protection from willful or wanton injury (Workmen's Compensation Act).

Twelve year old boy, who assisted driver of electric milk truck in making deliveries without receiving any regular wage therefor, *held* not an employé either of driver or of dairy company, in absence of evidence that latter had any knowledge that driver was permitting boys to ride on truck or to assist in deliveries, but he was a mere trespasser as far as dairy company was concerned, entitled only to protection from willful or wanton injury, and any injury to boy in course of such work was not compensable under Workmen's Compensation Act (St. 1917, p. 831, as amended).

5. Negligence 🔑11—To constitute "willful misconduct" there must be actual knowledge or its legal equivalent of danger from failure to act and conscious failure to avert injury.

"Willful misconduct" means something different from and more than negligence, however gross, and to constitute willful misconduct there must be actual knowledge, or that which in law is esteemed to be equivalent of actual knowledge, of danger to be apprehended from failure to act, coupled with a conscious failure to act to the end of averting injury.

[Ed. Note.—For other definitions, see Words and Phrases, First, Second, and Third Series, Willful Misconduct.]

6. Negligence 🔑11—To constitute "wanton negligence" there must be intent to cause injury; "recklessness;" "wantonness;" "gross negligence."

To constitute "wanton negligence" there must be a design to cause injury, but a recklessness amounting to a disregard of consequences will supply the place of specific intent, and "gross negligence" may be equivalent of willful or wanton negligence, where defendant's conduct exhibits reckless indifference to probable consequences with knowledge of facts and circumstances likely to result in injury; "recklessness" and "wantonness" being stronger terms than ordinary negligence and meaning a disregard of security equivalent to bad faith, and a willful or malicious disposition to injure (citing Words and Phrases, Second Series, "Wanton Negligence").

[Ed. Note.—For other definitions, see Words and Phrases, First, Second, and Third Series, Reckless; Recklessly; Recklessness; Wantonness; Gross Negligence.]

7. Automobiles 🔑158—Starting milk truck before boy assisting in deliveries jumped on step, who, as to dairy company, was mere trespasser, held not "wanton negligence" nor "willful negligence."

Where driver of dairy company's electric truck had for some time customarily started truck before 12 year old boy assisting him in making deliveries of milk had jumped on step of truck, *held*, that his act in starting truck before boy stepped thereon was not "willful negligence," nor "wanton negligence," so as to make

---

★Superseded by opinion of Supreme Court 280 P. 965.

dairy company, as to whom boy was mere trespasser, liable for injuries to boy.

[Ed. Note.—For other definitions, see Words and Phrases, First, Second, and Third Series, Willful Negligence.]

8. Trial 🔑343—Contention that general verdict for plaintiff imported finding for him on allegations of wantonness, willfulness, and recklessness could not be sustained, where there was no supporting evidence.

Plaintiff's contention that, inasmuch as complaint alleged that plaintiff was injured by reason of defendant's wantonness, willfulness, and recklessness, general verdict of jury for plaintiff imported finding for plaintiff on such issues, cannot be sustained, where there was no evidence supporting such allegations.

Appeal from Superior Court, Fresno County; Denver S. Church, Judge.

Action by Dayton Dyer, also known as Dayton Dyer Sibley, an infant, by Winifred Dyer Sibley, his guardian ad litem, against B. T. McCorkle and Frank M. Helm, Incorporated, doing business under the firm name and style of Jersey Farm Dairy Company. Judgment for plaintiff, and defendants appeal. Reversed as to defendant last named, and affirmed as to defendant first named.

Fenston, Williams & Hansen and Frank Kauke, all of Fresno, for appellants.

Gallaher & Jertberg, of Fresno, for respondent.

PARKER, Justice pro tem. [1] This is an action prosecuted by a minor, through his guardian, wherein it is sought to recover for injuries sustained as a result of the negligence of defendants. Judgment went for plaintiff, following the verdict of a jury. Defendants appeal, and the record comes before us under the alternative method of appeal. At the outset we are met with respondent's contention that the reporter's transcript is not properly before the court and that the same should not be considered for any purpose. The points urged in support of this contention have been heretofore considered and passed upon both in the District Court of Appeal and by the Supreme Court. Stoner v. Security Trust Co., 47 Cal. App. 216–220, 190 P. 500; Anstead v. Pacific Gas Electric Co., 201 Cal. 198, 256 P. 209. The contention of respondent was held to be without merit, and we have no reason to again pass upon the question other than to express assent with the conclusion reached in the cited cases. Particularly is this true in view of the fact that a rule of practice and procedure is announced and no property rights involved in the point made. Therefore, we hold the entire record properly before us. While the appeal is taken by both defendants, there are no points and authorities nor briefs of any kind filed in behalf of the defendant McCorkle. We shall not consider the appeal of this defendant, but confine our opinion to the appeal of the codefendant Frank M. Helm, Inc., a corporation, doing business under the firm name of Jersey Farm Dairy Company, who will hereinafter be referred to as Dairy Company. By way of further preliminary explanation, the term "plaintiff" will refer to the infant plaintiff alone, excluding the guardian. A narrative of the facts in the case will be necessary to an understanding of the contentions. The plaintiff Dayton Dyer at the time of the admitted injury was a boy of the age of 12 years. The defendant Dairy Company was at the same time engaged in the business of selling and delivering milk in the city of Fresno. In that business the Dairy Company used an electric truck, and the truck was driven by McCorkle, admitted to have been an employé of the Dairy Company. The method of delivery was the usual one. The customers of the Dairy Company resided throughout the various sections of the city. The Dairy Company, using its truck, delivered the milk in bottles along established routes to each house. McCorkle, the driver of the milk truck, had been a lodger at the home of plaintiff and had some acquaintance with the family. An older brother of plaintiff, at a time perhaps a few months preceding the date of the accident, had been helping McCorkle in his deliveries, and when he stopped the plaintiff began. The accident happened on April 11, 1926. It was about a month and a half prior to this date that plaintiff commenced helping McCorkle, the driver. The evidence does not disclose that they continued every day, but it is reasonable to assume such to be the case from the fact that, prior to April 11th, plaintiff had been in the truck about 50 times. The nature of plaintiff's connection with the delivery might be illustrated. It seems that the customers to whom delivery was made lived on both sides of the street, and when a stop was made the driver, McCorkle, would make a delivery on one side and the boy would make a delivery on the other. If the driver completed his deliveries first, he would return and start up the truck when the boy was about four or five feet from the truck. The boy rode on the step.

[2-4] McCorkle paid the boy no regular wage for the assistance. The testimony discloses that once he gave the boy 50 cents and on occasions smaller amounts. Occasionally McCorkle would buy candy for the boy, and in addition to all of this the boy had access to the milk and would drink as he desired. On the day in question the boy and McCorkle were engaged in making milk deliveries along the route. At the particular point where the truck was stopped there was no delivery to be made on McCorkle's side, but there was one to be made on the boy's side. According-

ly the boy got off with his bottles and completed the delivery. Upon his return and while he was running toward the truck, the driver started moving while the boy was still some four or five feet away. In attempting to board the moving truck the boy was hurt. Hence this action. The main point presented and urged by appellant goes to the liability of the Dairy Company, the admitted employer, and appellant urges its freedom from responsibility on the ground that the driver was acting wholly without the scope of his employment. Appellant contends that the boy either was an employé of the Dairy Company or he was not. That if he was an employé his recourse was to the Accident Commission. That if he was not an employé he was a mere volunteer. The theory of the trial in the lower court was that there was no employment, and the plaintiff insists such to be the case. Appellant seems content, as far as its argument proceeds, to concur in this. However, the main question to be determined is as to the acts and conduct of the servant McCorkle and the scope of his employment and authority. There is no evidence in the record that the Dairy Company ever had any knowledge of the fact that the driver was permitting boys to ride in the truck or to assist in the deliveries. True, the infant plaintiff testified that one time the driver told him that he did not want "too many kids" on the truck, but as against the Dairy Company this one item of testimony cannot be considered as even the slightest evidence of knowledge or acquiescence on the part of the employer. It is manifest that throughout the transaction the driver was acting within the scope of his employment in so far as the delivery of the milk might be regarded as the very purpose of such employment. It is further apparent from the record before us that in pursuit of the employment the servant had no authority, express or implied, to employ, invite, or permit assistants to aid him in his work. Appellant has put forth many reasons why the judgment of the trial court should be set aside; respondent, on the other hand, urges as many reasons why it should be affirmed. It would serve no useful or instructive purpose to set out in detail these various contentions and analyze each—distinguishing, approving, or rejecting in turn. The opinions of appellate tribunals are not intended to serve as questionnaires or monographic treatises. In the last analysis, they are intended to reflect the opinion of the court upon the case presented rather than catalogue the divergent views of opposing counsel. From the facts of the case as hereinafter outlined we are of the opinion that the relationship of employer and employé did not arise or result as between the infant plaintiff and either McCorkle or the Dairy Company. That is to say, no such relationship arose or was implied to the extent that the matter of compensation would properly or at all come before the Industrial Accident Commission pursuant to the Workmen's Compensation Act (St. 1917, p. 831, as amended). As between plaintiff infant and the Dairy Company there was no appointment or contract or apprenticeship, express or implied, oral or written; nor was there any authority, express, implied, or incident to the performance of his duties, that empowered the driver, McCorkle, to create, as between the infant and the Dairy Company, the relation of master and servant or employer and employé. The term of service was on no schedule, nor was any wage provided therefor. No duty of service was accepted by the plaintiff or any obligation of wage payment fastened upon defendant Dairy Company. The case of Giannini v. Campodonico, 176 Cal. 548, 169 P. 80, is illustrative of the law applicable. In that case the facts bear a striking resemblance to the case at bar. Plaintiff there was a boy of 14 years of age and resided across the street from the stable owned by defendant, who employed a colored stableman to take care of the horses and wagons and keep the stable in order. On the morning of the accident the boy saw the stableman leaving in a buggy, and at that time the stableman requested the boy to clean the stable during his absence, and promised him a nickel upon his return. A small door which was part of a large sliding door was left open for the boy. Subsequently the boy and two other boys entered the stable, and while in the premises the large sliding door fell, breaking the leg of the boy who had been engaged by the stableman, and inflicting other injuries upon him. Upon several occasions theretofore the boy had performed errands for the stableman at the latter's request and received some sort of remuneration. The door which fell down had previously been out of order and the stableman had attempted to remedy the defect. The court holds as follows: "Disregarding the testimony advanced by defendant and looking only to the case as presented by" plaintiff, "no ground for holding the defendant liable appears. It is well settled that as against a trespasser or mere licensee the owner of property owes no duty to keep the premises in safe condition. The only duty is to abstain from willful or wanton injury. In other respects one who thus enters upon the premises does so at his own risk and subject to all the ordinary risks which attach to such premises. * * * It is only in the case of one who has been expressly or impliedly invited upon the premises that the duty exists to exercise due care not to injure him or permit the premises to be in such condition that injury results. * * * The first question is whether the request of the stableman in this case is such an invitation as to render" the boy "an invitee. * * *

The facts * * * show that the duties of the stableman were of such a menial character that the position could not have carried with it the implied right to delegate the work or hire others to assist in the same. * * * In fact, the duties were such that the stableman could very easily perform them without aid. It must therefore be held that the request to do the work was unauthorized and could not impose any additional liability upon the defendant. * * * The stableman's promise to pay" the boy "to clean the stable could not make the latter an invitee. Neither can prior services raise such a relation, especially where it is not pretended that they were brought home in any way to the defendant. The fact that respondent is a minor does not give him any greater rights under the circumstances. 'That might excuse him from concurring negligence, but cannot supply the place of negligence on the part of "defendant," or confer an authority on one who has none. It may excite our sympathy, but cannot create rights or duties which have no other foundation.'" This ends quotation from Giannini v. Campodonico, 176 Cal. 548, 169 P. 80.

In the case of Curry v. Addoms, 166 App. Div. 433, 151 N. Y. S. 1017, where plaintiff had been engaged by a janitor who was without authority to engage any other person, the court says: "It is also urged that the plaintiff was a licensee. If so, she must trace her license to the defendant: but as he knew nothing of her, and was not bound to do so, and as the janitress," by her contract with plaintiff, "had no right to commit the defendant, he owed her no duty in the matter of the steps." The case of Higbee Co. v. Jackson, reported in 101 Ohio St. 75, 128 N. E. 61, is exhaustively annotated in 14 A. L. R., commencing at page 131. The action concerned the rights of a boy who had been invited to ride in a truck. The invitation was extended by the driver, without the knowledge of his employer, and accepted. The court says: "The grant of permission, so far as the company is concerned, was a mere nullity." The most that can be said is that the boy had no right upon the truck and that when he got in he was a trespasser as far as the defendant was concerned. The foregoing cases can in many respects be directly applied to the case at bar. The work of the truck driver was menial work, as the term goes. Surely it is demonstrated that it was not work that required assistance, inasmuch as it was work that a 12-year-old child could do, as far as the delivery of the milk itself was concerned, and the assistance was not rendered in the driving of the truck. Relying, also, on the Campodonico Case, we conclude that the boy was not an invitee. Therefore, being neither an employé, nor a licensee, nor invitee, there is but one other status in which he can be placed, and that is he was a trespasser as far as defendant Dairy Company was concerned. As such trespasser he was entitled to protection from willful or wanton injury. Sessions v. Southern Pacific Co., 159 Cal. 599, 114 P. 982; Higbee Co. v. Jackson, supra. If the driver of the truck had permitted the boy to be seated upon the truck and after driving some distance had suddenly become mindful of his breach of duty, he would not have been permitted to recklessly push the boy off and injure him. Likewise, seeing the boy in a dangerous position, he would not be permitted, ruthlessly and with no regard for the boy's safety, to run him down.

[5, 6] Notwithstanding the confused and indiscriminate use at times of the terms "negligence" and "willfulness" by judges and textwriters it is certain that the weight of authority supports the view that these terms have a distinct and well-defined meaning which is clearly pointed out in Holwerson v. St. Louis & S. Ry. Co., 157 Mo. 216, 57 S. W. 774, 50 L. R. A. 850, and accepted by California courts in Tognazzini v. Freeman, 18 Cal. App. 474, 123 P. 540; Taylor v. Pacific Electric R. Co., 172 Cal. 645, 158 P. 119. Willful misconduct means something different from and more than negligence, however gross. The term "serious and willful misconduct" is described by the Supreme Court of Massachusetts as being something "much more than mere negligence, or even gross or culpable negligence." To constitute "willful misconduct" there must be actual knowledge or that which in the law is esteemed to be the equivalent of actual knowledge, of the danger to be apprehended from the failure to act, coupled with a conscious failure to act to the end of averting injury. Helme v. Great Western Milling Co., 43 Cal. App. 416, 185 P. 510. Wanton negligence, likewise, means something in addition to mere actionable negligence. To constitute wantonness in the eye of the law it is not necessary to allege or show an intent to injure. Gross negligence, or what is sometimes called the "last" negligence, may be the equivalent of willful or wanton negligence; and where the conduct of defendant exhibits reckless indifference to probable consequences, with knowledge of facts and circumstances likely to result in injury, it becomes wanton negligence. Kramm v. Stockton R. Co., 3 Cal. App. 618, 86 P. 738, 903. "Recklessness" and "wantonness" are stronger terms than ordinary negligence, and mean a disregard of security equivalent to bad faith and a willful or malicious disposition to injure. To constitute wantonness there must be a design, purpose, or intent to do wrong, or cause the injury, but a recklessness amounting to an utter disregard of consequences will supply the place of a specific intent. Chicago, R. I. & P. Ry. Co. v. Lacy, 78 Kan. 622, 97 P. 1025. See, also, Words and Phrases, Second Series, vol. 4, p. 1236 et seq. Without going further into the

various constructions placed upon the term "wanton," it will suffice to say that to lawyer and layman alike the word, in common usage, immediately suggests something of complete abandonment of care.

[7] We are unable to conclude that the negligence here established on the part of the driver of the milk truck can be characterized as either willful or wanton in the sense contemplated by the law applicable. To so hold would be disregarding the plain import of the terms. The boy had been doing the same thing for over a month and a half and his brother before him for some months Day after day exactly the same procedure was followed. If the driver was on the truck before the boy got back, he would start up and move to the next house or next point of delivery. The boy would jump on and ride to that point. This boy was of the age of twelve years and normal, as far as appears, for that age. The truck was stopped at a distance of four feet, which demonstrates the speed at which it was traveling. We do not mean to say that because a course of conduct, such as a boy jumping on a truck, had been pursued for some months, that fact alone would render it free from negligence. But is it obvious that knowledge and experience serves the purpose of illustrating what is safe and what is dangerous, because these factors serve to a great extent in pointing the course of the future. There is not a scrap of testimony from which it can be inferred that the driver knew the boy was getting on the truck or was attempting to get on. One witness testified that the boy shouted to the driver to go ahead, but the boy denied so doing. Taking either view of this, our conclusion would not be affected. If it could be held that the boy assured the driver it was all right to proceed, then the driver might reasonably assume the boy in a position of safety.

[8] Respondent contends that inasmuch as the complaint alleged that the driver willfully, wantonly, and recklessly drove the truck, and that the plaintiff was injured by reason of the wantonness, willfulness, and recklessness of the defendants, the verdict of the jury, being a general verdict, imports a finding for plaintiff upon these issues. To sustain this contention it is necessary that there be some evidence supporting the allegations. Surely if plaintiff had offered no evidence at all, save as to the extent of his damage, and had offered no evidence at all as to the negligence, nor had defendant, a verdict for plaintiff would find no support in the mere allegations of the complaint. In the case of Higbee Co v Jackson, supra, the entire subject is completely annotated Many authorities have been collected in the note, and from a reading of the cases it becomes evident that the allowing of the rights of even a trespasser to the person invited by the servant, without the scope of his employment, is a question of much dispute, and where granted is a concession, and extension of the doctrine of respondeat superior. The doctrine of respondeat superior had its origin in consideration of public policy. Out of the necessities of new social and economic conditions it has been developed and extended, and its growth and application have been influenced and directed by these conditions The rule itself and its development are examples of the process by which the judgment of society as to what is necessary to the public welfare has from time to time been expressed in juristic form. But in extending the doctrine we cannot destroy it and deprive the master of all rights. If an employer's business and fortune were committed wholly to a servant or employé without regard to the nature or scope of the latter's employment, modern business would practically cease. The law has been exceedingly generous as to the plaintiff in cases such as in the instant case to give him the protection it has, in so far as it renders the master liable for a situation over which he has so little control. The basis of this solicitude of the law is the principle which is sometimes characterized as the humanitarian doctrine which is only invoked to prevent willful or wanton injury.

We are of the opinion that by no specious reasoning should the doctrine be extended. By giving such loose or careless construction to the terms "willful" and "wanton" as is sought here would be to destroy entirely any distinction between the various degrees of negligence. To sustain the contention of respondent here would be to hold affirmatively that wanton and willful misconduct means lack of ordinary care and would be in direct defiance of authority and destruction of principle. The court below, under the facts, should have granted the defendant's motion for a nonsuit.

The judgment is reversed as to appellant Frank M. Helm, Inc., doing business under the firm name of Jersey Farm Dairy Company, and the judgment is affirmed as to appellant McCorkle.

We concur: TYLER, P. J.; CASHIN, J.

Winifred Dyer SIBLEY Plaintiff and Respondent v. B. G. McCORKLE and Frank M. Helm, Inc. (a Corporation), Doing Business Under the Firm Name and Style of Jersey Farm Dairy Company, Defendants and Appellants.★ (Civ. 6351.)

District Court of Appeal, First District, Division 1, California. Jan. 11, 1929.

As Modified on Denial of Rehearing Feb. 9, 1929.

Appeal from Superior Court, Fresno County, Denver S. Church, Judge.

Fenston, Williams & Hansen and Frank Kauke all of Fresno, for appellants

Gallaher & Jertberg, of Fresno, for respondent.

PARKER, Justice pro tem. This cause is upon the same state of facts as Dyer v. McCorkle (Cal. App.) 274 P 587 this day decided.

This action is brought by the mother of the minor plaintiff in the Dyer Case to recover expenses incurred for physicians and hospital treatment for the minor. It has been stipulated between the counsel for the respective parties that if the judgment in the Dyer Case was affirmed such should be the decision in the instant case; that if the Dyer judgment were reversed then the judgment in the present case likewise should be reversed.

Judgment is reversed as to appellant Frank M. Helm, Inc , doing business under the firm name of Jersey Farm Dairy Company, and the judgment is affirmed as to appellant McCorkle.

We concur: TYLER, P. J.; CASHIN, J.

---

96 Cal. App. 358

PEOPLE v. DEMPSTER. (Cr. 1728.)

District Court of Appeal, Second District, Division 2, California. Jan. 21, 1929.

1. Indictment and information 🔑159(2)—Information in effect charging theft by charging embezzlement held properly amended during trial to charge grand theft (Pen. Code, § 484, as amended by St. 1927, p. 1046, § 1, and § 952, as amended by St. 1927, p. 1043).

Where information charging crime of embezzlement under Pen. Code, § 952, as amended by St. 1927, p. 1043, in effect charged theft, such section providing that in charging an offense each count shall be sufficient if it contains, in substance, statement that accused has committed public offense therein specified, amendment of the information during trial by substituting the words "grand theft" for the word "embezzlement" was proper, in view of the Code provision, and in view of Pen. Code, § 484, as amended by St. 1927, p. 1046, § 1, merging larceny, embezzlement, and obtaining money by false pretenses into one crime of theft.

2. Embezzlement 🔑2—Though offense charged as embezzlement was committed before passage of statute making it theft, defendant could be prosecuted for grand theft under amended information (Pen. Code, § 484, as amended by St. 1927, p. 1046, § 1).

Though offense charged in information as embezzlement, for which defendant was being prosecuted, was committed previous to amendment of Pen. Code, § 484 (St. 1927, p. 1046, § 1), merging larceny, embezzlement, and obtaining money by false pretenses into one crime of theft, defendant could be prosecuted under an amended information for grand theft, since punishment is the same for either; change being procedural one in no way impairing substantial right of defendant.

3. Larceny 🔑65—Evidence held to sustain conviction for grand larceny, notwithstanding conflicting testimony by prosecuting witness.

Evidence in prosecution for grand theft *held* sufficient to sustain conviction, notwithstanding certain testimony by prosecuting witness conflicting with other testimony by her and admissions of defendant that he misapplied money coming into his hand.

Appeal from Superior Court, Los Angeles County; Charles W Fricke, Judge.

Harold J Dempster was convicted of grand theft, and he appeals. Affirmed.

Buel R. Wood, of Los Angeles, for appellant.

U. S. Webb, Atty. Gen., and James S. Howie, Deputy Atty. Gen., for the People.

THOMPSON, J. The appellant was charged by an information in two counts with having embezzled the sum of $1,400 and $1,600, respectively During the course of the trial the judge pointed out to counsel that the commitment of the magistrate was for theft instead of embezzlement. The district attorney thereupon moved the court for leave to amend the information by substituting the words "grand theft" for that of "embezzlement, charging the defendant with the crime of grand theft, a felony instead of embezzlement," and changing the language of the charge to read that the defendant "did unlawfully obtain—lawful money of the United States, the property of one Hazel M. Kiler"

Defendant's counsel then agreed to proceed "without having the formal amended pleading before the court" or waiting to have it typewritten, whereupon the defendant was asked to plead severally to the counts charging grand theft, and interposed the plea of not guilty to each of them. The trial proceeded, the formal amended information was filed, and the jury returned a verdict of guilty on each count. This appeal is prosecuted from the judgment pronounced upon the verdict.

★Superseded by opinion of Supreme Court 280 P. 965.

[1, 2] Appellant's first contention is that he never pleaded to the amended information, and he directs our attention to the fact that, from the oral statement of the court when permission was granted to amend, the language employed was that the defendant "did unlawfully obtain" (the amount of money designated in each count) "lawful money of the United States, the property of one Hazel M. Kiler," whereas the amended information actually filed used the words "did unlawfully take away," etc. Concerning appellant's contention that he did not plead to the amended information, it is without merit. In effect he waived the reading of the information, with like effect as he did when first arraigned, and pleaded not guilty to two counts charging grand theft. The real question is: Could the information be so amended? If it could be so amended, not only is the first question conclusively settled, but also appellant's second assignment of error, to the effect that by the amendment he was twice put in jeopardy, falls to the ground.

In 1927, two sections of the Penal Code which have a direct bearing upon the instant question were amended. Section 952 was altered so that the material portions now read as follows: "In charging an offense, each count shall contain, and shall be sufficient if it contains *in substance*, a statement that the accused has committed some public offense therein specified. Such statement may be made in ordinary and concise language without any technical averments or any allegations of matter not essential to be proved. * * * In charging theft it shall be sufficient to allege that the defendant unlawfully took the property of another." St. 1927, p. 1043. In the cases of People v. Plum (Cal. App.) 263 P. 862, on application for rehearing (Cal. App.) 265 P. 322, and People v. Manchell (Cal. App.) 267 P. 718, in the reasoning of which we are in accord, the short form of information provided for in the amendment just noticed is sustained, at least in those cases where from a practical standpoint the defendant's rights are not prejudiced because he has been advised of the nature of the charges which he must meet at the trial.

The second amendment which directly bears upon the problems here presented is that of section 484 of the Penal Code. In so far as applicable to this case it reads: "Every person who shall feloniously steal, take, carry, lead, or drive away the personal property of another, or *who shall fraudulently appropriate property which has been entrusted to him*, or who shall knowingly and designedly, by any false or fraudulent representation or pretense, defraud any other person of money, labor, or real or personal property, or who causes or procures others to report falsely of his wealth or mercantile character and by thus imposing upon any person, obtains credit and thereby fraudulently gets or obtains possession of money or property or obtains the labor or service of another, is guilty of theft. * * *" (Italics ours.) St. 1927, p. 1046, § 1. The effect of this change of section 484, as is said in People v. Plum, supra, is "that the former crimes of larceny, embezzlement, and obtaining property by false pretenses are merged into the one crime of theft." Or, to put it in the language of Commonwealth v. King, 202 Mass. 379, 88 N. E. 454, where a like amendment was under scrutiny, the legislative intent was "to do away with the possibility of a criminal indicted for one of the three crimes mentioned escaping punishment by reason of its being afterwards found that his crime was technically one of the other two mentioned." It is thus made apparent that, when in the original information in this case the defendant was charged with having committed "the crime of embezzlement," in that he did "wilfully, unlawfully, knowingly and feloniously embezzle, appropriate and convert" certain sums of money which had been intrusted to him by Hazel M. Kiler, he was informed against as having committed one kind of theft as defined by section 484 as amended prior to the filing of either the complaint or information. It is equally obvious that the original information, "in substance," charges the commission of a public offense. In view of that portion of section 952 of the Penal Code which reads that the words used may be "any" which are "sufficient to give the accused notice of the offense of which he is charged," prior to the filing of the amended information the defendant stood charged with the offense of theft, although not in the language of the statute. It is true that technically the offense of embezzlement has been merged into that of theft, and therefore the information should with more propriety have used the term "grand theft," but it cannot be gainsaid that the defendant was advised of the nature of the charges preferred against him.

We are consequently brought to a position much akin to the situation presented in People v. Thal, 61 Cal. App. 48, 214 P. 296, wherein it was determined that an information in one count charging the offense of obtaining property by false pretenses which set out that the false pretense by which the property was obtained was the uttering and passing of a fictitious check, might be amended to charge two offenses, the one obtaining property by false pretenses and the other uttering and passing a fictitious check. The court said: "These two crimes are thus made to appear by said information as a part of the same transaction, out of which the charge of obtaining property under false pretenses arose. This being so we are of the opinion that such matter in the second count of the amended information was proper matter for the amendment of the original information, even though it charged the defendant with the commission of another crime not expressly stated in the charging part of the first information. Section 1008 of the Penal Code, providing for the amendment of informations after plea, permits by implication at least such amendments to be made, charging such offenses as are shown by the evidence taken at the preliminary examination to have been committed. We have not the evidence taken at the preliminary examination before us on this appeal and hence in support of this judgment we must assume that the evidence there taken was such as to show the offense to have been committed as charged in the second count of this amended information. The motion to amend" (as was the situation here) "was in fact made by the district attorney upon that express ground. The fact that another or additional offense was thus charged is not of itself sufficient to justify us in holding that the addition of this charge was not the proper subject of the amendment or that the trial court abused its discretion in permitting it to be made." As was pointed out in People v. Hinshaw, 194 Cal. 1, 8, 227 P. 156, the distinction must be drawn between those cases where it is attempted to charge a different offense and those where the offense is sought to be charged differently; it being always possible to amend to state a crime differently. To the same effect, see People v. Miller, 34 Cal. App. 641, 168 P. 574. These cases conclude the argument that the amendment was not properly allowed. Nor can it be successfully argued that, because the offense was committed prior to the amendment of section 484 of the Penal Code that appellant could not be prosecuted for grand theft instead of embezzlement as that term was used prior to the amendment. The punishment and the offense are the same. The change is a procedural one which in no way impairs a substantial right of the defendant.

[3] Appellant argues that the evidence is buy and pay for a Chrysler automobile. refers to an answer of the complaining witness on cross-examination to the following question: "During all the time that the defendant * * * you were giving the defendant money, were the different sums you advanced to the defendant, were they in the nature of loans or were they gifts?" The anser was, "They were all loans." It must be borne in mind that there were a great number of transactions, many of which were loans. The other testimony of this witness, however, together with the admissions of the defendant, abundantly establish the fact that the two different sums of money made the basis of the charge were given to him for the following particular purpose: First, to buy a home for the complaining witness; second, to buy and pay for 'a Chrysler automobile. Neither of these purposes was fulfilled, but the appellant made use of the money for his own purposes. A similar situation was involved in People v. Kirkpatrick, 77 Cal. App. 104, 246 P. 84, and the defendant was held to be guilty of embezzlement.

In view of the testimony establishing that all of the sums of money were neither gifts nor loans, we cannot give undue weight to an answer thus obtained. Further, the most that can be said of the testimony is that there is a conflict which we are not called upon to weigh.

Judgment affirmed.

We concur: WORKS, P. J.; CRAIG, J.

96 Cal. App. 161

CARROLL v. CENTRAL COUNTIES GAS CO. (two cases).

COBBS v. SAME. INGRAM v. SAME.

(Civ. 3666–3669.)

District Court of Appeal, Third District, California. Feb. 6, 1929.

Negligence 🔑65—Answer to interrogatories, to effect that injured persons were not exercising due care, did not of itself establish contributory negligence.

Jury's answer to interrogatories, to effect that injured persons were not exercising due care and caution for their own safety, *held* of itself not to establish contributory negligence, in that failure to exercise due care, in order to constitute contributory negligence, must be such want of care as contributes directly to injury complained of.

Appeals from Superior Court, Tulare County; Frank Lamberson, Judge.

On petitions for rehearing. Rehearing denied.

For former opinions, see 273 P. 875 and 878.

E. J. Emmons, of Bakersfield, and G. L. Aynesworth, of Fresno, for appellants.

O'Melveny, Millikin & Tuller, of Los Angeles, and Power & McFadzean, of Visalia (John A. Powell and Pierce Works, both of Los Angeles, of counsel), for respondent.

PER CURIAM. Respondent filed a petition for rehearing in each of the above cases. The principal ground set forth in said petitions for a rehearing is that the jury, by its answer to interrogatory No. 2, submitted by the court, at the request of respondent, established the contributory negligence of appellants, and, such negligence being so established, a judgment for respondent was the only one that could be rendered, and therefore the alleged errors of the trial court could not have been prejudicial.

Interrogatory No. 2 is as follows: "Were the persons who were riding in the automobile at the time of the accident exercising due care and caution for their own safety?"

This interrogatory was submitted to the jury in the two cases, Nos. 3666 and 3667, which were tried together, and was not answered by the jury; their answer to same being waived by respondent.

In the trial of cases Nos. 3668 and 3669, which by stipulation were tried by the same jury that tried the former cases and upon the same evidence, this interrogatory was again submitted to the jury, and its answer thereto was no.

The answer to this interrogatory, as given by the jury, does not establish that appellants were guilty of contributory negligence. For, in order that the negligence of the plaintiff may release a defendant from liability, such negligence must contribute proximately to the injury complained of. 19 Cal. Jur. 649, and authorities cited. It is not enough to constitute contributory negligence that plaintiff was not at the time of the accident exercising due care for his own safety, but it must also appear that such want of care contributed directly to the injury complained of.

Interrogatory No. 2 and its answer, as given by the jury, does not establish contributory negligence upon the part of appellants.

We are of the opinion that the petitions for rehearing should be denied, and it is so ordered.

PEOPLE v. KOEHN. (Cr. 1518.)★

District Court of Appeal, First District, Division 2, California. Feb. 1, 1929.

Rehearing Denied Feb. 15, 1929. Hearing Granted by Supreme Court Feb. 28, 1929.

1. Criminal law 🔑200(1)—Separate convictions of attempt to commit murder and malicious use of explosives, arising out of same series of acts, cannot stand (Pen. Code, § 601).

Separate convictions of attempt to commit murder, and of malicious use of explosives, in violation of Pen. Code, § 601, arising out of only one transaction or series of acts, cannot stand, in view of Pen. Code § 654.

2. Criminal law 🔑200(1)—One offense cannot be split into several distinct crimes.

One offense cannot be split so as to make of it several distinct crimes.

3. Criminal law 🔑199—Offense of attempt to murder includes that of malicious use of explosives, and, on improper conviction of both, latter conviction was set aside, and former affirmed.

Where defendant was improperly convicted both of attempt to commit murder and of malicious use of explosives, under evidence showing only one transaction, conviction for malicious use of explosives was reversed, and that of attempt to commit murder affirmed, since the latter included the former.

4. Indictment and information 🔑129(1)—Offenses of attempt to murder and malicious use of explosives were properly united in one information; "same class of crimes" (Pen. Code, §§ 601, 954).

Offense of attempt to commit murder and that of malicious use of explosives, in violation of Pen. Code, § 601, though arising from same transaction, where properly united in one information under Section 954, since they were of "same class of crimes" within meaning of that section.

Appeal from Superior Court, Fresno County; Charles R. Barnard, Judge.

Charles A. Koehn was convicted of attempt to commit murder and of malicious use of explosives, and he appeals. Conviction of attempt to murder affirmed, and conviction of malicious use of explosives reversed.

Lindsay & Gearhart and Carl E. Lindsay, all of Fresno, for appellant.

U. S. Webb, Atty. Gen., and William F. Cleary, Deputy Atty. Gen., for the People.

KOFORD, P. J. [1, 2] Defendant was charged, convicted, and sentenced upon two separate counts. His points upon this appeal amount to this—that both convictions and sentences cannot stand, because the evidence proves only one crime for which he may be punished.

The felony charged in the first count was: "Attempt to commit murder, in that the said Charles A. Koehn, on or about the seventeenth day of May, nineteen hundred and twenty-eight, at and in the said county of Fresno, and state of California, did willfully, unlawfully, feloniously and with malice aforethought, attempt to kill and murder one C. E. Beaumont, a human being, in the following manner, to wit: The said defendant, at the time and place aforesaid, did place a certain explosive and certain inflammable material at and near the dwelling house occupied by the said C. E. Beaumont, * * * and the said defendant did then attach a fuse thereto and did ignite said fuse, with the intent that the lighted fuse should explode the explosive and ignite the inflammable material, with the intent and purpose that as a consequence thereof the life of the said C. E. Beaumont would thereby be destroyed."

The felony charged in the second count was: "Malicious use of explosive, in that the said Charles A. Koehn, on or about the seventeenth day of May, nineteen hundred and twenty-eight, at and in the said county of Fresno, state of California, did willfully, unlawfully and maliciously put, place, deposit and attempt to explode a certain nitro-glycerine explosive substance, at and near a certain dwelling house occupied by one C. E. Beau-

---

★Superseded by opinion of Supreme Court 279 P. 646.

mont, * * * with intent to injure, intimidate and terrify the said C. E. Beaumont." This crime is defined in Penal Code, § 601.

The evidence upon which the defendant was convicted upon both counts showed only one transaction or series of acts. All the evidence produced was admissible under both counts. Whatever difference or differences there might exist between these two crimes in other cases, in this case the acts were identical. The only difference between the two crimes was the difference in intent with which the same identical acts were performed; i. e., the difference between the intent to kill and the intent to injure, intimidate, and terrify. In passing, it may be said that it was the testimony of the defendant that he had only simulated the appearance of having ignited the fuse to the bomb so as to frighten Judge Beaumont and thereby attract public attention to himself and his lawsuit and perhaps obtain more favorable consideration in certain litigation then pending. Of course, the jury did not believe this story, or they would not have found him guilty of attempt to murder as charged in the first count. It is not claimed that there is any break in the continuity of the events in the transaction so that it could be said at this point the intention changed and thereupon claim that certain particular acts accompanied the intent to frighten and injure and certain other acts accompanied the intent to murder. Theoretically the defendant may have *put* the explosive there with such an intent as to be a violation of Penal Code, § 601, and thereafter he may have attempted to explode it with the intent to murder, but there is no claim of such proof. No doubt the defendant by his entire one act committed acts which are denounced in more than one section of the Penal Code, and perhaps it is proper to say that he committed more than one crime, but the real question is, Shall he be separately punished upon each count?

We think this question is answered in the negative by the opening clause of Penal Code, § 654, "An act or omission which is made punishable in different ways by different provisions of this code may be punished under either of such provisions, but in no case can it be punished under more than one. * * *" In some transactions, however, what appears to be one act (e. g., breaking in and stealing) is in reality two crimes (e. g., burglary and larceny) the second crime beginning and ending after the first is completed. Each of such crimes is separately punishable without regard to the other. See People v. Brain, 75 Cal. App. 109, 241 P. 913, and cases cited. Other apparent exceptions exist where one crime includes more acts or facts than the other, though both crimes may share some of the acts in common. People v. Day, 199 Cal. 78, 248 P. 250.

The authorities relied upon by the respondent to sustain both sentences and convictions are not in point, for the reason that one of the two crimes treated of in each case was made up of acts and facts not all included in the other crime, and this without treating the special criminal intent as one of such acts or facts. Here the crime charged in the first count as proven by the evidence included every act included in the second and no more. It also included every fact and part of the second count, including, also, the intent to injure and terrify, for the intent to injure and terrify is included necessarily in the intent to murder and is proven necessarily by the same conduct or evidence which proves intent to murder. To hold otherwise would be to say that the intent to murder would be a defense for a defendant charged solely with the second count.

This case is ruled by the principle that one offense cannot be split so as to make of it several distinct crimes. This rule is illustrated in People v. Defoor, 100 Cal. 150, 34 P. 642, which holds that a conviction of assault under an information charging an assault with intent to murder is a bar to a prosecution for mayhem committed during the same assault or transaction. Attempt to murder does not always include the charge of violating Penal Code, § 601; yet under the evidence and pleading in the instant case it substantially does so. The same rules should be applied.

[3] It was proper to plead both charges in the information so that, if the evidence failed to prove intent to murder, the defendant could be convicted on the second count. But the conviction upon the first count included all of the elements of the second count. The court should have instructed the jury not to find defendant guilty upon more than one count instead of instructing them that they might find him guilty upon each count. The jury having found the defendant guilty of both charges, there is no difficulty in determining which conviction should yield to the other, because the first includes the second.

[4] The demurrer to the indictment was properly overruled. The two crimes charged were properly united in one information under Penal Code, § 954. They were of the same class of crimes within the meaning of that section. They were, of course, also connected together in their commission within the meaning of that section. It is claimed that it should, but does not appear upon the face of the complaint that such connection exists. The identity of acts, time, place, and circumstance as charged in the two counts is enough to show that connection between the two crimes which Penal Code, § 954, requires without a direct averment that the crimes were so connected together in their commission. It has been so held. People v. Jailles, 146 Cal. 301, 79 P. 965; People v. Day, supra; People v. Kelly, 75 Cal. Dec. 123. People v. Degnen, 70 Cal. App. 567, 234 P. 129, relied upon by appellant, is also au-

thority in support of the information. Appellant quotes language from page 572 of that report (234 P. 131), but the doctrine of the case on this point is on page 575 (234 P. 132).

The judgment of conviction upon the charge of attempt to murder as charged in the first count of the information is affirmed, and the judgment of conviction upon the second count, charging malicious use of explosives, is reversed.

We concur: STURTEVANT, J; NOURSE, J.

---

96 Cal. App. 549

FORNASERI et al. v. COSMOSART REALTY & BLDG. CORPORATION et al.

(Civ. 3577.)

District Court of Appeal, Third District, California. Jan. 31, 1929.

1. Corporations 🔑211(6)—Complaint to establish trust on alleged fraudulent assignment of option from corporation to defendant held defective in failing to allege fiduciary relation of defendant.

Complaint in action by stockholders and creditors to establish trust alleged to have arisen by reason of fraudulent procurement from corporation by defendant of assignment to him of option to purchase certain property *held* fatally defective, in failing to sufficiently state facts showing existence of relation of trust and confidence between defendant and corporation.

2. Corporations 🔑211(6)—Complaint seeking to establish trust arising from alleged fraudulent assignment of option from corporation to defendant held to insufficiently allege corporation's title to option.

Complaint, in action by stockholders and creditors to establish trust alleged to have arisen by reason of fraudulent procurement from corporation by defendant of assignment to him of option to purchase certain property, *held* fatally defective, in that it did not sufficiently allege facts showing that corporation held title to option.

3. Corporations 🔑548(3)—Creditor's suit in equity will not lie against corporation until claim has been reduced to judgment and legal remedies exhausted.

A creditor's suit in equity will not lie against corporation until his claim has first been reduced to judgment and his legal remedies have been exhausted.

4. Corporations 🔑189(9)—Delinquent officers are necessary parties to suit against corporation for fraud or mismanagement.

An equitable action against corporation for fraud or malversation of funds will not lie without making delinquent officers parties to the suit, since officers of corporation in their fiduciary capacity hold property and assets of corporation in trust, and, as such trustees, are alone accountable for fraud and mismanagement.

5. Corporations 🔑207—Minority stockholders may sue for redress on fraud or mismanagement by officers or third person on refusal of officers on request to institute proceedings.

When corporation has been divested of property through fraud or mismanagement of officers or directors or through fraud or coercion of third person, and officers upon request fail and refuse to institute proceedings to remedy injury, minority stockholders may maintain suit in equity for redress.

6. Trusts 🔑95—Trust may be impressed on corporate property wrongfully disposed of and accounting required of one wrongfully acquiring it.

A trust may be impressed upon property of corporation wrongfully disposed of and an accounting required of successor in interest who has wrongfully acquired the same.

7. Corporations 🔑189(7)—Stockholder, before suing corporation in equity for fraud of directors or third person, must make demand on officers to institute appropriate proceedings, followed by their failure or refusal to act.

Before stockholder may sue in equity against corporation for fraud by directors or third person, demand must be made on officers to institute appropriate proceedings, unless such demand would be futile, and officers must refuse or fail to act.

8. Corporations 🔑205—Stockholder must exhaust legal remedies before suing in equity for redress for wrongful disposal of corporate property (Civ. Code, § 305).

Under Civ. Code, § 305, before stockholder may sue in equity for redress for wrongful disposal of corporate property, he must show that he has exhausted his legal remedy, such as appealing for redress to stockholders at large, unless it appears that board of directors who decline to act own a majority of the stock and control corporation.

9. Corporations 🔑310(1)—Discretionary acts of directors are not subject to attack by minority stockholders in suit of equity, absent fraud or breach of trust.

In absence of fraud, breach of trust, or ultra vires transactions, conduct of directors in management of corporation is not subject to attack by minority stockholders in suit of equity, where such acts are discretionary and are performed in good faith.

10. Evidence 🔑73—Good faith of directors in managing corporate affairs is presumed, and their discretion will not be interfered with in doubtful cases.

Every presumption is in favor of good faith of directors of corporation in managing its affairs, and interference with transactions of discretionary nature by court in favor of minority stockholders is not warranted in doubtful cases.

Appeal from Superior Court, Los Angeles County; Harry A. Hollzer, Judge.

Action by Joe Fornaseri and others against the Cosmosart Realty & Building Corporation and another. From the judgment against them, plaintiffs appeal. Affirmed.

James Westervelt, of Los Angeles, for appellants.

Minor Moore, of Los Angeles, for respondent.

THOMPSON, Justice pro tem. This appeal was taken from a judgment which was rendered against the plaintiffs for failure to amend their pleading after a demurrer to the second amended complaint had been sustained.

The complaint is voluminous, comprising more than a hundred printed pages, but an epitome of its contents will suffice for the purpose of determining this appeal. The complaint alleges that the plaintiffs are stockholders and creditors of the Cosmosart Realty & Building Corporation of Los Angeles; that Clark & Sherman Land Company was the owner of 18 acres of land in the city of Los Angeles, which was leased for a term of years to one James E. Bowen; that this lease contained an option authorizing the lessee or his assigns to purchase this property upon terms specifically mentioned; that this land was worth treble the amount of the purchase price named in the option. The complaint also attempts to allege that this lease was assigned to the Cosmosart Realty & Building Corporation; that this defendant corporation was indebted to the extent of $160,000, but that it was nevertheless able to exercise its option to purchase this land, but failed and neglected to do so; that, upon the contrary, pursuant to a resolution of the directors of the corporation, this option was assigned to the respondent Grant, and an agreement with him, together with one Charles Ray and Albert A. Kidder, Jr., was executed, by the terms of which the interests of the respective parties were pooled, and the land was authorized to be subdivided and sold, from the proceeds of which sales Clark & Sherman Land Company, which had contracted to sell the property to Grant, was to receive the first $150,000, the Cosmosart Realty & Building Corporation was to receive the following $160,000, and the remaining $600,000 was to be divided equally among the respective parties to the agreement. It is alleged that this assignment of option and agreement were procured by fraud, and resulted in a substantial loss to the defendant corporation and its stockholders, that the directors held a controlling amount of stock in the corporation, and that they refused and neglected to institute proceedings to recover the said trust funds, or to protect the interest of the stockholders.

In support of appellants' contention that the option and agreement to purchase real property were procured by fraud, it is alleged that Ray and Kidder negotiated with the directors of the corporation and "undertook to raise the necessary funds to finance the debts of said corporation," and for this purpose employed respondent Grant to examine its books and accounts to ascertain the financial condition of the corporation; that, in the exercise of his employment, the respondent Grant, as the agent of Ray and Kidder, occupied a position of trust and confidence with the corporation, resulting in the directors and officers thereof conveying to him valuable information regarding its financial status, and that this fiduciary relation led to their "consulting with Grant and informing him fully as to its business affairs, assets and liabilities"; that "the said Grant was, during most of the said period, also an employee and agent of the defendant corporation." It is further alleged that, in procuring the execution of said contract, Will Hayes, an attorney formerly employed by, and whom the directors believed was appearing in their behalf, represented the respondent Grant, and advised the directors that respondent's option to purchase the Los Angeles lots was valid, binding and enforceable; that the respondent then threatened to purchase existing claims against the corporation, institute suits for their collection, and thus force the corporation into bankruptcy unless the contract was executed forthwith; that, with confidence in the advice of said attorney, and intimidated by respondent's threats, the directors executed the contract, but that said advice and threats were false and untrue, as the respondent well knew. It is further alleged that, pursuant to said agreement, the title to said property was subsequently conveyed in trust to the Title Guarantee & Trust Company of Los Angeles; that the tract was subdivided and many lots were sold, from the proceeds of which sales the Clark & Sherman Land Company was paid the sum of $150,800, the corporation defendant was paid $160,000, and that further funds were available for payment to the respondent Grant. The complaint prays that the proceeds of the sales of said property be declared to be a trust fund held for the benefit of the Cosmosart Realty & Building Corporation, its stockholders and creditors, and that the respondent be enjoined from otherwise disposing of said proceeds.

[1] The demurrer was both general and special. The appellants contend that the complaint sufficiently states facts showing the existence of a relation of trust and confidence between the respondent Grant and the defendant corporation. It is claimed that Ray and Kidder were employed by the corporation to finance its indebtedness so as to enable it to exercise its option to purchase the property for the purpose of subdivision and sale; that Grant was hired by Ray and Kidder to ascertain the financial condition of the corporation, and, while so engaged as their agent in examination of its books and accounts, obtained private information which enabled him to secure the option for his own benefit. The complaint, however, fails to allege that Ray or Kidder were actually employed by the corporation for any purpose whatever. All that

the complaint does allege in this regard is "that Charles Ray and Albert A. Kidder, Jr., *offered to defendant* Cosmosart Realty & Building Corporation, and *undertook on its behalf* to raise the necessary funds. * * *" Nowhere in the complaint is it stated that this offer was accepted, or that the corporation employed them to perform this service. Whatever service they did perform appears to have been voluntarily rendered. No agency or employment is actually alleged. It does appear that "Ray and Kidder employed the defendant Grant to examine the books and accounts of the defendant corporation," and that Grant "accepted their said employment and forthwith entered thereon." Since the allegations of the employment of Ray and Kidder by the corporation are insufficient to create an agency, it follows that Grant's employment by Ray and Kidder creates no fiduciary relation with the corporation. These allegations are therefore fatally defective. This defect of pleading was directly assailed by means of a special demurrer, in which it is charged that "it cannot be ascertained (from the complaint) whether the said Ray or Kidder entered into a contract of agency with the corporation, or not." It is further alleged in the complaint that "the defendant Grant was * * * also an employee and agent of the defendant corporation." It is, however, not alleged what the nature of this employment was. In view of the specific challenge of the special demurrer that "it cannot be ascertained (from the complaint) what was the nature of the defendant Grant's employment by the said corporation," this allegation is also fatally defective. The failure to allege the fiduciary relation of the defendant Grant was the very ground upon which the demurrer was sustained.

[2] The complaint is likewise defective in its attempt to allege the corporation's title to the option in question. This option was incorporated in a lease which was executed from Clark & Sherman Land Company to J. E. Bowen. The right to the option depended upon the title to the lease. There is no definite allegation that the lease was assigned or transferred to the Cosmosart Realty & Building Corporation by Bowen. The language of the complaint is a mere recital or description of the means by which the defendant corporation gained possession of the land described in said lease. The complaint states that "defendant (corporation) was then and there lawfully in possession of said land and premises as lessee by assignment from a certain J. E. Bowen under a lease made by Clark and Sherman Land Company." This is not a definite recital of facts showing an actual transfer of the lease, but is merely a recital of possession of the property, based upon an assumption that the lease was duly assigned. It follows that the title to the option is insufficiently alleged, and, unless it appeared that the defendant corporation held title to the option, the stockholders would have no ground upon which to complain of its transfer to Grant.

[3, 4] The plaintiffs have sued in the capacity of stockholders and *creditors*. There is, however, no allegation that, as creditors, they first reduced their claims to judgments and exhausted their legal remedies. This is necessary before a creditor may maintain an equitable action involving the assets of a corporation. A creditor's suit in equity will not lie against a corporation until the claim has first been reduced to judgment and his legal remedies have been exhausted. Roberts v. Buckingham, 172 Cal. 458, 156 P. 1018; 7 Cal. Jur. 793, § 6; 8 R. C. L. 19, §§ 23, 24; 4 Pomeroy's Eq. Jur. (4th Ed.) 3355, § 1415, page 3602, § 1533. The theory upon which the creditors of a corporation seek to reclaim property alleged to have been wrongfully conveyed, is that they possess an equitable lien upon such property for the payment of their claims. This theory of an equitable lien upon the assets of a corporation for the payment of creditors' claims, however, has been repudiated as the law in America. In the case of Fogg v. Blair, 133 U. S. 534, 10 S. Ct. 338, 33 L. Ed. 721, Mr. Justice Field says: "Such a doctrine has no existence." Even where a corporation has wrongfully conveyed property to an individual without consideration, an equitable action on the part of the creditor will not lie against the grantee to declare a trust in such property for the benefit of stockholders or creditors. This doctrine is fully discussed in the case of Delaney Producing & Refining Co. v. Crystal Petroleum Products Corporation et al. (Cal. App.) 264 P. 521. In that case, without having first reduced his claim to judgment, a creditor brought an equitable action against the corporation grantor and the individual grantee, alleging that the corporation was bankrupt and that it had wrongfully and fraudulently conveyed a valuable lease and option to the grantee. The complaint prayed that this property be declared to be held in trust by the grantee for the benefit of the stockholders and creditors. A demurrer to the complaint was sustained. From a judgment entered against the plaintiff for failure to amend, an appeal was perfected. Upon appeal, this judgment was affirmed. So far as the status of the plaintiffs is concerned in the present case, as creditors, that case is conclusive. Moreover, an equitable action against a corporation for fraud or malversation of funds will not lie without making the delinquent officers parties to the suit. A corporation is a distinct entity, separate and apart from its officers, who in their fiduciary capacity hold the property and assets of the corporation in trust, and who, as such trustees, are alone accountable for fraud and mismanagement. Delaney Producing & Refining Co. v. Crystal Petr. Prod. Corp., supra.

[5-8] Minority stockholders may maintain a suit in equity for redress for wrongful dis-

posal of property, or for an accounting in behalf of themselves and other stockholders for the benefit of the corporation, when through the fraud or malversation of officers or directors, or through the fraud or coercion of a third person, the corporation has been divested of property, and when upon request the officers fail and refuse to institute proceedings to remedy the injury. 6 Fletcher's Enc. of Corp. 6916, § 4064, page 6931, § 4066; Burbank v. Dennis, 101 Cal. 90, 35 P. 444. A trust may be impressed upon the property of a corporation, and an accounting required of a successor in interest who has wrongfully acquired the same. 6 Fletcher, supra, 6933, § 4066; Meredith v. Art Metal Cons. Co., 97 Misc. Rep. 69, 161 N. Y. S. 1. Before a stockholder's suit for redress will lie in equity, against a corporation for fraud on the part of the directors, or on the part of a third person, demand must first be made upon the officers to institute appropriate proceedings, unless such demand would be futile. Their refusal or failure to act must also follow. 14 Corp. Jur. 943, § 1466; 6 Fletcher, supra, 6934, §§ 4067, 4068. In the present action the complaint alleges a sufficient demand upon the directors, and refusal to act. Before a stockholder's suit in equity of this nature will lie, he must show that he has exhausted his legal remedies, such as appealing for redress to the stockholders at large (Civ. Code, § 305; 14 Corp. Jur. 944, § 1466; Hawes v. Oakland, 104 U. S. 450, 26 L. Ed. 827; Rathbone v. Parkersburg Gas Co., 31 W. Va. 798, 8 S. E. 570; Dunphy v. Traveller Newspaper Ass'n, 146 Mass. 495, 16 N. E. 426), unless it appears that the board of directors who decline to act own a majority of the stock and control the corporation (6 Fletcher, supra, 6916, § 4064). In the present case it is alleged that the board of directors control a majority of the stock and refuse to act.

[9] In the absence of fraud, breach of trust, or transactions which are ultra vires, the conduct of directors in the management of the affairs of a corporation is not subject to attack by minority stockholders in a suit at equity, where such acts are discretionary and are performed in good faith, reasonably believing them to be for the best interest of the corporation. 14 Corp. Jur. 927, § 1444; 6 Fletcher, supra, 6924, § 4065, page 6797, § 3992, page 6931, § 4066; Rogers v. Nashville, C. & St. L. Ry. Co. (C. C.) 91 F. 299.

[10] It is extremely doubtful whether the acts of the directors which are complained of in the present suit amount to a violation of discretion on their part. So far as the complaint enlightens us, the corporation defendant had no property other than the lease of the Los Angeles lots. It was indebted to the extent of $160,000. It cost $150,000 additional to purchase the fee in this land from Clark & Sherman Land Company. In its stringent financial condition, the corporation would have had difficulty in negotiating funds with which to pay its debts, satisfy the claims of Clark & Sherman Land Company, and market the property. Such a plan would have required a considerable outlay of time and money. The success of the enterprise was at least doubtful. The procedure which was followed by the directors possessed no such element of chance. In pooling its interest pursuant to the terms of the contract, the corporation debts were to be first paid. The cost of purchasing the fee in the property was to be next paid. The balance of the proceeds was to be divided into three parts, one of which was to be paid to the corporation. Good business judgment would seem to recommend the safe and sure plan which was adopted by the directors, especially since the corporation was deeply in debt and unprepared to market the property to good advantage. At least the transaction appears to be a discretionary matter, and, if so, affords a stockholder no authority to challenge it in this equitable action. Every presumption is in favor of the good faith of the directors. Interference with such discretion is not warranted in doubtful cases. In Gamble v. Queens County Water Co., 123 N. Y. 91, 25 N. E. 201, 9 L. R. A. 527, it is said: "To warrant" interference by a court in favor of minority stockholders "a case must be made out which plainly shows that such action is so far opposed to the true interests of the corporation itself as to lead to the clear inference that no one thus acting could have been influenced by any honest desire to secure such interest, but that he must have acted with an intent to subserve some outside purpose, regardless of the consequences to the company."

While it is true that primarily the fraud and coercion complained of is charged to the defendant Grant, yet the clear inference exists that the directors of the corporation were guilty of malfeasance in refusing to institute an action for redress. Indeed, except for the existence of such fraud or breach of trust on the part of the directors, this action would not lie.

The demurrer was therefore properly sustained, and the judgment is affirmed.

We concur: FINCH, P. J.; PLUMMER, J.

96 Cal. App. 632

PEOPLE v. STRIDER et al. (Cr. 1721.)

District Court of Appeal, Second District, Division 2, California. Feb. 6, 1929.

1. **Criminal law 🔑563—Corpus delicti may be established without showing crime charged was committed by defendant.**

It is not essential, in order to establish the corpus delicti, to show that the crime charged was committed by defendant.

2. **Robbery 🔑24(3)—Evidence as to identification held sufficient to sustain conviction for robbery.**

In prosecution for robbery, evidence relating to identification *held* sufficient to sustain conviction.

3. **Robbery 🔑24(1)—Evidence relative to defendant's complicity held sufficient to sustain conviction for robbery.**

Evidence, in prosecution for robbery, relative to defendant's complicity in crime, *held* sufficient to sustain conviction.

4. **Criminal law 🔑1044—Objection to question on cross-examination really to answer, without motion to strike answer, was not available on appeal.**

Where objection to question on cross-examination was not really to the question but to the answer, and there was no motion to strike answer so as to give trial court opportunity to pass on real question, the objection against question was not available to defendant on appeal, in that he had duty under such circumstances of moving to strike the answer.

5. **Criminal law 🔑763, 764(6)—Refusal of instruction that jury might properly consider that defendants, when apprehended, were unarmed, held not erroneous.**

In prosecution for robbery, refusal of instruction that, in considering the question of innocence or guilt, the jury might properly consider that defendants when apprehended were unarmed, *held* not erroneous, since instruction should not bear upon weight to be attached to particular piece of evidence.

6. **Criminal law 🔑798(1)—Instruction relative to juror's duty, if entertaining reasonable doubt of guilt, held properly modified to state duty in case of definite conclusion as to guilt or innocence.**

Requested instruction, relative to juror entertaining reasonable doubt of guilt of defendant having duty not to vote for verdict of guilty, *held* properly modified so as to state that juror had duty not to vote for contrary verdict in case he should reach a definite conclusion as to guilt or innocence of defendant.

Appeal from Superior Court, Los Angeles County; Leon R. Yankwich, Judge.

Walter Strider and George Crawford were convicted of robbery, and Crawford alone appeals. Affirmed.

C. L. Belt and E. S. Green, both of Los Angeles, for appellant.

U. S. Webb, Atty. Gen., John L. Flynn, Deputy Atty. Gen., and John D. Richer, of Los Angeles, for the People.

WORKS, P. J. The defendants were convicted of the crime of robbery. Defendant Crawford appeals from the judgment.

Evidence was adduced at the trial which tended to prove the following facts: Appellant and his codefendant, Strider, hailed a taxicab, of which one Bates was the driver. Both entered the vehicle and one of them—the evidence does not show which—directed Bates to drive them to a certain street intersection. When the cab neared the place, Bates asked at which corner the defendants desired to alight, and "they" told him to turn down a certain street and stop at the third house on the left. When Bates reached the place indicated, an automobile, with a man and woman seated in it, was found parked there, and "they"—his passengers—told him to drive further on. When he had gone 100 or 150 feet beyond the parked car, "they" told him to stop. He did so, read his taximeter, and remarked to Strider and appellant that the fare was a certain amount. Strider then said, the passengers apparently still being in the cab: "To hell with the fare. We want what you have got." Strider then pointed what looked like a pistol at Bates, and following this action placed it against his back. Strider then said to the driver, "Keep your back to us," and rifled his pockets, taking money and papers from them. Strider and Crawford then left the taxicab and walked away in the view of the man and woman in the parked car. These latter saw defendants at the trial and testified that in size—one of them being much taller than the other—and in the appearance of their apparel they resembled the two men seen walking from the taxicab. Appellant testified that at the trial he wore the same suit of clothes in which he was dressed the night the robbery was committed. Bates, when on the witness stand, identified defendants as the two passengers, one of whom despoiled him of his money and papers. Immediately after the robbery, Bates drove away and soon met a police officer. The two then went to the scene of the crime and proceeded on a search for the culprits. At about four blocks from the spot they saw a moving automobile, stopped it, and found defendants in it.

[1] It is contended by appellant that the corpus delicti was not proven, but the proof was so clearly made that the point is hardly worthy of mention. From something that is said in one of the briefs we infer that appellant entertains the view that a complete proof of the corpus delicti contemplates a showing that he committed the crime. If this is appellant's view, he is in error in holding it. "To establish the corpus delicti it is not es-

---

🔑For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

sential to show that the crime charged was committed by the defendant." People v. Rodway, 77 Cal. App. 738, 247 P. 532.

[2, 3] The point is also made that the evidence was insufficient to sustain the verdict against appellant. Two grounds are taken in support of this contention. It is first said that there was no sufficient identification of appellant as the person who was present with Strider in the taxicab when the robbery was perpetrated. Without reciting the specific evidence bearing upon the point, we are amply satisfied that the identification was sufficiently complete. It is also contended that there was no evidence showing appellant's complicity in the crime, and authorities are cited to the effect that one who merely stands by and sees a crime committed may not be charged with a participation in it. But, within the meaning of those authorities, this was not a case of standing by. The two defendants hailed the taxicab together, entered it together, and left it together. If it was Strider who ordered Bates to drive beyond the car parked before the house at which the driver had previously been told to stop, appellant, if he were innocent, must have regarded the circumstances as suspicious, and yet he made no comment upon it. Moreover, when Strider said to Bates that "we" want what you have got and ordered him to keep his back to "us," appellant heard what was said without demur, thus impressing upon the mind of Bates the fact that he was in the hands of two criminals instead of only one. If appellant had merely denied the right of Strider to use the plural pronouns, Bates might have called upon him, as an innocent and well-disposed citizen, for aid. After Bates had been despoiled of his property and Strider and Crawford had alighted from the cab, the latter made no attempt to separate himself from the active perpetrator of the robbery. On the contrary, he, together with Strider, entered another automobile; appellant thus joining his companion in an attempt to flee from the scene of the crime. Appellant's conduct was not that of an innocent man. The evidence was sufficient to show his complicity in the robbery.

[4] When appellant's mother was on the witness stand, it was developed that her son had been working for one McClellan. This testimony came at the close of the direct examination. The cross-examination began thus:

"Q. Where was he working? A. For McClellan, the contractor, because this Mr Corval [who had not been mentioned during the direct examination] gave him a job, because he goes to him and gets him a job. * * *

"Q. * * * He works for Mr. Corval, is that correct? A. Mr. Corval gets him a job.

"Q. Who is Mr. Corval?"

An objection was interposed to this latter question, it was overruled, and appellant now claims that the ruling was error. We think it was not. The question was harmless. There was nothing in it to indicate to the court what harmful answer, if any, it might bring forth. The witness replied, however: "He is a parole officer of some kind." Appellant objects strenuously that the question forced the witness to make an answer which indicated that appellant had once been in the toils of the law, thus degrading and prejudicing him in the minds of the members of the jury, but it is evident that the objection is not really to the question but to the answer. Yet there was no motion to strike the answer. The trial court was given no opportunity to pass upon the real question which is presented here. It was the duty of appellant, under these circumstances, to move to strike the answer (People v. Smith, 151 Cal. 619, 91 P. 511), and, as he did not do so, the objection which he now urges against the question is not available to him. In the case cited the Supreme Court said: "There was nothing on the face of the question to indicate that an answer to it might not be relevant, material, and competent evidence, and hence it was not improper to overrule the objection urged against the inquiry upon the only ground urged—namely, that it was irrelevant, immaterial, and incompetent. The question only appeared to be vulnerable to all these objections when the answer to it was given, and as that was the first and only time it appeared to be so, it was the duty of the defendant to move to strike the answer out, and having failed to do so no error can be predicated on the overruling of the objection."

[5] Appellant requested an instruction which contained a statement that in considering the question of innocence or guilt the jury might "properly consider that the defendants when apprehended were unarmed," and it was refused. We think the refusal was proper. Instructions should not "bear upon the weight to be attached to a particular piece of evidence, as their effect may be either to convey to the jury the impression that the judge is suspicious of the testimony against which the instruction is particularly directed, or give added weight to the testimony, depending upon the nature of the comment." 8 Cal. Jur. 294.

[6] Appellant asked for an instruction containing this sentence: "If, after consideration of the whole case, any juror should entertain a reasonable doubt of the guilt of the defendant, it is the duty of such juror, not to vote for a verdict of guilty, nor to be influenced in so voting for the single reason that a majority of the jury should be in favor of a verdict of guilty" The trial judge gave the instruction, but changed the quoted sentence to read thus: "If after consideration of the whole case any juror should reach a definite conclusion as to the guilt or innocence of the defendants or either of them, it is the duty of

such juror not to vote for a contrary verdict, nor to be influenced in so voting for the single reason that a majority of the jury or all of the jurors should be in favor of such a verdict." We think the alteration was proper.

Judgment affirmed.

We concur: CRAIG, J.; IRA F. THOMPSON, J.

---

96 Cal. App. 611

NISSEN v. COULT et al. (Civ. 3663.)

District Court of Appeal, Third District, California. Feb. 5, 1929.

1. Appeal and error ⚷1011(1)—Findings based on conflicting evidence may not be disturbed.

Findings based on substantially conflicting evidence may not be disturbed by an appellate court.

2. Waters and water courses ⚷263—Evidence held to sustain finding that damage to rice crop was not caused by negligence or misconduct on part of directors of irrigation district.

Evidence, in action for damages against directors of irrigation district for alleged negligence and misconduct in failing, refusing, and neglecting to supply plaintiff with necessary water, *held* to sustain finding that damage accruing to plaintiff's rice crop was not caused by any willful violation of duty by said directors, nor through any negligence or misconduct on their part.

3. Waters and water courses ⚷254—Water user cannot complain of unauthorized sale of water by irrigation district directors unless deprived of water thereby.

Sale of water by directors of irrigation district for use on lands lying outside of district, without legal authority so to do, furnishes no ground for complaint on part of water user, unless he was deprived of water to which he was entitled by such unauthorized action.

Appeal from Superior Court, Yuba County; Eugene P. McDaniel, Judge.

Action by G A. Nissen against J H. Coult and others. Judgment for defendants, and plaintiff appeals. Affirmed.

Frank A. Duryea, of Marysville, for appellant.

Warren Steel and Homer Lingenfelter, both of Marysville, and Jackson & Peterson, of San Francisco, for respondents.

JAMISON, Justice pro tem. This is an action for damages brought by appellant against respondents Coult, Steel, and Eichler, directors of the Cordua irrigation district, for their alleged negligence and misconduct and willful violation of their duties as such directors, in failing, refusing, and neglecting to supply appellant with the water necessary to irrigate and mature his rice crop growing on land situated in said district; the National Surety Company being joined as party defendant because of the fact that it had executed bonds on behalf of said directors for the faithful performance of their duties.

The case was tried by the court sitting without a jury, and judgment was rendered in favor of respondents. The facts substantially are as follows: In the fore part of 1925, W. F. Cordes, being then the owner of 632 acres of land situated in said irrigation district, entered into an agreement with F. W. Johnson for the sale of said land to him, and under said agreement Johnson took possession of the land. On February 10, 1925, Johnson leased all of the westerly portion of said land, being the part that had theretofore been cropped to rice, to appellant, who agreed to plant same to rice during the 1925 season; the amount of land so leased to appellant being 260 acres. Appellant claims to have planted some 212 acres of said land to rice, but claims that by the negligence and misconduct of said directors in failing to furnish him with the water to which he was entitled, he was able to mature a crop upon 90 acres only. In his opening brief appellant sets forth six specifications of error, the first of which is that the evidence was insufficient to support the findings; the second, that the decision is against the law; and, third, fourth, fifth, and sixth, that the trial court erred in finding that the lessor had not assigned to the lessee his water rights, that the trial court erred in not finding that the appellant was entitled to 220 inches of water, that it erred in finding that respondent directors were not guilty of negligence in the performance of their official duties, or otherwise, and in finding that the failure to pay the assessments on the Cordes ranch justified the said directors in refusing and failing to deliver sufficient irrigation waters to the appellant.

We will first consider the question as to whether or not there is substantial evidence to support the finding of the court that the said directors were not guilty of negligence in the performance of their official duties, or otherwise, as claimed by appellant.

The trial court found that whatever damage was suffered by appellant to his rice crop during the irrigating season of 1925 was caused by the negligence, carelessness, and conduct of appellant and his employés; that while they attempted to prepare some 220 acres for rice, no proper work was done toward cleaning out the irrigation ditches on said land and placing same in condition to receive the water that came to said land, and apply and distribute same in a proper manner for rice growing; that it is not true that appellant suffered any damage that was caused, proximately or at all, by any negligence or misconduct, or willful or other violation of the official duty of said directors, or of any of them, in failing, refusing, or neglecting to deliver irrigation water to appellant in any manner, or at all. There is substantial support for these findings in the testimony of Warren Steel, one of the respondent directors. He testified that in the beginning of the irrigation season in 1925 he saw and knew the condition of the Cordes land upon which appellant was preparing to grow the rice crop, and that the service ditch and checker ditches leading to and upon said land were foul with water grass, wire grass, tules, and different kinds of weeds, and that in the fore part of June, 1925, he told S. G. Meng, who was the employé of appellant having charge of the planting of said rice crop, that unless the ditches were cleaned out he would have difficulty all during the irrigating season in irrigating the crop of rice, but that the ditches were not cleaned and remained in that condition during the whole season. This witness further testified that appellant, during the whole of the irrigating season of 1925, received for the irrigation of his crop of rice from 225 to 275 inches of water, and that if appellant had cleaned his ditches and handled the water properly, he would have covered his rice field with it. Defendants also produced evidence showing that at the beginning of the irrigating season, upon request of appellant, they caused a full head of water to be turned into the ditch leading to the land leased by him, but that by the failure of appellant to have a flume in said ditch in proper condition, the water escaped and did not reach his land. There was also evidence that water that should have gone to the rice crop of appellant was surreptitiously turned off and lost to appellant's land by users above him, and that when this was brought to the attention of the directors they adopted measures that prevented its recurrence.

[1-3] The rule is well settled that findings based upon substantially conflicting evidence may not be disturbed by an appellate court. Hunt v. L. M. Field, Inc., 202 Cal. 701, 262 P. 730; Waer v. Waer, 189 Cal. 178, 207 P. 891; Levi v. Chesley, 178 Cal. 145, 172 P. 607; Webster v. Lowe, 177 Cal. 385, 170 P. 850. The trial court having found upon substantially conflicting evidence that the damage accruing to appellant's rice crop during the season of 1925 was not caused by any willful violation of their duties by said directors, nor through any negligence or misconduct upon their part, we are of the opinion that we cannot do otherwise than affirm the judgment. There was evidence that during the irrigating season of 1925 the said directors sold 480 inches of the water belonging to said district for use upon lands lying outside of the district. Admitting that the directors were without legal authority so to do, yet, before such action upon their part can furnish ground for complaint upon the part of appellant in this action, it must appear that by such unauthorized act he has been deprived of water to which he was entitled.

By the findings of the court and by the testimony of Steel it appears that such action upon the part of the directors did not prevent appellant from receiving all water to which he was entitled.

As our views as hereinbefore expressed are determinative of this appeal, we deem it unnecessary to pass upon the other alleged errors of the trial court.

The judgment is affirmed.

We concur: FINCH, P. J.; PLUMMER, J.

---

96 Cal. App. 412

NATIONAL AUTOMOBILE INS. CO. v. SUPERIOR COURT IN AND FOR LOS ANGELES COUNTY. (Civ. 6296.)

District Court of Appeal, Second District, Division 2, California. Jan. 24, 1929.

Bail ⟹74(1)—Original bail held unexonerated; accused failing to appear on arraignment date, and bond to cover bail as reduced not being furnished.

Where bond for bail as reduced on motion of defendant charged with violation of Wright Act (St. 1921, p. 79) was not furnished and accused did not appear and answer charge nor hold himself amenable to orders and process of the court, original bond furnished for bail was not exonerated, and hence was forfeitable as bond provided when defendant failed to appear on date of arraignment.

Application by the National Automobile Insurance Company for writ of certiorari to review an order of the Superior Court of Los Angeles County of forfeiture of bail furnished by petitioner for Domenick Romeo. Order affirmed.

Frank S. Adams and Milton H. Silverberg, both of Los Angeles, for petitioner.

Everett W. Mattoon, Co. Counsel, S. V. O. Prichard, Deputy Co. Counsel, and William B. McKesson, Deputy Co. Counsel, all of Los Angeles, for respondent.

CRAIG, J. On June 4, 1928, one Domenick Romeo was arrested and taken before a judge of the municipal court of the city of Los Angeles upon a charge of having violated the Wright Act (St. 1921, p. 79), a felony, at which time he gave bail in the sum of $2,500, as then fixed, and was released. On June 6th, at the close of his preliminary examination, the defendant moved for a reduction of bail to $1,500, whereupon an order was made and entered directing that he furnish bail in the amount last mentioned or be committed to the custody of the sheriff until such bail be given. He was not taken into custody, nor did he furnish new bail, but left the courtroom and was at all times at large thereafter. Upon the date set for arraignment in the superior court, Romeo failed to appear, whereupon the latter court declared his bail forfeited, and ordered the issuance of a bench warrant. The original bail in the sum of $2,500 having been furnished by the petitioner herein, it seeks by certiorari to review the proceedings below, and prays exoneration therefrom.

The numerous authorities relied upon by the petitioner are uniform in adhering to the well-established rule that if a defendant be convicted, or be surrendered by his sureties and actually taken into custody, his bail given for appearance at the time of trial will be exonerated, and the bond rendered functus officio. But there is no contention in the instant case that the defendant was at any time surrendered, nor that he was present at the time set for arraignment, or that he was tried.

We are cited to no authority directly in point, nor are we aware of any. In People v. Newman, 100 App. Div. 436, 91 N. Y. S. 811, it appeared that Newman and another entered into a recognizance in the sum of $1,000, wherein it was provided that the principal would "personally appear during the said [preliminary] examination and on each and every day to which the said examination may be adjourned until the same is fully completed." The defendant in the criminal case was present at the commencement of the preliminary examination, and after hearing testimony on the part of the people the magistrate continued the proceedings, and directed that the defendant furnish a new undertaking in the sum of $1,500, which he failed to do, but departed, and was not present when the examination was resumed. In affirming a judgment against the surety it was said, in part: "The undertaking was dated January 21st. An examination was then undoubtedly begun and testimony was taken on the part of the people, but it does not appear that the examination was then completed, for Newman in his affidavit says that the accused was required to furnish surety in the sum of $1,500 for a further examination, which indicates that the examination was incomplete. Until that further bond was furnished the one upon which Newman was surety continued in force. The mere increase of the amount of bail did not exonerate the appellant Newman until the new bond was furnished and Schaeffer was still in the custody of his surety. He was not taken into the custody of the law at all. It was the duty of the surety to produce his principal during the examination or until the further bail was given."

The undertaking here involved provided, not alone for the appearance of the accused at the preliminary examination, but required that he "appear and answer the charge above mentioned in whatever court it may be prosecuted, and will at all times hold himself amenable to the orders and process of the court, and if convicted, will appear for judgment and render himself in execution thereof; or, if the said defendant fails to perform either of these conditions, that he will pay to the people of the State of California the sum of twenty-five hundred dollars." The accused for whose appearance the petitioner herein became surety did not perform the condition that he appear and answer the charge "in whatever court it may be prosecuted," nor did he "hold himself amenable to the orders and process of the court." It was the duty of the surety to produce his principal so that if convicted the latter could "appear for judgment and render himself in execution thereof," and for a failure to do so the surety promised to "pay to the people of the State of California the sum of twenty-five hundred dollars." Upon the second order of the municipal court having been made, it was the right of the surety to surrender the principal. The order of June 6th did not purport to exonerate the bond previously given. As a result of it such exoneration could have been secured through the execution of a new bond in the sum of $1,500. Until such bond be given, however, we think the one first provided was in full force and effect. This conclusion having been reached, no other argument presented requires consideration.

The order is affirmed.

We concur: WORKS, P. J.; THOMPSON, J.

---

96 Cal. App. 630

MARTIN v. STERLING GROCERY CO. et al.
(Civ. 6428.)

District Court of Appeal, Second District, Division 1, California. Feb. 6, 1929.

1. Appeal and error 🔑629—Motion to set aside appellant's default and extend time to file transcript is addressed to appellate court's sound discretion (Code Civ. Proc. § 473).

Motion, under Code Civ. Proc. § 473, to set aside appellant's default in not filing transcript of record, points and authorities, within time prescribed by law and court rules, and extend time for filing transcript, is addressed to sound discretion of appellate court.

2. Appeal and error 🔑629—Affidavit of appellant's attorney held not to show that long delay in filing transcript was caused solely by "inadvertence or excusable neglect" (Code Civ. Proc. § 473).

Affidavit of appellant's attorney that he instructed his docket clerk to have reporter prepare transcript when he called to give requested estimate of costs, but that regular clerk was on vacation and substitute neglected to make entry in office docket as to when transcript was due, and that affiant was busily engaged in legal work and first knew that transcript was not being prepared when notified of motion to dismiss appeal after lapse of over 130 days, *held* not to show that delay was caused solely by inadvertence or excusable neglect within Code Civ. Proc. § 473.

[Ed. Note.—For other definitions, see Words and Phrases, Second Series, Inadvertence, Surprise, and Excusable Neglect.]

Appeal from Superior Court, Los Angeles County; W. D. McConnell, Judge.

Action by Mrs. Alice Martin against the Sterling Grocery Company, a copartnership, and others. Judgment for defendants, and plaintiff appeals. On defendants' motion to dismiss the appeal. Motion granted.

Elbert E. Hensley, of Los Angeles, for appellant.

Lucius K. Chase, of Los Angeles, for respondents.

CRAIL, Justice pro tem. [1, 2] The motion to dismiss is made upon the ground that appellant has failed to file a transcript of the record and her points and authorities within the time prescribed by law and the rules of this court, and the motion is based upon the certificate of the county clerk and various affidavits showing such default. Appellant admits her default but seeks relief under the provisions of section 473, Code of Civil Procedure, on the grounds of inadvertence and excusable neglect. Goldberg v. Davis, 76 Cal. App. 489, 244 P. 952; City Properties Co. v. Bond & Finance Corp., 195 Cal. 566, 234 P. 1112.

The affidavit of appellant's attorney shows that the action is for damages for personal injuries; that the trial resulted in a judgment for defendants, and that in due time appellant gave notice of appeal and the next day, or August 30, 1928, notified the clerk to prepare a transcript on appeal, and on the same day he notified one of the stenographic reporters of said trial that he had given the notices above indicated and requested said reporter to consult with another reporter of said trial, and ascertain the approximate cost of a transcript and to notify affiant's office, whereupon satisfactory arrangements would be made for payment for same; that one or two days later the reporter telephoned affiant and advised that while he had looked up his own notebook and could tell approximately the amount of his charges, he had not as yet been able to consult with the second reporter to learn the amount of his charges for the portion of the testimony taken down by him; he agreed, however, that as soon as he received notice from the county clerk to prepare the transcript on appeal he would notify affiant of the total approximate charges for the same, at which time affiant was to notify the reporter to proceed with the preparation on the transcript on appeal; also, that on his part he instructed his docket clerk that, when the reporter called to give his said estimate and to get his final instructions as to the preparation of the transcript, she should have him prepare the same. Then follows a long recital of facts in the affidavit to the effect that the docket clerk upon whom he ordinarily relied was on a two weeks' vacation at the time, and that her substitute, upon whom he also relied, through ignorance or lack of experience in the position, failed him and neglected to make an entry in the office docket as to when the matter was due, and that he was not aware that the final arrangements for the transcript had not been made, and relied upon the fact that if any further arrangements were to be made the same would be called to his attention; that affiant himself was busily engaged in the trial of cases and other legal work during this period of time, and that the first he knew that the transcript was not in process of preparation by the reporter was when he received the notice of the motion to dismiss the appeal, January 15, 1929; that the delay was caused by the facts as by him stated. We have set out the above in order to show the gist of the claim of inadvertence and excusable neglect upon which appellant relies for permission to file the transcript. There was also a showing on the part of affiant of good faith and a belief by him that there are reasonable grounds to expect a reversal if the appeal were considered on its merits. No arrangements have yet been made for the preparation of the transcript.

The motion to set aside appellant's default and to extend the time in which the transcript may be filed is addressed to the sound discretion of this court. Affiant's affidavit is not convincing. If he had intended to proceed diligently he would have taken some care during the period of more than one hundred thirty days which elapsed before the notice of motion to dismiss the appeal was served upon him. We are of the opinion that the default was not caused solely by inadvertence or excusable neglect; and the implied motion to set it aside is denied.

Respondents' motion to dismiss the appeal is granted.

We concur: HOUSER, Acting P. J.; YORK, J.

96 Cal. App. 669

PEOPLE v. LANNAGAN et al. (Cr. 1761.)

District Court of Appeal, Second District, Division 2, California. Feb. 7, 1929.

Indictment and information 🔑71—Information for burglary, alleging entry was made with intent to commit crime of larceny, held sufficiently specific (Pen. Code, § 952).

Information for burglary, alleging entry was made with intent to commit the crime of larceny, *held* sufficiently specific, in that the word "larceny" has been so long employed in law for purpose of designating particular offense that its use in information could not have failed to advise accused of nature of offense, as required by Pen. Code, § 952.

Appeal from Superior Court, Los Angeles County; B. Rey Schauer, Judge.

James Lannagan and James Monroe were convicted of burglary and robbery, and defendant Monroe appeals. Affirmed.

Stanley Visel, of Los Angeles, for appellant.

U. S. Webb, Atty. Gen., and John D. Richer, of Los Angeles, for the People.

THOMPSON, J. Two informations were filed by the district attorney of Los Angeles county, charging the defendants in three counts with burglary and in five other counts with robbery. They were tried by a jury and found guilty. The appellant prosecutes this appeal from the judgment and an order denying his motion for a new trial.

But one ground is advanced as a reason for reversal. The counts which charge the defendants with burglary allege in each instance that the entry was made "with the intent then and there to commit the crime of larceny." The appellant says that, "since the crime of burglary may be committed in five distinct ways, it cannot be ascertained from the burglary counts which one of these distinct ways was meant." He also relies upon the case of People v. Myers (Cal. App.) 269 P. 963, as an authority for his position. It is to be noted, however, that in the Myers Case the language employed was "with the intent then and therein to commit the crime of theft." The ruling in that case was based upon the fact that theft may be committed in five different ways, and had nothing to do with the definition of larceny other than to point out that larceny had been renamed by statute, and made one of the kinds of theft. When such general language is employed that the information fails to state the nature of the offense charged, it is obvious that it fails to meet the requirements of good pleading or of the provisions of section 952 of the Penal Code, which section necessitates that, while the information may be in the words of the enactment or any other words, it should be "sufficient to give the accused notice of the offense of which he is charged." We think that the word larceny has been so long employed in the law for the purpose of designating a particular offense, and has come to have such a well-understood meaning, that its use in these informations could not have failed to advise the accused of the nature of the offense with which he was charged. In this respect we are fully in accord with the case of People v. Giron (Cal. App.) 270 P. 462, and find therein nothing inconsistent with People v. Myers, supra.

Judgment and order affirmed.

We concur: WORKS, P. J.; CRAIG, J.

---

96 Cal. App. 604

CURTIS v. WASEM et al. (Civ. 6200.)

District Court of Appeal, Second District, Division 1, California. Feb. 4, 1929.

1. Bills and notes 🔑188—Indorsement in blank on back of note is sufficient assignment in writing of note (Civ. Code, § 3112).

Indorsement in blank on back of note, which is a sufficient indorsement under Civ. Code, § 3112, is also a sufficient assignment in writing of the note.

2. Bills and notes 🔑110, 534—Attorney's fees, allowed pursuant to per cent. designated in note, cannot be said to be illegal or excessive.

Where note provided that designated per cent. of amount found to be due should be added for attorney's fees, if suit were brought to recover on the note, a fee allowed by court on such basis cannot be said to be illegal or excessive.

Appeal from Superior Court, Los Angeles County; Ira F. Thompson, Judge.

Action by Amelia R. Curtis against Al Wasem and another. Judgment for plaintiff, and defendants appeal. Affirmed.

L. Kearney, of Los Angeles, for appellants.

Edward T. Sherer and Welburn Mayock, both of Los Angeles, for respondent.

CRAIL, Justice pro tem. This is an action on a promissory note. No question is raised as to the execution and delivery of the note to the payee, David Robbins. The plaintiff is his sister, and alleges that she is his assignee. As a defense the defendants set up in their answer that the note was without consideration, and was delivered to David Robbins conditionally; that the note was a part of a transaction whereby he conditionally sold his confectionery store at Clifton, Ariz., to defendants; that the sale was not to be completed, and the note was not to become a promissory note, unless Robbins should die in the military service of the United States, and in that event only should the defendants become liable for payment of said note; that he was discharged alive from military service, but failed to return the note or take back his confectionery.

It was set up in the complaint that the note, before maturity, for a valuable consideration, was sold and delivered to the plaintiff; but this position was abandoned by the plaintiff, and nothing further need be said on this issue. The parties went to trial on the affirmative defenses set forth in the answer. The court found for the plaintiff as to all the facts set forth in said defenses and entered judgment accordingly.

[1] It is the first contention of appellants that the plaintiff and her brother both testified that there was a written assignment of the note, and that this evidence was stricken out as a conclusion and not the best evidence, yet the plaintiff did not show any effort to get the written assignment nor lay any foundation for the introduction of oral evidence as to the contents of the written assignment, and that this constituted a complete failure of proof as to the assignment. There is other evidence, however, including an indorsement in blank on the back of the note and an identification of the signature of David Robbins thereon. Such a signature of the indorser without additional words is a sufficient indorsement (Civ. Code, § 3112), and such an indorsement is an assignment in writing.

[2] It is next contended that the attorney fee allowed by the trial court was excessive and illegal. The note provided that a designated per cent. of the amount found to be due on the note should be added for attorney's fees, if suit were brought to recover on the note. A fee was allowed by the court on this basis. The basis was not illegal, and under the circumstances not excessive. It is next contended that the interest allowed by the court was excessive. However, respondent has voluntarily remitted all in excess of the amount which appellants claim as the correct sum. And, by computing the attorney's fees on this sum, the judgment, not remitted, stands at $3,604.63, including interest and attorney's fees, on the date of its entry.

It is next contended that plaintiff should have been compelled to answer the question, what became of the $11,000 she held along with the note sued on herein. We have read the transcript. The question was irrelevant. Furthermore it was waived.

It is next contended that the trial court erred in striking out an answer of one of the witnesses, on the ground that the answer was the conclusion of the witness. A reading of the transcript makes it clear that the answer was a mere conclusion and that the ruling was correct. Other assignments of error are mere repetitions of the points already covered, raised in different form or at different stages of the trial. There is no merit in the appeal.

Judgment affirmed.

We concur: HOUSER, Acting P. J.; YORK, J.

---

96 Cal. App. 626

SECURITY REALTY CO. v. KOST et al.

(Civ. 6197.)

District Court of Appeal, Second District, Division 1, California. Feb. 6, 1929.

1. Landlord and tenant 🔑184(1)—Tenancy held not terminated and chattel mortgage securing rent satisfied by notice to quit.

Notice to quit, if rent for certain month were not paid within three days, did not terminate tenancy and cancel lease, thereby satisfying chattel mortgage securing payments thereunder, though tenants immediately quit premises and tendered payment of rent to such time, in view of stipulation in lease, that lessor, obtaining possession on default in payment of any monthly installments, might lease or rent premises and collect deficiencies from tenant.

2. Landlord and tenant 🔑184(1)—Findings, as to when or whether lease was terminated, and amount of unpaid rent, for which mortgaged personalty was security, held unnecessary in action for possession of such personalty.

In action, not to foreclose mortgage, but merely to recover possession of chattels, mortgaged to secure payments of rent under lease authorizing lessor, obtaining possession on default in payment of any installment, to lease premises and recover deficiencies from tenant, it was not necessary for trial court to find when or whether lease was terminated and amount due, for which mortgaged personalty was security; only issue being whether lessor was entitled to possession of personalty.

Appeal from Superior Court, Los Angeles County; F. C. Valentine, Judge.

Action by the Security Realty Company, a corporation, against Mary Kost, Leonard Egley, Viola Egley, and others. From a judgment for plaintiff, defendants Egley appeal. Affirmed.

Geo. M. Harker and H. J. Brady, both of Los Angeles, for appellants.

Hill, Morgan & Bledsoe and A. S. Montague, all of Los Angeles, for respondent.

YORK, J. The plaintiff leased certain real property to defendant Mary Kost, who thereafter assigned her lease to defendants Egley. Together with the assignment of the lease, Mary Kost sold and transferred to the Egleys certain personal property, constituting the furniture, furnishings, etc., in the leased premises. This personal property was subject to a chattel mortgage, which had been executed by Kost to the plaintiff to secure the payment of each and every of the installments of rent provided for in the lease. A default having occurred in payment of rent due, the lessor gave notice to defendants Egley to pay the unpaid balance of rent then due within three days from the date of the notice or deliver up possession of the premises. Said defendants thereupon vacated the premises without paying the rent demanded, but they first removed from said premises the mortgaged property. This action was brought by lessor, who was also the mortgagee, to recover possession of the mortgaged property. By claim and delivery proceedings the personal property was delivered to the plaintiff and was in possession of the plaintiff when judgment was entered herein. Judgment was entered in favor of the plaintiff that plaintiff retain possession of the mortgaged property, and also recover the amount of expenses incurred in obtaining such possession. From this judgment, defendants Egley appeal.

Appellants' first and second points are that the three-day notice to quit, by reason of the fact that the appellants immediately quit the premises and tendered payment of rent computed to that time, constituted a termination of the tenancy and cancellation of the lease, and, therefore, a satisfaction of the chattel mortgage given to secure the payments under the lease.

Their third point is that the tender of a check, made by the tenant to the landlord, for rent up to the date when the premises were surrendered, was full payment of any rent due or to become due.

The fourth point is that it was material and necessary for the trial court to find when or whether the lease was terminated, and how much, if anything, was due the plaintiff on the lease for which the mortgaged personal property was security, which personal property was sued for in this action, which is an action for the possession of the personal property only.

The trial court found that the plaintiff was entitled to the possession of the personal property sued for by reason of the fact that the mortgagor had failed to make payment of the monthly installments of the rent, required by the lease, and by reason of the fact that the rent due on the first of June, 1925, was not paid, and the tender, if it was a tender, was only for a part of said sum, and that, therefore, the plaintiff, as mortgagor, was entitled to possession of all of the property mortgaged in accordance with the terms of the lease and the mortgage. There was sufficient evidence for the trial court to make this finding.

[1] The notice given in the instant case expressly provided that the whole amount of rent for the month of June was demanded, and did not demand any forfeiture of the lease, but possession of the real property was demanded only if the rent was not paid. The owner of the property had a right under the lease and under the mortgage to repossess the property in case of nonpayment of rent, so as to enable the owner to rent the property for the best price obtainable, and, if this price was not equal to the amount agreed to be paid under the lease, the mortgage would then be security for the payment to the owner of rent for the property leased to the full amount of the deficiency. The lease contained the following stipulation: "If the tenant shall abandon or vacate said premises before the expiration of this lease, or if, on account of default in the payment of any monthly installment of rent after the tenth of the month, suit shall be brought, and possession of said premises shall be obtained from the tenant by the lessor, the lessor, if it so elect, shall have the option to lease or rent said premises for such rent and upon such terms as it may see fit, and if a sufficient sum shall not be realized to satisfy the rent herein reserved, the tenant agrees to satisfy and pay all such deficiency at the end of each month, and the option and privilege is hereby given the lessor to sue for and collect such deficiency, if any, from the tenant at the end of each month during said time."

In Burke v. Norton, 42 Cal. App. 705, 184 P. 45, the lease contained a stipulation in different words, but similar to that above quoted, in that the lessor was given the right, upon nonpayment of rent, to enter into possession of the premises and, at his option, terminate the lease. The action was in unlawful detainer after a three-day notice to pay rent or surrender possession. The court, in its judgment in favor of the plaintiff, and contrary to the desire of the plaintiff, declared the lease forfeited. The plaintiff appealed and obtained a modification of the judgment by striking out the forfeiture clause. The court declared the rule to be that the retaking of premises by the lessor releases the lessee from subsequently accruing rents, *unless the lease expressly provides otherwise.* Authorities to this effect are cited and quoted.

[2] By reason of the foregoing conclusions reached in this opinion, and by reason of the fact that this is not an action to foreclose a mortgage, but is merely an action brought solely and only for the possession of chattels mortgaged, it was not necessary for the trial court to make the findings, which were requested by appellants, as specified in their fourth point as hereinbefore set out. The only issue in this claim and delivery action was whether or not the owner of the real property, who was also the owner of the chattel mortgage, was entitled to the possession of the personal property described in the complaint.

Sufficient facts were found by the trial court to justify the judgment that the plaintiff was entitled to possession of such personal property.

The judgment is therefore affirmed.

We concur: CONREY, P. J.; HOUSER, J.

96 Cal. App. 415

BAXTER v. KING et al. (Civ. 6521.)

District Court of Appeal, First District, Division 1, California. Jan. 25, 1929.

Trusts ⚷371(1)—Complaint seeking accounting and to declare trust, alleging fraud without explaining delay, held not to state cause of action.

Complaint, in action to have trust declared in certain real property and for an accounting, alleging fraud, *held* not to state cause of action, where it did not state time or circumstances, and agreement relied on was alleged to have been entered into nearly 40 years before action, and where it contained no allegation that in any manner attempted to explain plaintiff's laches in prosecuting alleged claim, and no allegation that plaintiff had exercised due diligence to discover fraud or anything to explain delay in filing action for 7 years after death of party with whom plaintiff's decedent had contracted concerning trust.

Appeal from Superior Court, Alameda County; John J. Allen, Judge.

Action by Jennie M. Baxter, as administratrix of the estate of Sadie E. Pritchard, deceased, substituted, against Hazel H. King and another. Judgment for defendants, and plaintiff appeals. Affirmed.

C. Franklin Baxter, of Los Angeles, and Hamilton A. Bauer, of San Francisco, for appellant.

George Clark Sargent, of San Francisco, for respondents.

TYLER, P. J. Action to have a trust declared in certain real property and for an accounting. By a third amended complaint plaintiff alleges: That on January 1, 1892, she and one Fred G. King, now deceased, entered into a verbal agreement of partnership in the city of Denver, state of Colorado, for the purpose of purchasing, developing, and selling oil properties. That the said partnership continued in existence from the date of its inception to December 11, 1920. That on said last-named date King died in Oakland, Cal., and said partnership was thereby dissolved. During its existence, King, so it is alleged, held in his possession and exclusive control all the moneys and property of the partnership amounting to the sum of $300,000. That out of such assets King paid to plaintiff the sum of $25,000 and a like amount to himself. That thereafter King without the knowledge of plaintiff took from the remaining assets the further sum of $25,000, which he invested in nonmineral and nonoil properties. That subsequent to the purchase thereof and without the knowledge and consent of plaintiff, King, without consideration, transferred the same to his wife, Hazel Hubbard King, and his mother-in-law, Mary Blanche Hubbard, defendants herein. It is then charged, on information and belief, that such transfers were made to defraud plaintiff. The description of the different parcels of land, which are situated in Alameda county, is then set forth. Promise on the part of King to make an accounting in the early part of the year 1921 is then alleged, which accounting was prevented through his death. The complaint then recites that plaintiff had no knowledge of the acts of King, in the purchase of the real property and the conveyance of the same to his relatives, until one year before the commencement of this action. The prayer is that defendants be compelled to account for all rents and income derived from the described real property and that defendants be adjudged to hold the same as trustees for the benefit of the partnership of which plaintiff is the sole survivor. General relief is also asked for. To this third amended complaint defendants interposed a demurrer upon the ground that it did not state a cause of action and also that the action was barred under various provisions of the Code of Civil Procedure. Uncertainty in many particulars was also alleged. The demurrer was sustained without leave to amend, and judgment followed that plaintiff take nothing by her action. This is an appeal from the judgment.

It will be noticed that the agreement relied on by plaintiff is alleged to have been entered into nearly forty years ago. The complaint contains no allegation that in any manner attempts to explain plaintiff's laches in prosecuting her alleged claim, nor does it contain the existence of any facts which might show impediments to an earlier prosecution thereof. The mere recital that she had no knowledge of King's acts is insufficient to take the case out of the statute. Kleinclaus v. Dutard, 147 Cal. 245, 81 P. 516. Time and circumstances of the acts of fraud should have been set forth which would show that plaintiff was not presumed to have had knowledge of them, so that the court might determine therefrom whether the discovery of the acts was within the time alleged. Musick Cons. Oil Co. v. Chandler, 158 Cal. 7, 13, 109 P. 613; Denike v. Santa Clara, etc., Co., 9 Cal. App. 228, 231, 98 P. 687.

There is an entire lack of allegation to show that plaintiff had exercised due diligence to discover the facts constituting the fraud or any facts excusing failure to make an earlier discovery. 12 Cal. Jur. p. 806.

Then again there is no allegation which in any manner explains the delay in the filing of the action for a period of over seven years after the death of King, although the allegations show that plaintiff was acquainted with this fact; nor is there allegation that a claim was ever presented against his estate. A further analysis of the pleading is unnecessary. The demurrer was rightfully sustained.

Judgment affirmed.

We concur: KNIGHT, J.; CASHIN, J.

96 Cal. App. 409

PEOPLE v. MAGGIO.★ (Cr. 1694.)

District Court of Appeal, Second District, Division 2, California. Jan. 24, 1929.

Rehearing Denied Feb. 8, 1929. Hearing Denied by Supreme Court Feb. 21, 1929.

1. Criminal law ⚷1024(1)—People held entitled to appeal from trial court's order modifying judgment of conviction after affirmance and remittitur (Pen. Code, § 1238, subd. 5; Const. art. 6, § 4½).

Order of trial court, modifying original judgment of conviction after affirmance and remitting of certificate to trial court, by which order sentence was changed from imprisonment to fine, *held* appealable on part of the people, under Pen. Code, § 1238, subd. 5, permitting appeals from orders made after judgment affecting people's substantial rights, notwithstanding Const. art. 6, § 4½, in view of maxim that the interest of the state requires that there shall be an end to litigation.

2. Criminal law ⚷1192—Jurisdiction of trial court after appeal and remittitur is limited to orders necessary to carry judgment into effect, there being no power to alter or suspend judgment (Pen. Code, §§ 1263, 1265).

Jurisdiction of trial court, which is suspended during appeal, reattaches after remitting of certificate of judgment only for limited purpose of making orders necessary to carry the judgment into effect, under Pen. Code, §§ 1263, 1265, and does not extend to altering or suspending judgment.

3. Criminal law ⚷1192—Trial court's order modifying judgment of conviction, after affirmance thereof, so as to impose fine, instead of imprisonment, held void (Pen. Code, §§ 1263, 1265).

Order of trial court, modifying judgment of conviction, after affirmance thereof on appeal, and remission of certificate of judgment, so as to impose fine, instead of imprisonment, *held* unauthorized, since power to alter or suspend conviction ceases after affirmance thereof by appellate tribunal, under Pen. Code, §§ 1263, 1265.

Appeal from Superior Court, Imperial County; A. C. Finney, Judge.

Salvadore Maggio was convicted of an offense, and from an order amending and modifying the judgment of conviction of violation of section 367c, Penal Code, after affirmance on appeal, the People appeal. On the merits, and on defendant's motion to dismiss appeal. Motion to dismiss denied, and order reversed.

U. S. Webb, Atty Gen., John L. Flynn, Deputy Atty. Gen., and Elmer W. Heald, Dist. Atty., and Edward B. Patterson, Deputy Dist. Atty., both of El Centro, for the People.

Ernest R. Utley and R. B. Whitelaw, both of El Centro, for respondent.

THOMPSON, J. This cause was heretofore before us on an appeal from the judgment and an order denying a motion for a new trial. The judgment and order were affirmed on April 6, 1982. See People v. Maggio (Cal. App.) 266 P. 813. After the remittitur had gone down, and on June 1, 1928, upon motion of the defendant, the trial judge modified the judgment theretofore rendered, and affirmed by this court, by which the defendant was sentenced to imprisonment at San Quentin for the terms provided by law, to one in which the defendant was fined in the sum of $500. The people prosecute this appeal from the order made, amending and modifying the judgment. The respondent has made a motion to dismiss the appeal, on the ground that the people have no right to appeal from such an order.

[1] Section 1238 of the Penal Code provides that "an appeal may be taken by the people: * * * 5. From an order made after judgment, affecting the substantial rights of the people." If this appeal is properly prosecuted, it must be by virtue of this language. Respondent seriously argues that, from all of the testimony which was before this court on the former hearing, it appears that the punishment sought to be imposed by the order of June 1st is amply sufficient, and all that the court ought to impose, and, therefore, the rights of the people are not substantially affected. He further argues that we ought to invoke the aid of section 4½ of article 6 of the Constitution in the determination of the question.

We cannot concede the validity of respondent's argument. A familiar maxim of jurisprudence is, "Interest reipublicæ ut sit finis litium." While it is apparent that the people would not have had a right of appeal, if the judgment now sought to be enforced against the defendant had been pronounced in the first instance, yet that is not the situation with which we are confronted. The people have a right to rely upon the finality of judgments, and to know, when a judgment has become final, that there has been an end to that particular litigation. To say that the rights of plaintiff have not been substantially affected would be to deny the force and value

---

★Rehearing denied. Hearing denied by Supreme Court.

of the quoted maxim, and deal a vital blow to the sanctity of judgments. This is not an instance of where final judgment was not rendered because of invalidity of the first attempt, nor is it a case wherein the judgment still reposed within the breast of the judge. It had been entered and affirmed, and appellant is interested in maintaining its integrity.

[2, 3] We are therefore brought to the question whether the trial court had the authority to amend and modify its judgment, arising on the merits of the appeal. What has already been said applies in principle to this problem, but we also find statutory limitations upon the power of the court in this particular. Section 1263 of the Penal Code reads: "If a judgment against the defendant is affirmed, the original judgment must be enforced." And section 1265 of the same Code says: "After the certificate of the judgment has been remitted to the court below, the appellate court has no further jurisdiction of the appeal or of the proceedings thereon, and all orders necessary to carry the judgment into effect must be made by the court to which the certificate is remitted." The respondent here is undoubtedly correct in arguing that jurisdiction of the trial court, which has been suspended during the appeal, reattached, but only for limited purposes, to wit, to make "orders necessary to carry the judgment into effect." Beggs v. Superior Court, 179 Cal. 130, 175 P. 642, is very much in point. In that case, after affirmance of the judgment upon appeal, the defendant made application for a suspension of the execution of the sentence, claiming that the superior court had jurisdiction to pass upon that question at any time before his surrender to the warden of the penitentiary. Our Supreme Court, after quoting from sections 1263 and 1265 of the Penal Code, says: "It is clear, from the reading of these provisions, that, after a judgment of conviction in a criminal case has been affirmed by an appellate tribunal, judicial power to alter or suspend it has ceased." This language is apt and conclusive. We are also impressed with the conviction that any other interpretation would result in endless confusion and uncertainty.

Motion to dismiss appeal denied, and order reversed.

We concur: WORKS, P. J.; CRAIG, J.

On Petition for Rehearing.

PER CURIAM. In denying the petition for a rehearing herein we deem it proper to say that Beggs v. Superior Court, 179 Cal. 130, 175 P. 642, is cited for the purpose of indicating the construction which should be given sections 1263 and 1265 of the Penal Code, and not for the purpose of construing section 1203 of the Penal Code as now amended, respecting the power of the trial court to entertain an application for probation after judgment is pronounced. The latter question is not here involved. The judgment from which this appeal is presented purports to be one in lieu of a judgment formerly pronounced, and not an order designating the fine as a condition annexed to the granting of probation.

Petition for rehearing denied.

---

96 Cal. App. 637

In re SHAW'S ESTATE.

McREAVY v. SHAW.

(Civ. 6348.)

District Court of Appeal, Second District, Division 2, California. Feb. 6, 1929.

1. Appeal and error 🔑1099(3)—Decision of court on former appeal that office of executrix and trustee were separate cannot be disturbed on subsequent appeal.

Decision of appellate court on former appeal, involving compensation of executrix, that the office of executrix and trustee were separate offices, and ordering settlement of executrix's account on such premise, cannot be disturbed on subsequent appeal from order sustaining objection to annual account of trusteeship.

2. Trusts 🔑315(1)—Executrix, renouncing right to designated compensation, was nevertheless entitled to compensation fixed by will after entering on trusteeship (Code Civ. Proc. § 1618).

Executrix, renouncing right to designated compensation as executrix, in accordance with provisions of Code Civ. Proc. § 1618, and electing to take the compensation allowed her by law in lieu thereof, was, nevertheless, entitled to compensation fixed by will for trusteeship, after having completed her duties as executrix.

3. Trusts 🔑315(1)—Renunciation of payment of executor's fees should not be allowed, unless carrying renunciation of payment for both services of executor and trustee.

Where will fixes one payment for both services of executor and trustee, the renunciation of the payment for executor's fees should not be allowed, unless it carry with it the renunciation of the whole payment, with all the consequences thereof.

Appeal from Superior Court, San Diego County; L. D. Jennings, Judge.

In the matter of the estate of William Shaw, deceased. Annual accounting by Marie Shaw McReavy of trusteeship, wherein Marion Shaw filed objections. Order sustaining the objection, and the trustee appeals. Reversed.

F. L. Richardson, of San Diego, for appellant.

Crouch & Sanders, of San Diego, for respondent.

STEPHENS, Justice pro tem. William Shaw died, leaving a will wherein he appointed the appellant herein, Marie Shaw McReavy, executrix and trustee. The twelfth paragraph of the will reads as follows: "I hereby affix the compensation of my executor and trustee at the sum of $10 per month, for the first twelve months after qualifying as such, and $5.00 per month for each month thereafter." Decedent left a codicil to his will, the second paragraph of which reads: "It is my further will and desire that the compensation of my executor and trustee fixed in the twelfth paragraph of my said will be thirty dollars ($30) per month instead of ten dollars ($10) and five dollars ($5) per month respectively, as therein provided, and that said paragraph twelfth of my said will is hereby revoked and changed accordingly."

The named executrix entered upon her duties as such, but under the provisions of section 1618 of the Code of Civil Procedure she renounced her right to the designated compensation as executrix, by signing and filing with the court a document which reads as follows: "Renunciation of Compensation Given Executrix by Will. Comes now Marie Shaw McReavy, the duly appointed, qualified and acting executrix of the above-named estate, and hereby renounces all compensation given her under the last will and testament of William Shaw, deceased, and hereby elects to take the compensation allowed her by law, under the provisions of section 1618 of the Code of Civil Procedure of the state of California."

Upon distribution of the estate she asked for and was allowed, after coming to this court (260 P. 351), statutory executor's fees, together with some extraordinary fees. In her first annual account of her trusteeship, she gave herself credit for the sum of $345 as her compensation, at the rate of $30 per month from the 14th day of January, 1927. Respondent objected thereto, and successfully contended in the superior court that "the executrix has obtained a large sum of money over the amount provided in the will as extra compensation, solely by waiving the compensation provided in the will, part of which was the appointment and compensation as trustee."

[1, 2] The objection should have been denied. This court decided, in the opinion in the former appeal, that the office of executrix and trustee are separate offices—especially that such is the case in this estate—and in effect ordered the settlement of the executrix's account upon this premise. That being the law of the case, we cannot here disturb it, even if we were of a mind so to do. While appellant was executrix of the estate she performed no duties as trustee, and she received the executor's statutory fee, plus an extraordinary fee allowed for extraordinary services as executrix. By her renunciation she had elected to so take in lieu of the sum fixed in the will. This has nothing whatever to do with the matter of the trusteeship. She entered upon her trusteeship upon stepping out of her office as executrix, and is entitled to the compensation fixed by the will therefor.

In re Estate of Whitney, 78 Cal. App. 638, 248 P. 754, presents a state of facts not found in the instant case. There the compensation for services as executors and trustees was inextricably mixed, through an agreement recited in the will whereby such services were to be performed for a certain legacy, with a sum of money added thereto by the testator. The executors, as such, renounced their right to take compensation as provided by the will and elected to take under the statute, and when their report as trustees came on they claimed compensation as such, without regard to the fact that the will had so mixed the two that separation was impossible. The Court of Appeal held that this could not be done, that they were limited to the compensation provided by will, and that the executors' fees collected would be credited thereon. The whole difference between the points to be decided in the two cases can be simply stated as follows: In the Whitney Case the will provided for one compensation to cover both classes of service, and in the instant case, under the construction given the will when before this court on the first appeal, the will provided for a distinct compensation for each service.

[3] It should be noted that the trial court in the Whitney Case permitted the renunciation of executors' fees as provided in the will and ordered the statutory fee paid to them. When the petition for allowance of trustees' fees reached the Court of Appeal, the whole matter of payment of executors' fees had passed beyond the time of appeal. We do not take it that the appellate court approved the trial court's action therein. We are inclined to the opinion that, where the will fixes one payment for both services of executor and trustee, the renunciation of the payment for executor's fees should not be allowed, unless it carry with it the renunciation of the whole payment, with all the consequences thereof.

The order is reversed.

We concur: WORKS, P. J.; THOMPSON, J.

96 Cal. App. 597

BERNSTEIN v. MINNEY et al. (Civ. 6547.)

District Court of Appeal, First District, Division 1, California. Feb. 4, 1929.

1. Appeal and error 🔑719(6)—Without specifications, stating wherein evidence was insufficient to sustain findings, findings will be deemed correct.

No specifications having been filed, stating wherein evidence was insufficient to sustain lower court's findings of fact, or wherein those findings were contrary to evidence, such findings will be deemed correct on appeal.

2. Covenants 🔑103(3)—Defendants, by conveying other lots free of restrictions, held to have waived right to enforce restrictions in prior deeds to plaintiff.

Where defendants conveyed lots to plaintiff out of a large tract by deeds prohibiting structures other than residences on breach of which it was stipulated title should revert to grantors, and thereafter defendants sold other parcels from same tract and from another adjacent tract without restrictions, and permitted property owned by them to be used for business purposes, *held* that they thereby waived restrictions and could not insist that restrictions be rigidly enforced as to lands of plaintiff, and mere fact, that forfeiture of whole fee was stipulated in deeds for breach of restrictions, was immaterial on plaintiff's right to equitable relief.

3. Evidence 🔑359(3)—Pictures of adjacent property, showing business structures, held admissible in action involving waiver of restrictions in deeds.

In action to quiet title to realty against conditions subsequently contained in deeds from defendants to plaintiff, prohibiting erection of other than residences, pictures of adjacent property, showing business structures, *held* admissible.

4. Quieting title 🔑1—Action to quiet title held proper proceeding to determine whether conditions subsequent in deeds, restricting property to residence purposes, had been waived by grantors (Code Civ. Proc. § 738).

Under Code Civ. Proc. § 738, action to quiet title to realty against conditions subsequent contained in deeds from defendants to plaintiff, either directly or by mesne conveyances, *held* proper proceeding to determine whether defendants, by selling other lots free of restrictions, waived right to enforce restrictions as against plaintiff, since waiver may be made by written instrument or by conduct.

5. Covenants 🔑103(2)—Conducting business in house designed solely for residence purposes held no less violation of restrictions limiting use to residence purposes.

That business was conducted in house originally designed solely for residence purposes *held* not to constitute any the less a violation of restrictions in deed, prohibiting erection of any structures other than residences on premises.

6. Evidence 🔑18—It is common knowledge that business and residential property respectively have peculiar values, and that a combination has depreciating effect on values of either.

It is common knowledge that business property has a value peculiar to itself, that residential property has a value peculiar to itself, and that a combination of the two has a depreciating effect on the values of either of the other kinds.

Appeal from Superior Court, Alameda County; J. D. Murphey, Judge.

Action by Isabel Bernstein against Ernest T. Minney and another. Judgment for plaintiff, and defendants appeal. Affirmed.

Breed, Burpee & Robinson, of Oakland, (William M. Thornton, of Oakland, of counsel), for appellants.

Eugene K. Sturgis and Cyril W. McClean, both of Oakland, for respondent.

WARD, Justice pro tem. This is an appeal by defendants from a judgment quieting plaintiff's title to certain real property against conditions subsequent contained in the deeds from defendants to her, either directly or by mesne conveyances (except as to race restrictions).

Defendants were the owners of a large tract of land which they subdivided into over 500 lots, but these lots were not mapped and recorded, nor were the streets accepted at the time that plaintiff obtained ownership; neither was there a general restriction agreement giving rights to cograntees for breach of any restrictions. Any restrictions noted in the deeds inured solely to the benefit of defendants upon breach. Plaintiff acquired three parcels in 1923. The deeds contained conditions prohibiting, until the year 1940, the erection of any structures other than residences which were required to cost not less than $2,500; also, restrictions as to setbacks from the front property line on Foothill boulevard in the city of Oakland, county of Alameda. Upon a breach of these conditions it was stipulated that title should revert to the grantors who were at the time of the trial the sole owners thereof.

[1, 2] No specifications having been filed as to wherein the evidence was insufficient to sustain the findings of fact of the lower court, or wherein those findings were contrary to the evidence, it is to be deemed that the findings are correct. To enable us to ascertain what equity requires to be done, we must peruse those findings, and take therefrom those salient points which may be considered as decisive of the case, i. e., first, defendants, both before and subsequent to the acquisition of this property by plaintiff, sold other parcels from the same tract to other buyers, many instances being specifically set forth, the deeds to which in some cases con-

tained restrictions, in other cases not, and in some instances express permission was granted to erect buildings in which business was to be conducted; thereafter, in some instances restrictions were waived, and in several transactions defendants themselves rented part of such restricted lots for business purposes; second, there was no general scheme for restrictions, so that there would be interlocking rights as between the grantees themselves to enforce the restrictions against one of their number or to claim damage by breach; third, that defendants owned other property in the immediate vicinity facing on Foothill boulevard, and permitted parcels thereof to be used for business purposes; fourth, that, through the conduct of defendants, the district facing Foothill boulevard, embracing the lands of plaintiff, has lost the character of residential property, and has assumed that of business property; fifth that parcels of land to the east, to the west, adjacent, contiguous to, and across the street from the plaintiff, have places of business thereupon; sixth, that commercial signs are maintained thereon by the defendants under lease of land, the deed to which contains a nonuser clause for business purposes.

In the light of these facts found by the trial court, the question before this court is simply this: Can the defendant arbitrarily insist that the restrictions be rigidly enforced as to the lands of plaintiff, thus compelling these parcels either to remain vacant until 1940, or to be improved only with residences, to the detriment of the adjacent business property, and with loss (by reason of the undesirability of the location for residential purposes), in all probability, to the plaintiff, when by defendants' own conduct and connivance, directly and indirectly, they themselves have destroyed the residential character of that neighborhood, and themselves are responsible for depriving the plaintiff of that character of property which courts must recognize requires surroundings of a vastly different nature than that of business property? If the breach of condition had already been made and defendants had not expressly stipulated a forfeiture, but, on the other hand, had come to this court asking for damages, it is quite apparent from the findings of fact that no damage was done to them, and they would be awarded no compensation. Does the mere fact that a forfeiture of the whole fee is stipulated in the deeds alter the power of this court, under these circumstances, to render equitable justice? We think not. It is for just such conditions as these that equity is designed as a remedial agency.

[3] Appellants make but three points needing determination: First, that the acts of defendants did not create an additional title in favor of plaintiff; second, that the court erred in admitting into evidence pictures of adjacent tracts showing business structures; and, third, that a quiet title action is not a proper proceeding for the determination of the issues herein.

In the case of Downs et al. v. Kroeger, 200 Cal. 743, 254 P. 1101, such pictures of adjacent property, not a part of the particular block in question, were admitted and were deemed competent evidence. We accept that form of proof as being likewise competent in this case.

[4] Appellants' point, that the acts of defendant did not create an additional title in favor of plaintiff, is not well taken, as, also, is their point that a quiet title action is not a proper proceeding for the determination of the issues here. Appellants labor under the idea that no jurisdiction would rest to determine the effectiveness of these restrictions, unless and until the restrictions were first breached by plaintiff and an action brought by defendants to declare the title forfeited to them. Such is not the theory of this case at all. The theory to which we subscribe is this: Plaintiff has brought this action, not as a moot case to determine in advance what the court would do if she committed a breach, but to determine the question whether or not there is now an existing waiver of those subsequent conditions, effective as of to-day. It must be conceded that a waiver may be made by a written instrument, or it may be made by conduct. "A condition may be waived by acts as well as by express release" —citing cases including Brown v. Wrightman, 5 Cal. App. 391, 90 P. 467. "Any acts on the part of the grantor which are inconsistent with a claim of forfeiture are evidence of his waiver of the condition." Thompson on Real Property, 1924, vol. 3, § 2053. Defendants could not be heard to contend that a quiet title action would not be the proper vehicle for plaintiff to try out the question as to whether or not an express waiver were in point of law or in fact broad enough to accomplish the result of removing the restrictions. If plaintiff could ask for such determination of a written waiver, without first committing a breach, there is no good reason why she could not and should not be permitted to have a determination now, after the acts of defendant have been committed, as to whether the present effect of the acts are to constitute a waiver of restrictions. Section 738, Code of Civil Procedure, is broad enough to permit the bringing of an action thereunder in which this claim of waiver may be adjudicated.

This waiver claimed by plaintiff is an existing waiver, if the conduct of the defendants constitutes a waiver at all, and, therefore, the inquiry narrows down as to whether the acts and conduct of defendants, as found by the lower court, may be construed as such conduct which in itself waives the restrictions in plaintiff's deeds and estops the defendants from their enforcement. Save as to the character of the business involved, the case of Brown v. Wrightman, supra, is on all fours.

In that case as here, the appellant contended that his conduct with reference to other lands can have nothing to do with his right to the lands conveyed upon condition, and the court then said:

"The description of the two tracts * * * show them to consist of contiguous portions of the Rancho San Bernardino, and parcels of the same lands. But conceding them to have been held by different title, we are not aware of any rule which considers the place of the act constituting the waiver or estoppel if the act be such as to cause the result upon which the waiver or estoppel depends. No authority has been called to our attention which would permit the plaintiff to render it impossible to fulfill the purpose for which the condition subsequent was placed in the deed, if the act by which this was accomplished were done on one side of the street, while he would not be permitted to do so if the act were done on the other side of the street. This attempted distinction 'sticks in the bark.'

"The authorities cited by appellant declare the rule that forfeitures are not favored by the courts, and that conditions providing therefor are to be construed liberally in favor of the holder of the estate, and strictly against the enforcement of the forfeiture."

See, also, Duncan v. Central Pass. Ry. Co., 85 Ky. 525, 4 S. W. 231, wherein the court held that subsequent sales of lots in the tract without such restrictions constituted a waiver or abandonment. In Jenks v. Pawlowski, 98 Mich. 110, 56 N. W. 1105, 22 L. R. A. 863, 39 Am. St. Rep. 522, it was said: "Restrictions of this class are sustained upon the theory that a party has the right, in disposing of his property, to prevent such a use by the grantee as might diminish the value of remaining land, or impair its eligibility for other uses. * * * But is there no mutuality in such agreements? It certainly cannot be said that a grantor has the right afterwards to sell an adjoining lot without restrictions, and thereby diminish the value of his former grantee's property, and impair its eligibility for other uses, converting the locality, * * * and still be allowed to insist upon the restriction." See, also, Chippewa v. Tremper, 75 Mich. 36, 42 N. W. 532, 4 L. R. A. 373, 13 Am. St. Rep. 420. In the case at bar, not only did the defendants themselves lease property, the deed to which contained a restrictive clause for their own business uses, but they were customers of a business conducted on a lot facing Foothill boulevard; they also put upon the market an adjacent tract for sale, and permitted business to be conducted upon parcels likewise fronting upon that boulevard.

[5, 6] Appellants make the point that some of the business being conducted as specified by plaintiff was conducted in residences. The court cannot consider that this hybrid proposition of grafting a business on a house, designed originally solely for residence purposes, is any the less a violation of the spirit of the restrictions. It is common knowledge that business property has a value peculiar to itself, that residential property has a value peculiar to itself, and that a combination of the two has a depreciating effect on the values of either of the other kinds. In the old case of the Duke of Bedford v. Trustees of the British Museum, 2 Mylne and Keen, 552, plaintiff was denied the relief of a forfeiture, because, after selling property with restrictions as against the erection of a certain class of house, he himself erected upon his own adjoining land that class of house, and it was held that by his own acts he had waived the right to take advantage of the covenant which he had engrafted upon the property sold.

The case of Strong v. Shatto, 45 Cal. App. 29, 187 P. 159, cited by appellants, involves a change in the condition of the property, a change of circumstances brought about by conditions independent of the acts of the grantor, and does not rest upon or involve the question, as in this case, whether there is a waiver or estoppel created by the grantor. The case of Currie v. Title Ins. Co., 60 Cal. App. 192, 212 P. 409, involved a change of title, and it was held in that case that Strong v. Shatto did not apply. The case of Strong v. Hancock, 201 Cal. 530, 258 P. 60, was an action to quiet title against restrictions subsequent. The legal sufficiency of the complaint was upheld, although the relief was not granted. The Supreme Court stated that it was bound by the findings of the trial court that the changes in the neighborhood were not sufficient to make the tract undesirable for residential purposes. In the case at bar the trial court found that the parcels of land involved had been made undesirable for residential purposes. Strong v. Hancock did not involve the question of waiver or estoppel by acts and conduct of the grantors—which is the basic question here. We do not deem it necessary, from our viewpoint, to traverse the case of Downs v. Kroeger, supra, or similar cases, further than to approve the doctrine enunciated therein.

Plaintiff has a right to have her title quieted. The acts and conduct of the defendants in the present case were inconsistent with an intention to enforce the restrictions now before this court, and such acts and conduct are sufficient in themselves to constitute a waiver of those restrictions (save as to race restrictions).

Judgment affirmed.

We concur: TYLER, P. J.; KNIGHT, J.

SANTA CRUZ PORTLAND CEMENT CO. v. SNOW MOUNTAIN WATER & POWER CO. et al., and consolidated cases. (Civ. 6578.)★

District Court of Appeal, First District, Division 2. California. Feb. 5, 1929.

Rehearing Denied March 5, 1929. Hearing Denied by Supreme Court April 1, 1929.

1. Mechanics' liens ⚷281(1)—Evidence held to sustain finding that owner had no funds to pay lien claimants at time contractor abandoned work (Code Civ. Proc. § 1183).

Trial court's finding, in action to foreclose mechanics' liens, that at time contractor, who executed bond pursuant to Code Civ. Proc. § 1183, abandoned work under contract, there was no fund in hands of owner available for payment of lien claimants, *held* sustained by the evidence.

2. Mechanics' liens ⚷315—Laborers or materialmen may sue on contractor's bond without perfecting their claims by filing verified liens (Code Civ. Proc. §§ 1183, 1187).

Bond given by contractor, pursuant to Code Civ. Proc. § 1183, to secure payment of claims for labor and material, may be sued on by laborers or materialmen, without perfecting their claims by filing of verified liens, as required by section 1187.

3. Mechanics' liens ⚷315—Materialman may waive right to lien without impairing right to proceed against sureties on contractor's bond (Code Civ. Proc. § 1183).

A materialman may waive his right to lien without in any way impairing his right to proceed against sureties on bond given by contractor in compliance with Code Civ. Proc. § 1183.

4. Indemnity ⚷14—Indemnitors of surety, made parties to suit against surety after permitting case to go by default after notice of pendency of action by cross-complaint, cannot have judgment set aside on plea cross-complaint was defective (Code Civ. Proc. § 1183).

Where partners with contractor entered into agreement with surety company on bond given by contractor, pursuant to Code Civ. Proc. § 1183, whereby they became indemnitors of surety company, and agreed to become parties to any action against surety company, and that any judgment against latter might also be entered against them, *held*, in view of Civ. Code, § 2778, that, where they were made parties to action against surety company by order of court, notified of pendency of action by service of cross-complaint, and suffered case to go by default, they cannot thereafter have judgment set aside on ground that cross-complaint by surety company was defective.

Appeal from Superior Court, Lake County; M. S. Sayre, Judge.

Consolidated actions by the Santa Cruz Portland Cement Company and others against the Snow Mountain Water & Power Company and others. From the judgment, the Santa Cruz Portland Cement Company, the Fidelity & Deposit Company of Maryland, James A. Talbot, W. F. Howard, and others appeal. Affirmed.

James A. Talbot and W. F. Howard, in pro. per.

R. P. Henshall, of San Francisco, for certain appellants.

Redman & Alexander, of San Francisco, for appellant Fidelity & Deposit Co. of Maryland.

Morrison, Hohfeld, Foerster, Shuman & Clark, of San Francisco, for other appellants.

Max Thelen, of San Francisco, and Benjamin C. Jones, of Lakeport (Pillsbury, Madison & Sutro and Thelen & Marrin, all of San Francisco, of counsel), for respondent Snow Mountain Water & Power Co.

C. J. Goodell, of San Francisco, for respondent Betchel.

BURROUGHS, Justice pro tem. These are consolidated mechanics' lien cases, all arising out of the construction of the respondent Snow Mountain Water & Power Company's Scott dam, in Lake county, California. Said Snow Mountain Water & Power Company will be hereinafter referred to as the Power Company.

A contract for the construction of said dam was entered into on December 15, 1919, between the Power Company, as owner, and the defendant W. A. Kraner, as contractor. In accordance with the provisions of section 1183 of the Code of Civil Procedure, a bond was entered into between said Kraner, as principal, and the appellant Fidelity & Deposit Company of Maryland, as surety. The contract, plans, and specifications, and the surety bond, were all filed and recorded in the office of the county recorder, as required by said section 1183, supra, before any work under the contract was performed. Kraner started work under the contract, established camp, built roads, hired and bought machinery and necessary supplies, and continued the work of building said dam until the morning of July 1, 1921, when all work on the dam ceased. Certain controversies had theretofore arisen between the Power Company and Kraner, and one of the questions here presented is whether Kraner abandoned the contract.

In Snow Mountain Water & Power Co. v. Kraner, 191 Cal. 312, 216 P. 589, wherein the said defendant Kraner was appellant, the very question here presented was before the Supreme Court of this state for hearing and determination. The evidence passed upon in that appeal is substantially the same as presented here. After a careful analysis of the law and the facts bearing upon the point presented, the Supreme Court held that Kraner abandoned said contract, and that the Power Company was justified under the terms thereof in taking over the work of completing the dam. To set forth in this

---

★Rehearing denied. Hearing denied by Supreme Court.

opinion the evidence would be a repetition of that contained in Snow Mountain Water & Power Co. v. Kraner, supra, and from which we would logically reach the same conclusion. We therefore adopt that opinion upon the question of abandonment as the opinion of this court, and hold that Kraner abandoned his contract.

[1] The trial court found that, at the time Kraner abandoned the work under the contract, there was no fund in the hands of the Power Company available for the payment of any of the lien claimants. Appellants attack this finding as not sustained by the evidence. The contract price for all work, material, and supplies for the erection of said dam is a lump sum of $1,122,350, with additional provisions in said contract for alterations or changes which might be ordered by the Power Company in accordance therewith. H. D. Pillsbury, vice president of the Power Company, testified that at the time Kraner abandoned the contract he had been paid the sum of $884,938.75 for work, materials, and supplies furnished under the lump sum contract price; that he was paid for labor and materials which were furnished outside the lump sum price the additional sum of $182,020.91. Kraner admitted having received these sums from the Power Company. Witness J. B. Reddick, who was the resident engineer of the Power Company during the entire period of the construction of the dam, testified that when Kraner quit work on the dam he left unfinished, within the lump sum contract price, 15,461 yards of concrete unpoured, 2,700 cubic yards of excavation at the north end of the dam, and between 1,500 and 2,000 yards at the south end; excavation for a cut-off wall under section 14, and filling of same with concrete; excavation for southern diversion wall; placing of sluice gateway and needle and butterfly valves on outlet pipe; construction of trash racks in front of gate; placing of doors and drainage tunnel; placing of impervious hydraulic fill, to prevent the seepage of water under dam; placing of fill on downstream foundation of dam, to protect foundation; removal of forms along crest of dam; filling of openings in dam; filling of recesses in upstream face of dam; removal of trestle and concrete bunkers, and clearing the camp; removal of railroad track and construction equipment. Comparing the amount of work done by Kraner with the work left unperformed, the net result of the testimony of this witness was to the effect that the dam, at the time Kraner abandoned work, was 75 per cent. completed, with possibly 1 or 2 per cent. one way or the other.

S. L. Shuffleton, an engineer of wide experience in the construction of hydroelectric and steam power plants, and also in the construction of concrete dams, testified in detail concerning the amount of work which Kraner had completed and the amount left unfinished, and by comparison he placed the dam as 78.2 per cent. completed. It also appears from the evidence that, had Kraner completed the portion of the dam yet to be completed, and within the line of the lump sum contract price, it would have cost him $245,961.41. As against this evidence Kraner testified that he was never paid more than 85 per cent. of the amount earned by him monthly. He also testified that the total yardage of cement to be poured was 86,172 yards. That the contract price was $1,122,350, which would give a figure of $13 plus per cubic yard for concrete poured by him. Figuring on the basis of the testimony of this last witness, it is claimed by appellants that, as Kraner poured, according to his own figures, 73,279 cubic yards of cement at the price of $13.025 per yard, he had earned $954,458.98, and, having been paid only $884,938.75, there is still a balance due him in the hands of the Power Company of $69,520.23, which last-named sum is available for the satisfaction of the liens of appellants.

The fallacy of this position becomes apparent upon reading the contract and the testimony of Reddick and Shuffleton. If the contract of Kraner with the Power Company was merely to pour the concrete, no doubt these figures would be a proper basis for the computation of the amount earned by Kraner; but the argument of the appellants fails to take into consideration there were some 52,000 cubic yards of excavation to be removed within the contract, and, as heretofore stated in the testimony of witness Reddick, many other things to be performed beside the cement work itself. Under these circumstances the trial court was justified in accepting a figure of 78 per cent. as the basis for its computation of the amount of work done by Kraner. Section 1183, Code Civ. Proc.; McDonald v. Hayes, 132 Cal. 490, 64 P. 850; Hoffman-Marks Co. v. Spires, 154 Cal. 111, 97 P. 152; Pacific Portland Cement Co. v. Hopkins, 174 Cal. 251, 162 P. 1016. Based upon this calculation, the finding of the court that there was no fund in the hands of the Power Company available for the payment of appellants' claims is fully sustained by the evidence.

Appellants further claim that the Power Company was indebted to Kraner, the contractor, for work done and materials and supplies furnished during the months of May and June, 1921. This contention is based on the theory that the Power Company, prior to said time, had breached the contract, and therefore all labor performed and all materials and supplies furnished by the contractor were not a part of the contract. Having heretofore held that the contract was in full force and effect until abandoned by the contractor, the work, supplies, and materials furnished during said months were properly included in the lump sum contract price (Snow Mountain W. & P. Co. v. Kraner, supra), and had been paid for by the Power Company in accordance with the terms of the contract.

It is further contended by certain appellants that the finding of the trial court that their claims against Kraner had been paid, compromised, settled, and discharged is without support in the evidence. This controversy arises out of the fact that the said appellants assigned their claims, with all rights thereunder, to the appellants Howard and Talbot, who were partners with Kraner in the construction of the Power Company's dam, and also indemnitors on the bond of their codefendant, Fidelity & Deposit Company of Maryland. As we have already held that there was no fund in the hands of the Power Company available for the payment of these liens, this finding becomes immaterial. The only other party to the controversy who could be affected by the finding complained of would be the appellant Fidelity & Deposit Company of Maryland; but as Howard and Talbot were not only partners with Kraner in the contract, but were also indemnitors on the bond given by the surety company, no claim could be, nor do we understand is, made by said Howard and Talbot against the surety company. We therefore hold that it is unnecessary to decide the question here presented.

The court further found that certain of the claims now owned by Howard and Talbot were not of the class that entitle the holders to the benefit of the law relating to liens. In view of our previous holding that there is no fund in the hands of the Power Company for the payment of liens, and, further, as no judgment is sought by appellants against the surety company, the finding becomes immaterial.

[2, 3] The appellant Fidelity & Deposit Company of Maryland was the surety on the bond given by the contractor in accordance with the provisions of section 1183 of the Code of Civil Procedure. The court gave judgment against the contractor and said surety company in favor of the plaintiff W. A. Betchel in the sum of $7,973.26, with interest thereon from the date of the judgment. The court also gave judgment against the contractor and said surety company in favor of the plaintiff Santa Cruz Portland Cement Company in the sum of $63,837.96, with interest thereon from the date of said judgment, and the said surety company appeals therefrom. It is urged in support of the appeal that the court, having found that there was no lien existing in favor of Betchel and the Santa Cruz Portland Cement Company against the property of the Power Company, it was error to give judgment in their favor and against this appellant.

In General Electric Co. v. American Bonding Co., 180 Cal. 675, 182 P. 444, it was held that a bond given by a contractor pursuant to section 1183 of the Code of Civil Procedure to secure payment of claims for labor and material to be furnished in the construction of a building and which is expressly made to inure to the benefit of any and all persons who perform labor upon or furnish materials to be used on the work described in the building contract, and which also provides that any and all such persons shall have and are given a right of action to recover upon the bond against the principal and surety, or either of them, in any suit brought to foreclose mechanics' liens which may be filed by such persons or any of them, upon the property mentioned in the contract, or in a separate suit brought upon the bond, may be sued upon by laborers or materialmen without perfecting their claims by the filing of verified liens as required by section 1187 of said Code. In Fraters G. & P. Co. v. Southwestern C. Co., 200 Cal. 688, 254 P. 1097, in affirming the doctrine enunciated in General Electric Co. v. American Bonding Co., supra, the Supreme Court further held that a materialman may waive by agreement or otherwise his right to a lien without in any way impairing his right to proceed against the sureties upon the undertaking given in compliance with section 1183 of the Code of Civil Procedure. These cases, so far as we are advised, have never been reversed or modified, and, in our opinion, are a complete answer to appellant's contention. Indeed, we understand that counsel for appellant concedes the force of these decisions, but earnestly contends that in deciding them the Supreme Court overlooked considerations which would preclude the construction of the statute placed upon it by the court. However, under well-recognized principles, this court is bound by the decisions of the Supreme Court, and, therefore, without discussing the merits of counsel's contention, we hold that the point is not well taken.

[4] The court entered judgment against the cross-defendants James A. Talbot and W. F. Howard, and in favor of the plaintiffs W. A. Betchel and the Santa Cruz Portland Cement Company, said judgments being in the same amount as given by the trial court in favor of said last-named parties and against the Fidelity & Deposit Company of Maryland. Talbot and Howard have appealed therefrom. The relation of these appellants to this case may be summarized from the evidence as follows:

They were partners with Kraner, the contractor, in the execution of the contract in building the Power Company's dam. They were indemnitors of the surety company on the bond given by the contractor, Kraner, under the provisions of section 1183 of the Code of Civil Procedure. After the commencement of 23 of the separate actions to enforce liens against the property of the Power Company, all of said actions being consolidated in this action, said appellants purchased the claims of said 23 lien claimants and have continued the actions in the name of the original parties, and through the aid of counsel have vigorously prosecuted said claims, both in the trial court and upon appeal herein. On their appeal from the judgment entered against them in favor of plaintiffs Betchel and the Santa Cruz Portland Cement Company they have appealed in propria persona. In support of this appeal they now urge that the cross-complaint upon which they were brought into court does not state facts sufficient to constitute a cause of action. The cross-complaint was filed by the said surety company, and, after alleging the corporate capacity of this company, proceeds as follows:

"(2) That at the time said Fidelity & Deposit Company of Maryland executed the bond or undertaking referred to in the complaint in the above-entitled action, and as a part of the same transaction, and as a part consideration for the execution of said bond, said Fidelity & Deposit Company of Maryland made and entered into a contract in words and figures as follows:

" 'This agreement made the 20th day of December, A. D. 1919, between W. A. Kraner, W. F. Howard, and James A. Talbot, parties of the first part, and Fidelity & Deposit Company of Maryland, party of the second part, witnesseth:

" 'Whereas, the second party has executed, or is about to execute, as surety, a bond in approximately the sum of five hundred fifty-two thousand seven hundred fifty-seven and 50/100 (552,757.50) dollars, running to the Snow Mountain Water & Power Company, guaranteeing the performance of a certain contract entered into by W. A. Kraner with the Snow Mountain Water & Power Company, for the construction of a concrete dam across the South Eel river at Gravelly Valley, Lake county, California; and

" 'Whereas, the parties of the first part are copartners in the performance of the said contract, which has been made and will be performed in the name of the said W. A. Kraner, but for the joint account of the parties of the first part; and

" 'Whereas, the party of the second part has executed, or is about to execute, said bond upon the application of the said indemnity of the said W. F. Howard and said James A. Talbot, and in reliance upon this agreement:

" 'Now therefore, it is agreed by and between the parties hereto—

" 'First. That in the event of any suit or legal proceedings being brought against the second party, as surety on said bond, the second party shall have the right to apply to the court in which such action is brought for an order making the first parties, parties defendant, both individually and as copartners, and said parties of the first part do hereby consent to the granting of such order by the court, and do agree to become such parties defendant; and in the event of any judgment being rendered against the parties of the second part in such action or actions, same judgment shall also be rendered against each of the parties of the first part, both individually and as copartners.

" 'Second. The party of the second part agrees that in the event of any suit or proceeding being brought against it, or in the event of any claims being made against it, arising out of the execution of said bond, it will cooperate with, and will assist the parties of the first part in settling said claims or in defending such suit or suits.

" 'In witness whereof, the parties hereto have caused these presents to be executed the day and year above stated. W. A. Kraner. W. F. Howard. James A. Talbot. Fidelity and Deposit Company of Maryland [Seal], by Guy Le Roy Stevick, Attorney in Fact. Attest: Paul M. Nippert, Agent.'

"(3) That said agreement is still in full force and effect.

"Wherefore, Fidelity & Deposit Company of Maryland prays that plaintiff take nothing and further prays that in the event judgment shall be rendered against said Fidelity & Deposit Company of Maryland in this action such judgment shall also be rendered against the said W. A. Kraner, W. F. Howard, and James A. Talbot, both individually and as copartners, and further prays that it be adjudged and decreed that said W. A. Kraner, W. F. Howard and James A. Talbot exonerate the Fidelity & Deposit Company of Maryland and hold it harmless from all obligation and liability in respect to the matters referred to in the complaint in the above-entitled action."

Upon the filing of this cross-complaint the court made its order making these appellants parties to this action and they were served with a copy of the cross-complaint. They did not appear in the action so far as their relation thereto as indemnitors was in issue, but permitted their default to be entered. Conceding that, standing alone and unaided, the foregoing document is defective as a pleading, the agreement set forth therein was received in evidence on the trial of the action, and by its terms these appellants consented that the court should make them parties to any action on the contract of suretyship, and they also expressly agreed that any judgment entered against the surety company should be also entered against them both individually and as copartners. While neither party to this controversy has offered any authorities for or against the claim of appellants, it would seem logical that appellants should be bound by their own agreement. The document, whether it be held sufficient as a cross-complaint or not, gave notice to appellants that a suit was pending against the surety company. The complaint against the latter stated a cause of action on the contract of suretyship, and, after a trial, judgment was entered against the surety. No just reason appears why these appellants should not be bound in accordance with the terms of their contract of indemnity.

There is no dispute that the agreement between Howard and Talbot on the one hand, and the surety company on the other, is a contract of indemnity. There can be no question that under the facts of this case a judgment rendered against the surety company could be used as the basis of an action by the latter against Howard and Talbot. Civ. Code § 2778; 13 Cal. Jur. § 15, p. 996. Such being the case, we can conceive of no reason why the indemnitors may not by their contract agree, as they did agree in this case, to become parties to any action against their indemnitees, and that any judgment entered against the latter might also be entered against them. Under their agreement of indemnity they were made parties to the action by the order of the court. They were notified of the pendency of the action by service of the cross-complaint, and they suffered the case, so far as they were concerned, to go by default. They should not now be permitted to have the judgment set aside upon the plea that the cross-complaint was defective.

No good reason has been shown why the judgment should be disturbed, and it is therefore affirmed.

We concur: NOURSE, Acting P. J.; STURTEVANT, J.

---

96 Cal. App. 664

PEOPLE v. McCANN. (Cr. 1730.)

District Court of Appeal, Second District, Division 2. California. Feb. 7, 1929.

1. Indictment and information 🔑130—Each misapplication of money, by cashier intrusted therewith, constituted "theft," and was properly charged separately (Pen. Code, § 484, as amended by St. 1927, p. 1046).

Each separate misapplication of his employer's money by defendant, who was bookkeeper and cashier for savings and loan association, constituted "theft," within Pen. Code, § 484, as amended by St. 1927, p. 1046, and was properly charged as a separate and distinct offense.

[Ed. Note.—For other definitions, see Words and Phrases, First, Second, and Third Series, Theft.]

2. Criminal law 🔑535(2)—Evidence, apart from defendant's statements to officers, held sufficient to establish corpus delicti, in prosecution for grand theft by misapplication of employer's funds (Pen. Code, § 484, as amended by St. 1927, p. 1046).

In prosecution for grand theft, under Pen. Code, § 484, as amended by St. 1927, p. 1046, against bookkeeper and cashier, for misapplication of money of savings and loan association, evidence, independent of defendant's statements to officers after his arrest not amounting to a confession, *held* sufficient to establish corpus delicti.

3. Embezzlement 🔑44(2)—Evidence held sufficient to establish defendant cashier's intent to commit public offense of grand theft by misapplying employer's money (Pen. Code, § 21 and § 484, as amended by St. 1927, p. 1046).

In prosecution for grand theft, under Pen. Code, § 484, as amended by St. 1927, p. 1046, against cashier of savings and loan association, by misapplying employer's money intrusted to him, evidence *held* sufficient to establish defendant's intent to commit public offense within Pen. Code, § 21.

4. Criminal law 🔑406(3)—Expert accountant's testimony, regarding defendant's explanation of items entered in books, held at least evidence of defendant's voluntary statements regarding defalcations (Pen. Code, § 484, as amended by St. 1927, p, 1046).

In prosecution for grand theft, under Pen. Code, § 484, as amended by St. 1927, p. 1046, against cashier of savings and loan association, by misapplying funds intrusted to him, testimony of expert accountant respecting defendant's statements to him, explaining entries in association's books when accountant was examining books, *held* at least evidence of defendant's voluntary statements regarding his defalcations.

5. Criminal law 🔑1169(1)—Admitting in evidence account books containing entries by defendant, charged with misapplying funds, and expert accountant's statement, held not prejudicial, where jury did not see them (Pen. Code, § 484, as amended by St. 1927, p. 1046.)

In prosecution, under Pen. Code, § 484, as amended by St. 1927, p. 1046, for grand theft against cashier of savings and loan association, admission in evidence of books containing entries made by defendant, and expert accountant's statement of entries extracted from books in accused's presence and under his direction, showing shortages respecting which auditor testified, *held* not prejudicial, where jurors did not see either of exhibits mentioned.

Appeal from Superior Court, Los Angeles County; Emmet H. Wilson, Judge.

George J. McCann was convicted of grand theft, and he appeals. Affirmed.

Arthur Brigham Rose, of Los Angeles, for appellant.

U. S. Webb, Atty. Gen., and Frank Richards, Deputy Atty. Gen., for the People.

CRAIG, J. The appellant was charged by information consisting of five counts with having committed grand theft, in that on the following dates he did unlawfully take from the Pacific States Savings & Loan Company, a corporation, the respective sums of money specified, that is to say: August 15, 1927, $300; August 27, 1927, $500; April 11, 1928, $500; October 10, 1927, $250, and October 17, 1927, $306.48. He was convicted upon each count, whereupon he moved for a new trial, which was denied, and he appeals from the judgments and from the ruling of the trial court upon said motion.

It appears that McCann was bookkeeper and cashier of the company mentioned, and that it was his duty in that capacity to make entries in the books of his employer of moneys received and disbursed, and to write checks which he presented to the vice president for signature. It was customary for the company to carry daily about $350 in petty cash, and at the end of the day the cashier prepared a check for an amount necessary to balance the petty cash account, presented it to the proper officer for signature, and charged portions thereof to various accounts. Each count of the information is founded upon an alleged shortage of funds, and, the method which the people contended appellant pursued in stealing moneys of his employer being similar upon all five occasions, it is sufficient for the purposes of this appeal to detail the facts presented to the trial court and jury as to one of the counts.

On August 27, 1927, appellant made a check to balance petty cash, numbered 3828, for the sum of $650.86, which he entered in the cash book, and charged to the following accounts: Installments 6 per cent. account, $520; exchange, $101.86; F. P. coupons, $29. This check was posted to the account of Brent M. Martin, whose certificate was No. 114, in the record of individual accounts, whereas the only charge entered against that account consisted of $20, which appeared to have been withdrawn on August 16, 1927. None of the balance of said check was charged against any other individual account, and the rest of the $500 was not accounted for. The vice president, and the assistant secretary, each testified to the method of business, system of bookkeeping, duties of appellant, and shortages; a certified public accountant, who audited the books also verified the entries and deficiencies. It was stipulated that McCann indorsed check No. 3815, and a handwriting expert swore that in his opinion all of the entries were made by the same person who wrote the indorsement. The assistant secretary and the vice president both identified the handwriting, and the latter testified to having signed the checks at the instance of the defendant, who represented them to be for balancing petty cash account. When arrested, he admitted to one officer that his accounts were short $8,000. One of the officers testified upon cross-examination by the defendant's attorney that McCann stated that he did not know why he had taken the money, that it was "just wild ideas," and that he "wished he could get a chance to work for the Pacific States Savings & Loan Company for one year without pay; if he could do that he could square himself up."

[1] It is strenuously insisted by appellant that, since he was admittedly bookkeeper and cashier, and the moneys represented by the various checks lawfully came into his possession, he was not guilty of theft, if he used or misapplied them, and that, in any event, since there was an alleged shortage of $5,000 or $8,000, it constituted but one offense, which was improperly split into five separate causes of action, or counts.

Section 484 of the Penal Code, as amended by St. 1927, p. 1046, expressly provides that: "Every person * * * who shall fraudulently appropriate property which has been intrusted to him, * * * is guilty of theft." The trial court instructed the jury in the foregoing language, and also that if one who assumes to act in the capacity of agent or servant of another "is intrusted with and receives into his care and custody property, for the use of another person, and fraudulently appropriates such property to his own use or to any use or purpose not in the due and lawful execution of his trust, is guilty of theft." Appellant was convicted upon an abundance of evidence, a portion of which we have pointed out, including his own admissions, which tended to show that, assuming to be the agent of the Pacific States Savings & Loan Company, he was intrusted with, and received into his care and custody, certain of its personal property, for the use of the latter, upon five different occasions, which he applied to none of his employer's accounts, and did not have on hand at the time of the audit. We think this clearly constituted theft, as defined by the Penal Code, and that the argument, that one amount taken in April, two upon different dates in August, and two on the 10th and 17th of October, 1927, should have been charged as one offense, does not require extended discussion nor citation of authority. The thefts were obviously separate and distinct offenses.

[2] It is next contended that the corpus delicti was not established, and that the evidence tending to connect appellant with the commission of the crimes was wholly insufficient to warrant or sustain a conviction. The defendant did not testify, nor did he in any manner attempt to trace into the hands of any other person the moneys which, according to his own entries, were intrusted to him, and which were withdrawn by means of checks which he does not deny having indorsed. Authorities cited by appellant fail to support his contentions. In many instances they exhibit an absence of proof of the corpus delicti, or of the guilt of the defendant without his confession. However, in People v. Roganovich, 77 Cal. App. 158, 246 P. 132, it was said: "But it does not follow that where there has been received evidence of substantial weight tending to prove the corpus delicti, a confession made by the defendant may not be used by the jury as cumulative evidence further tending to establish the fact of the corpus delicti, as well as to prove the fact that the defendant committed the crime."

Appellant's statements to the officers did not legally amount to a "confession." They consisted of admissions which the jury may or may not have deemed of major importance in arriving at their verdicts. There was much substantial evidence both of the corpus delicti, and of the guilty connection of appellant with the offense charged, independent of such statements.

[3] It is unnecessary to discuss at length appellant's contention that intent to commit a public offense was not proved. The intent or intention is manifested by the circumstances connected with the offense, and the sound mind and discretion of the accused. Pen. Code, § 21. These elements of proof are embraced in the record.

[4, 5] Objections were interposed to the introduction of certain exhibits numbered 6 and 7 on behalf of the people. The first was a book containing entries made by the defendant, and the latter consisted of the expert accountant's statement of entries extracted from the books in the presence of the accused, under his direction, showing shortages about which the auditor testified, and which he marked "doubtful," at the defendant's suggestion. The witness testified as to McCann's explanation of the items embraced therein, and it was at least evidence of the defendant's voluntary statements regarding his defalcations. In any event, his counsel removes the possibility of its prejudicial effect upon the jury, as it is said that the jurors did not see either of the exhibits mentioned.

Many other rulings of the trial court and admonitions of counsel have been carefully reviewed. We do not think they manifested bias on the part of the judge, or that they were such as to impress the jurors unfavorably to appellant in the impartial consideration of the defendant's cause. This conclusion equally applies to the complaint that no instructions were given on behalf of the defendant. No instructions were offered by the defendant, but we think those given were sufficiently comprehensive to inform the jury as to the law of the case.

The remaining assignments consist of asserted prejudicial remarks of the district attorney. However, no attempt is made to indicate why the parts of the argument to which reference is made are objectionable, or in what respect they could have injured the defendant's cause. In our examination of the record we have found no statements of the prosecutor which appear to us as having been capable of prejudicing his rights.

Our perusal of the whole record has not disclosed evidence of a miscarriage of justice, although, in considering the points raised in appellant's briefs, we have carefully scrutinized the record in its entirety.

The judgment and order denying a new trial are affirmed.

We concur: WORKS, P. J.; THOMPSON, J.

---

96 Cal. App. 640

In re OFFILL'S ESTATE. (Civ. 6347.)★

District Court of Appeal, Second District, Division 2, California. Feb. 6, 1929.

Rehearing Denied March 6, 1929.

1. Wills 🔑302(1)—Facts held to sustain conclusion that witnesses were properly requested to witness will (Civ. Code, § 1276).

That witnesses were present near foot of bed wherein testator was confined, and that attorney drawing will mentioned that such two persons would sign as witnesses, *held* sufficient to sustain conclusion that they were requested to sign according to legal requirement, as provided in Civ. Code, § 1276.

2. Wills 🔑302(1)—Evidence held sufficient to sustain conclusion that testator declared instrument to be his will (Civ. Code, § 1276).

Evidence *held* sufficient to sustain conclusion that decedent did declare to all present at time of signing, that instrument signed was his will, as required by Civ. Code, § 1276.

3. Wills 🔑302(1)—That witness signing will was present when it was drawn held to support conclusion that she was requested to sign (Civ. Code, § 1276).

That party signing will as witness was present in room with testator just prior to his death when pencil will was drawn, which she signed by request, and was also present when immediate subsequent will, drawn by attorney, was signed by testator, which such witness also signed, *held* to sufficiently support conclusion that she was requested to sign subsequent will propounded for probate, as provided by Civ. Code, § 1276.

4. Wills 🔑302(1)—Evidence held insufficient to show that witness signing will did not sign in testator's presence (Civ. Code, § 1276).

Evidence *held* insufficient, in application for probate of will, to show that certain witness did not sign in presence of decedent, as required by Civ. Code, § 1276, the testimony being that he stood, while signing, by foot of bed in which testator lay, there being no testimony from which it could be found whether witness and decedent were not in plain sight of each other.

5. Wills 🔑123(5)—Testator need not actually view witnesses signing will, but circumstances must allow view; such being meaning of word "presence" in statutory requirement (Civ. Code, § 1276).

Testator of will need not actually view the act of signing by attesting witnesses, but the circumstances must be such that the testator could have seen the signing; such being the meaning of the word "presence" in Civ. Code, § 1276, requiring that witnesses be present.

[Ed. Note.—For other definitions, see Words and Phrases, First, Second, and Third Series, Presence.]

6. Wills 🔑289—Testator found to be of sound mind held presumed to have been conscious of execution of will.

Where court specifically found testator to be of sound mind, presumption that testator remained of sound mind throughout execution of will justifies conclusion testator was not un-

---

★Rehearing denied.

conscious or asleep, whether propped up or lying back on bed in which he was confined during drawing of will, but was awake, conscious, and aware of what was going on.

7. Wills ⚷302(1)—Witness' testimony that he did not notice whether others were between him and testator when he witnessed will was insufficient to support finding that he did not sign in testator's presence (Civ. Code, § 1276).

In application for the probate of will, evidence *held* insufficient to support defendant's finding that certain witness signing will was not in presence of testator at time he signed will, as required by Civ. Code, § 1276, where he testified that he did not notice whether others in room at time were directly between him and testator at time such witness signed will, and that he did not notice line of vision.

Appeal from Superior Court, Los Angeles County; Reuben S. Schmidt, Judge.

Application by E. Louise Bell for the probate of the will of Mathias Walter Offill, deceased. Decree in favor of the contestant Addie O. Freeman denying the probate, and the proponent appeals. Reversed.

Nelson D. Miller, of Santa Monica (Anderson & Anderson, of Los Angeles, of counsel), for appellant.

Frankley & Spray, of Los Angeles, for respondent.

STEPHENS, Justice pro tem. A purported will of Mathias Walter Offill, deceased, was offered for probate under petition of E. Louise Bell, for letters with the will annexed. Addie O. Freeman, a daughter of deceased, contested the probate thereof on a number of separate grounds. Only three of the grounds of contest need be noticed herein, and they put in issue the points covered by the following references and quotations from the court's findings.

After hearing without a jury, the court found: That neither of the alleged witnesses "signed said purported will as attesting witnesses or witnesses in the presence of said decedent." That "said decedent did not at the time of or prior or subsequent to the subscribing of said purported will, declare to Ann Gambs, B. R. Darling and R. J. Darling, or any or either or all of them, that the instrument was his will." That "* * * * the decedent did not, by word or action, or in any manner whatever, request the said [witnesses] or either or any of them, to sign said purported will as attesting witnesses."

Based upon these points the court denied the probate of the will, and proponent appeals.

Decedent had been married twice. The contestant was the only surviving child of the first union. The second marriage was between decedent and a widow, the mother of several children. The determination of this contest will decide whether the surviving child shall take as an heir or share the estate with the decedent's stepchildren, as provided by the terms of the purported will.

The second wife, after many years of life with decedent, predeceased him by a month or so. The property affected by the will was held in joint tenancy. Shortly after her death he caused the stepchildren (his own daughter not then being in the home) to come into his room where he lay sick abed, and indicated to one of them that he desired to make a will; that he wanted a Mr. R. J. Darling or Mr. Pierce or anybody called in for witnesses. Mr. Darling and his son, B. R. Darling, responded. Decedent said he wished to leave his estate share and share alike to all. One of the stepdaughters, at decedent's request, wrote out these wishes by lead pencil, and decedent signed, and the paper was passed to the Darlings, who were standing at the foot of the bed, and they signed as witnesses. The nurse, Ann Gambs, also signed as a witness. The signing and witnessing of this will seemed to have been according to all of the legal requirements, but some one suggested that a lawyer should be called. Thereafter, an hour or more having elapsed, the same people (six, eight, or ten) again assembled in the sick man's room, and there was in addition a Dr. O'Flaherty, who was practicing medicine, but was also an attorney, although not in the active practice of the law. The doctor, who was not attending the sick man, had been induced to help out because a practicing lawyer could not be secured. He had partly prepared a will on the typewriter before leaving his office and before seeing the sick man, and copied by long hand in ink the devising part of the pencil will into a blank of his typewritten form and entered the sick room. Dr. O'Flaherty approached the bed, exhibited the document to the sick man, who was propped up by pillows and who was from time to time giving evidences of pain by groaning and moaning, and then read it aloud.

The testimony of Dr. O'Flaherty as to the signing, which is not varied from materially by other witnesses, is as follows:

"Q. Was the will read to him? A. After I took it away from him I read it to him specifically, just as it is written here, and asked him if that was his will. * * * And the old gentleman said 'Yes,' * * * So I told him that it would be necessary to sign the will in the presence of two witnesses who were standing at the foot of the bed, Mr. Darling and his son.

"The Court: Did you mention those names to Mr. Offill? A. I don't believe I did, your Honor, because I presumed that he knew who they were. He seemed to be all right. So he * * * took the pen and signed it after I read it to him, and I told Mr. Darling it would be necessary for him and his son to sign it in the presence of Mr. Offill."

The doctor then (and the younger Darling's testimony differs in some respects therefrom) stated that the Darlings were standing right up against the foot of the bed; that Mr. Offill was still sitting up in bed. Both of the Darlings signed above the foot of the bed, using a magazine to write upon. The will was again in the doctor's hands and he told Ann Gambs, the nurse, who had signed the pencil will, that two witnesses were sufficient, but she could sign too, and she did.

B. R. Darling testified:

"Q. Examine the signature, M. W. Offill. Was that signature signed in your presence? A. Yes, sir.

"Q. When and at what time? Where and at what time? Where was that signed? A. Why, in the bedroom. I don't remember the time of day.

"Q. Of what house? A. Mr. Offill's house.

"Q. In Santa Monica? A. Yes.

"Q. Examine the date and see if that is the date it was signed. (Showing paper to witness.) A. I think it is.

"Q. Did he sign in your presence? A. Yes.

"Q. Did you sign in his presence? A. Yes.

"Q. Did R. J. Darling sign in your presence? A. Yes.

"Q. And Ann Gambs? A. Yes.

"Q. And did R. J. Darling sign in the presence of the testator, Mr. Offill? A. Yes.

"Q. Mrs. Gambs signed in the presence of Mr. Offill? A. Yes."

The witness further testified that, when he signed the will presented by Dr. O'Flaherty, he took the will from his father, R. J. Darling, and, when he signed, two or three persons were between him and the foot of the bed; that he was standing some few feet back of the foot of the bed. He did not notice at the moment of signing whether the line of vision was clear between himself and Mr. Offill or not. He also testified in answer to the court's question:

"We signed at the foot of the bed."

"Q. By the Court: Where was Mr. Offill at that particular time—sitting up in bed or lying down? A. In bed. He laid back down. * * *

"Q. By the Court: Did you observe him at all after he actually appended his signature to that document? A. No."

The court then asked if he is to understand that Mr. Offill was placed flat in bed after signing, and the witness answered in the affirmative, and that he did not observe Offill at all after that. He further testified that he thinks the vision between himself and the testator was obstructed by the foot of the bed when he signed as a witness; that he was standing at the time, and some one held a magazine in his hand to rest the will upon as the witness signed. He estimated the bed as being 3 or 3½ feet high and the point at which the will was held on the magazine to be about 4 feet high; that Mr. Offill said nothing from the time he said "Yes" to the doctor's question until after the signing was completed.

Dr. O'Flaherty and the nurse testify that Mr. Offill sat propped up by pillows all of the time until after the signing by the witnesses, after which the pillows were taken away and he was laid back. Dr. O'Flaherty says that no one was between B. R. Darling and Offill at the moment of Darling's signing.

The nurse also testified: "Q. What did you actually see? A. He (B. R. Darling) went to hand it (the will) back, I presume, to Dr. O'Flaherty, he made this motion, and Mr. Offill he looked up, and he motioned to me; and I said, 'Might I sign this also?' And Dr. O'Flaherty said, 'Perhaps you better; you are the nurse; watched the case; perhaps you better sign too.' "

There was testimony by other witnesses. No other witness indicates that B. R. Darling was anywhere but at the foot of the bed beside his father when he signed. There is no other testimony (if B. R. Darling's testimony goes that far) to the effect that Mr. Offill was laid down off the pillows as soon as he signed. There is other testimony that he sat propped up and observed everything going on until after the three witnesses had signed. The evidence is uncontradicted that the bed was a steel Simmons bed, presumably of ordinary height.

Section 1276 of the Civil Code is as follows: "*Written Will, How to be Executed.* Every will, other than a nuncupative will, must be in writing; and every will, other than a holographic will, and a nuncupative will, must be executed and attested as follows:

"1. It must be subscribed at the end thereof by the testator himself, or some person in his presence and by his direction must subscribe his name thereto;

"2. The subscription must be made in the presence of the attesting witnesses, or be acknowledged by the testator to them to have been made by him or by his authority;

"3. The testator must, at the time of subscribing or acknowledging the same, declare to the attesting witnesses that the instrument is his will; and,

"4. There must be two attesting witnesses, each of whom must sign the same as a witness, at the end of the will, at the testator's request and in his presence."

This state of facts presents the question: Is there any considerable testimony to support conclusions (A) that at least two witnesses did not sign in the presence of the decedent; (B) that the decedent did not declare to at least two of the alleged witnesses that the instrument was his will; (C) that decedent did not in any manner request at least two of the alleged witnesses to attest his will as witnesses? There is ample evidence to support the proponent's claim that the required number of witnesses were requested to witness this instrument as decedent's will, and that they did so in the testator's presence. Is there evidence worthy of consideration in conflict with this view? If so, the judgment must be affirmed. If not, the judgment must be reversed. We shall approach the question, taking up the last-named phase first.

[1] C. We think that the fact that the two Darlings were present and signed the pencil will, and that they were also present near the foot of the bed when the propounded will was signed, and that the doctor mentioned the fact that these two persons present would sign as witnesses, is sufficient to sustain the conclusion that they were requested to sign according to the legal requirement, and we find no evidence to the contrary.

[2] B. We think the evidence briefly referred to herein, together with the answer "Yes" by decedent to the doctor's question as to whether or not the instrument was his will, is sufficient to sustain the conclusion that decedent did declare to all present at the time of signing that the instrument signed was his will, and we find no testimony to the contrary. "It is not necessary that the testator should have spoken words declaring the document to be his will, or that he should expressly request the witnesses to sign it as such. It is sufficient if this declaration and request are unmistakably indicated to the persons signing as witnesses by the testator's conduct and actions, although there is no declaration in words to that effect." Estate of Silva, 169 Cal. 116, at page 120, 145 P. 1015, 1016. See Estate of Dow, 181 Cal. 106, 183 P. 794, and cases therein cited.

[3] A. There is no evidence contradicting and no circumstance inconsistent with the nurse Ann Gambs' account of how she came to sign. She signed the first or pencil will in the immediate presence of the testator. She and Dr. O'Flaherty were close to the testator when the conversation took place as to her signing the second will. It is natural that the nurse should watch her patient carefully under the trying circumstances. There is every reason to believe, and apparently no reason to disbelieve, her testimony as to the sick man's "motion." But, disregarding the motion entirely, the circumstances surrounding the drawing of the will supports the conclusion that she was requested to sign.

[4] We think there is no evidence from which the conclusion could be drawn that R. J. Darling did not sign in the presence of decedent. The testimony is that he stood, while signing, by the foot of the bed, and there is no testimony from which it could be found, whether the decedent had been lain back upon the bed or still was propped up, that the two were not in plain sight of each other.

[5] The meaning of the word "presence" in the statutory requirement that "there must be two attesting witnesses, each of whom must sign the same as a witness, at the end of the will, at the testator's request and in his presence has been treated fully in the leading case of Estate of Dow, 181 Cal. 106, 183 P. 794, and supports the theory that the testator need not actually view the act of signing, but the circumstances must be such that the testator could have seen the signing. The English cases follow the same theory in the construction of a statute of similar nature." Shires v. Glasscock, 2 Salkeld, 688, 91 Eng. Rep. 584; Davy v. Smith, 3 Salkeld, 395, 91 Eng. Rep. 892.

[6] Mr. Justice Wilbur, in the Dow Case, supra, calls attention to the fact that a testator is presumed to be of sound mind throughout the execution of the will, and that this presumption justifies the conclusion that the maker of the will was not unconscious or asleep meanwhile. It may be recalled that the court in the instant case specifically found the testator to be of sound mind. Therefore the presumption comes to the aid of the testimony that the testator, whether propped up or lying back on the bed, was awake, conscious, and aware of what was going on.

[7] The only point remaining undisposed of is: Does the testimony support a finding that B. R. Darling was not in the presence of decedent when he signed as a witness to decedent's will?

In approaching the question, we know of no more apt words than those of Mr. Justice McFarland so often quoted from Field v. Shorb, 99 Cal. 661, 666, 34 P. 504, 505: "We are adverse to holding that a finding by a jury or trial court on an issue of fact is not warranted by the evidence, whatever we might think as to its preponderance, where there is presented a fair, reasonable ground for a difference of opinion, and where a conclusion either way could not be considered as the necessary result of the exercise of an unsound judgment. But where the great current of the evidence is against the verdict, and we cannot escape the conviction that it is wrong, we should not be deterred from setting it aside by the contention that one or two general statements or assertions of one or two witnesses bring the case within the rule which governs in cases where there is a *material* 'conflict of evidence.'"

In the case of In re Coburn, 11 Cal. App. 604, 620, 105 P. 924, 931, it is said: "We are fully aware that an appellate court will not reverse a finding if there is a substantial conflict in the evidence; but the evidence, in order to raise a conflict, must be such as to present a fair and reasonable ground for a difference of opinion. The finding or verdict must have meritorious support in the evidence. A few general statements without substantial reasons is not sufficient to raise a conflict." See, also, Smith v. Belshaw, 89 Cal. 427, at page 430, 26 P. 834; Wenban Estate, Inc., v. Hewlett, 193 Cal. 675, at page

693, 227 P. 723; Estate of Presho, 196 Cal. 639, 238 P. 944; Felsenthal v. Warring, 40 Cal. App. 119, at page 134, 180 P. 67; White v. Greenwood, 52 Cal. App. 737, at page 742, 199 P. 1095.

We also have in mind that no evidence as to the fact that the will truly expresses the testator's wishes can dispense with proper proof of every legal requirement in the making of the will. In re Walker, 110 Cal. 387, 42 P. 815, 30 L. R. A. 460, 52 Am. St. Rep. 104; Estate of Seaman, 146 Cal. 455, 80 P. 700, 106 Am. St. Rep. 53, 2 Ann. Cas. 726.

With these principles to guide us in studying the testimony, we have concluded that when B. R. Darling signed the propounded will he did so in the actual presence of decedent, and also, in legal contemplation, in the presence of decedent. His written attestation to the will states this to be a fact. In the early stages of his testimony in this case he affirms it. Later his testimony is somewhat uncertain, and he explains: "But it made me feel so bad to go in there and see an old man—I had never witnessed anything like that before—that I was flustered, I guess." His testimony as to his position when signing the instrument is not definite and out of accord entirely with the testimony of all the other witnesses. The same is true of his testimony to the effect that there were persons between himself and the bed occupied by the testator at the moment of signing, and not consistent with his own testimony, for he concludes on that subject as follows:

"The Court: Who was standing between you and the foot of the bed? A. I don't remember.

"The Court: How many people do you recall? A. It seemed like three or four.

"The Court: Were they directly between you and Mr. Offill at that particular time? A. I didn't notice.

"The Court: Your line of vision? A. I did not notice."

It seems to us that the final assertion that he did not notice that persons who were standing between him and the foot of the bed were or were not in the line of vision between himself and the testator leaves that point without any evidence at all.

The testimony about the obstruction of the vision by the foot of the bed seems wholly destroyed by the court's clear examination, but, aside from that, it is out of line of all of the other testimony and with the admitted physical facts. Felsenthal v. Warring, supra. The witness was standing at or near the bed foot, writing. He was writing on a book held by some one for him. The bed was not a structure of wooden head and foot board, but was a steel bed of common manufacture. Evidence, if it is evidence, of no greater probative nature than that can be of no use at all where there is clear evidence negativing it. To borrow an expression from the opinion in Wenban Estate, Inc., v. Hewlett, supra, the testimony "is so nebulous and evanescent as to render it nothing more than a mere pretense of evidence."

At best, the evidence of B. R. Darling is self-contradictory, uncertain, and by his own admission indefinitely recalled from a "flustered" mental reception of the facts as they occurred.

In our opinion, the evidence does not support the court's finding that B. R. Darling was not in the presence of the testator when he signed as a witness to the will.

The judgment is reversed.

We concur: WORKS, P. J.; THOMPSON, J.

206 Cal. 439

SHIPLEY v. JORDAN et al. (S. F. 12735.)

Supreme Court of California. Feb. 8, 1929.

1. Executors and administrators 🔑315(5)—Powers and duties of trustees regarding trust property under will are measured by decree of distribution transferring property.

Powers and duties of trustees in regard to trust property devised by will are to be measured by terms of decree of distribution by virtue of which trustees received property in trust for city.

2. Executors and administrators 🔑315(5)—Will held merely evidence aiding in distributing estate, and was entitled to no further consideration after decree of distribution, except on direct appeal therefrom.

Will *held* merely evidence before court sitting in probate when called on to determine how estate should be distributed, but was entitled to no further consideration after entry of decree of distribution for purpose of determining rights of parties interested in estate, except on direct appeal from decree.

3. Evidence 🔑413—Will offered to explain testator's intention, in action to enjoin unauthorized expenditure by trustees, held properly excluded as varying decree of distribution.

In action to enjoin trustees under will from alleged unauthorized expenditure of trust funds for erection of library, will offered to explain testator's intention and nature of trust was properly excluded, on objection that evidence of will varied decree of partial distribution and was not within issues.

In Bank.

Appeal from Superior Court, Monterey County; Fred A. Treat, Judge.

Action for injunction by Lotta A. Shipley against John B. Jordan and others. Judgment for defendants, and plaintiff appeals. Affirmed.

C. F. Lacey, of Salinas, for appellant.

J. A. Bardin, of Salinas, and Argyll Campbell, of Monterey, for respondents.

WASTE, C. J. The plaintiff appeals from a judgment refusing to enjoin, temporarily or permanently, the defendants, who are the trustees of Carmel-by-the-Sea, a municipal corporation, and trustees under the will of Ella Reid Harrison, deceased, from an alleged unauthorized expenditure of a $20,000 trust fund for the erection of a library building upon property devised to the city for that pur-

---

🔑For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

pose, and to be known as the "Ralph Chandler Harrison Memorial Library." Plaintiff alleges that the city trustees, disregarding the terms of the trust, intend to construct a nonfireproof frame building instead of a "fireproof construction and of Spanish style of architecture."

In their answer the defendants admit that, as trustees under the will of Mrs. Harrison, they intend to expend the sum of $20,000 in the construction of "a frame-stucco building, with a tile roof, and of architecture suggestive of the Spanish," but deny that the proposed construction is contrary to the terms upon which the trust fund was bequeathed and distributed. They specifically plead that portion of the decree of distribution in the estate of Mrs. Harrison which distributes to the board of trustees of the city of Carmel-by-the-Sea twenty $1,000 bonds, certain real property in that city, a large number of books, etchings, curios, and furniture, as follows: "In trust to said Board of Trustees of the City of Carmel-by-the-Sea, and its successors, for the following eleemosynary purposes, namely: To build, construct, equip and maintain a public library building and to conduct and maintain a library service in the City of Carmel-by-the-Sea, with and by the property hereby distributed and the proceeds, issues and profits thereof, for the use, benefit and upon behalf of the people, generally, of the City of Carmel-by-the-Sea, which said public library building shall be known as 'Ralph Chandler Harrison Memorial Library.'"

On the trial of the cause this decree was introduced in evidence. Certain evidence, including the will of Mrs. Harrison, was offered by the plaintiff as explanatory of the testator's intentions and the nature of the trust. The testimony was objected to by the defendants on the ground that it was incompetent, irrelevant, and immaterial, and offered for the purpose of impeaching and varying a decree of partial distribution, and not within the issues. The objection was sustained. Injunctive relief was denied. The correctness of the court's ruling in regard to the proffered testimony presents the only question for consideration on this appeal.

[1] The ruling of the trial court excluding the evidence was correct, and the judgment must be affirmed. The decree of distribution is the instrument by virtue of which the defendants have received the property in trust for the city. Their powers and duties in regard to that property are to be measured by its terms. Goad v. Montgomery, 119 Cal. 552, 557, 51 P. 681, 63 Am. St. Rep. 145.

[2, 3] There seems to be some uncertainty as to whether or not the will was actually admitted in evidence. Whether it was or not does not change the situation. The will was merely evidence before the court sitting in probate when it was called upon to determine how the estate should be distributed, but upon the entry of the decree of distribution that decree became the measure of the rights of the parties interested in the estate, and the will was entitled to no further consideration for that purpose except upon a direct appeal from the decree. In re Trescony, 119 Cal. 568, 570, 51 P. 951.

The judgment is affirmed.

We concur: RICHARDS, J.; SHENK, J.; SEAWELL, J.; CURTIS, J.; PRESTON, J; LANGDON, J.

---

206 Cal. 441

CRAIG v. WHEELER et al. (L. A. 10464.)

Supreme Court of California. Feb. 8, 1929.

Judgment 🔑725(4)—Judgment in prior action determining that foreclosure was valid held conclusive in action to quiet title.

Where it was adjudged, in action to quiet title, that plaintiff had no right in premises involved, rendering judgment that decree of foreclosure in favor of one of defendants, made and entered in another action to which plaintiff was not a party, was void, in which case an appeal had been taken which determined that judgment of foreclosure was not void, but constituted a valid judgment, *held* reversible error.

In Bank.

Appeal from Superior Court, Los Angeles County; A. C. Finney, Judge.

Action to quiet title by Lee Craig against Helen Reehl Wheeler and others. Judgment adverse to plaintiff and named defendant, and the latter appeals. Reversed as to portion of judgment appealed from.

Bicksler, Smith & Parke, of Los Angeles, for appellant.

L. E. Dadmun, of Los Angeles, for respondent.

RICHARDS, J. This action as originally commenced by the plaintiff was one to quiet title to a lot situate in the city of Los Angeles, of which he alleged himself to be the owner and in possession, and further alleged that the defendants claimed some right, title, and interest in said premises which were without right or value; wherefore the plaintiff prayed judgment quieting his title as to the defendants. The defendant Helen Reehl Wheeler, by her answer to said complaint, denied that the plaintiff was or ever had been the owner of said lot or any portion thereof or that he was ever in possession thereof or any part thereof. The said defendant further set forth that she was the owner of said premises by virtue of the fact that one Frances May Craig, a former owner thereof, had made and executed to said defendant a mortgage upon the property in due form to secure a loan of $4,000, which mortgage had been foreclosed by said defendant by decree of foreclosure duly given and made in said action; that said premises had been sold under and by virtue of said decree, and that said defendant had become the purchaser thereof at the foreclosure sale; and that in due course a sheriff's deed to the premises had been duly and regularly executed to her, by virtue of which deed she had become the owner in fee of the same.

The defendant Wheeler also filed a cross-complaint against her codefendant, Mabel King Fallis, alleging that the latter was claiming some right, title, and interest in the premises, which claim was without merit, and prayed for a judgment quieting her title against her said codefendant. The defendant Mabel King Fallis failed to answer the complaint of the plaintiff or the cross-complaint of her codefendant, and her default was duly entered. Thereafter plaintiff filed an amended complaint, wherein he set forth that he was the owner in fee of said premises by virtue of the fact that he was the husband of said Frances May Craig and that said property, while standing in the name of Frances May Craig, was at all times the community property of himself and said Frances May Craig, and that the same was such at the time that Frances May Craig borrowed from the defendant Helen Reehl Wheeler the sum of $4,000 and gave the mortgage above referred to upon the premises for the security thereof; that the money was borrowed and the mortgage given without the knowledge or consent of the plaintiff, but that as to the mortgagee she was aware at the time of taking the same that the plaintiff and Frances May Craig were husband and wife, and that the latter had no authority to make or execute said mortgage. The plaintiff further set forth at length the facts relating to the foreclosure of the mortgage, and stating in hæc verba the several steps taken by the mortgagee thereof to procure the publication of summons in said foreclosure action, together with the order for such publication, and, having set forth these matters in detail, he alleged that the order for publication of summons was void, and that the judgment thereafter rendered in said foreclosure action was also void upon its face, and that the defendant Helen Reehl Wheeler derived no right or title to the property by virtue of the sheriff's deed which had followed such foreclosure. Wherefore said plaintiff prayed judgment quieting his title against both the defendants in said action. A stipulation was presently filed to the effect that the answer of Helen Reehl Wheeler to the original complaint should stand as her answer to the amended complaint of plaintiff, and that all new matter contained therein was to be deemed denied. The cause came on for trial upon the issues as thus presented, and upon its submission the trial court made its findings of fact and conclusions of law, wherein it found that the allegations of the plaintiff in both his original and amended complaint with respect to his ownership of the premises in question were untrue, and that he did not have, and never had, any right, title, or interest in said premises. The court further found that the defendant Mabel King Fallis had no right, title, or interest therein. The court then proceeded to find that the right, title, and interest of the defendant Helen Reehl Wheeler in said premises consisted originally in her interest therein derived from the aforesaid mortgage which had been duly executed to her by Frances May Craig, who, at the time of the execution of the same, was the owner of said premises as her sole and separate property. The court further found the facts in detail with respect to the foreclosure of said mortgage, finding the detailed steps taken in the foreclosure as set forth in the plaintiff's amended complaint to be true. As conclusions of law from the foregoing findings of fact the trial court found, first, that the plaintiff had no right, title, interest, possession, or right of possession in or to said premises or any portion thereof, and was entitled to take nothing by his action; second, that the judgment and foreclosure in the action brought by the defendant Helen Reehl Wheeler against Frances May Craig and others, was by reason of the facts set forth in its aforesaid findings of fact void. The trial court thereupon made and entered its judgment in accordance with its aforesaid conclusions of law. From this singular judgment the plaintiff has taken no appeal. The defendant Helen Reehl Wheeler has, however, appealed from that portion of the judgment wherein it was adjudged and decreed "that the judgment and decree of foreclosure of the superior court of the state of California in that certain action entitled Helen Reehl Wheeler, plaintiff, against Frances May Craig, Jack Cady, R. Whiston and Charles McGee, defendants, being cause Number 158845, is void."

The plaintiff has filed no brief in response to the appeal of the defendant Helen Reehl Wheeler from that portion thereof above set forth. It is difficult to understand why the trial court, having found and adjudged that the plaintiff had at no time any right, title, interest, or possession in or to said premises, or any portion thereof, should have found it necessary or proper to determine that the decree of foreclosure in favor of Helen Reehl Wheeler, made and entered in another action to which the plaintiff herein was not a party, was void. But, however that may be, a sufficient reason for a reversal of the judgment which the court made and entered is to be found in the fact that in the case of Helen Reehl Wheeler v. Frances May Craig et al., above referred to, and in which case an appeal was taken to this court, we have heretofore decided that the judgment of foreclosure made in said action upon substituted service was not void, but that the same constituted in all respects a valid judgment. This decision, filed on January 12, 1929, has become final, and is to be found in (Cal. Sup.) 273 P. 558, and it is determinative of the present appeal. Said judgment having thus been found to be valid, it follows that the conveyance of said premises to the plaintiff in the action by sheriff's deed made in pursuance of the judgment of foreclosure invested the plaintiff Helen Reehl Wheeler in said action and the defendant and appellant in this action with the title to the premises, and that she would have been entitled in this action to have had her aforesaid title and ownership of said premises acquired thereby upheld if in this action she had prayed for such affirmative relief as against the plaintiff and respondent herein. As it is, however, she is probably fully protected in her ownership of said premises by the determination in her favor of the former appeal.

The judgment as to that portion thereof appealed from herein is reversed.

We concur: WASTE, C. J.; SEAWELL, J.; SHENK, J.; CURTIS, J.; LANGDON, J.; PRESTON, J.

206 Cal. 456

STERN & GOODMAN INV. CO. v. DANZIGER et al. (FREELAND et al., Interveners). (L. A. 10623.)

Supreme Court of California. Feb. 11, 1929.

1. Appeal and error 🔑79(2)—Orders dismissing interveners' complaints held final and appealable as to interveners.

Orders dismissing complaints in intervention in action to quiet title *held* final and appealable as to the interveners.

2. Appeal and error 🔑612(2)—Clerk of trial court alone may authenticate judgment roll, order appealed from, and notice of appeal (Code Civ. Proc. § 951).

The clerk of trial court alone may authenticate the judgment roll order appealed from and the notice of appeal under Code Civ. Proc. § 951, providing that appellant must furnish court with copy of notice of appeal of judgment or order appealed from and of papers used on hearing in trial court on appeal from judgment rendered on an appeal or from an order except one granting new trial.

3. Appeal and error 🔑143—Interveners, whose complaints in intervention were dismissed, held to have no appeal from judgment rendered in action to quiet title.

Where complaints of interveners in action to quiet title were dismissed, interveners *held* to have no appeal from judgment rendered in action; they having been unsuccessful as interveners, so that record tendered by them purporting to be three judgment rolls on appeal from order dismissing complaints in no way concerned interveners.

4. Appeal and error 🔑874(1)—Where appeals from orders dismissing complaints in intervention were taken before there could legally be judgment roll and only record tendered was judgment roll, review was precluded; only authenticated papers being orders and appeal notices (Code Civ. Proc. §§ 951, 953a; Supreme Court Rule 29).

Where orders dismissing complaints in intervention and appeals taken therefrom were prior to time there could legally be judgment roll in action to quiet title, on appeal from order dismissing the complaints in intervention, where record entered purported to be three judgment rolls, the only two papers authenticated, as required by Code Civ. Proc. §§ 951 and 953a, and Supreme Court Rule 29, in the record tendered, are the orders and notices of appeal therefrom, so that no record exists upon which orders may be reviewed.

5. Parties 🔑42—Interveners claiming only from or under defendants already in default in action to quiet title were precluded from intervening as matter of right; default being equivalent to "trial" (Code Civ. Proc. § 387).

Where interveners appealing from order dismissing their complaints in intervention in action to quiet title claimed only from or under defendants already in default, they were precluded from intervening as matter of right; default being equivalent to "trial," within meaning of Code Civ. Proc. § 387.

[Ed. Note.—For other definitions, see Words and Phrases, First, Second, and Third Series, Trial.]

In Bank.

Appeal from Superior Court, Los Angeles County; Leon R. Yankwich, Judge.

Action to quiet title by the Stern & Goodman Investment Company against Ed Danziger, in which the Graceland Development Company and others intervened. Judgment for plaintiff, and orders dismissing the complaints in intervention, and the interveners appeal from a dismissal of their complaints. On motion to dismiss appeal. Orders affirmed.

J. M. Danziger, of Los Angeles, for appellants.

Joseph L. Lewinson, Jerry Powell, and Frank L. Kostlan, all of Los Angeles, for respondent.

PRESTON, J. In this cause the orders of dismissal are affirmed, but without costs to any party to this action. We exercise this power because upon no possible ground could the appeals be sustained. Sonoma M. Co. v. National Mag. P. Co., 189 Cal. 433, 434, 208 P. 962.

[1, 2] Respondent bases a motion to dis-

miss the appeals from said orders upon the claim that the orders are nonappealable under the statute. This contention is erroneous. The orders dismissed the complaints in intervention; hence as to the interveners they are final and appealable. Dollenmayer v. Pryor, 150 Cal. 1, 87 P. 616; Britt v. East Side, etc., Co., 25 Cal. App. 231, 143 P. 244; Howe v. Key System, 198 Cal. 532, 246 P. 39.

But the appellants are without any record whatsoever to support their appeals. From certain papers certified by the clerk only, we get the following assumed facts: The action is by plaintiff corporation to quiet title to certain real property in Los Angeles county. The trustees of two certain corporations alleged to be defunct are made defendants, as is one Foster, alleged to be an attaching creditor upon the interest of one of the said corporate claimants to the property in suit. The two corporations defaulted. A demurrer to the answer of said Foster was sustained without leave to amend. Later judgment passed for the plaintiff.

After the defaults of the corporate defendants had been duly entered, efforts to have them set aside failed. Graceland Development Company, a corporation, then upon an ex parte order of the court, was allowed to intervene. It alleged merely succession to the rights of one of the defunct corporations in the property under a written contract, the tenor of which was not set forth, ending with the allegation that said predecessor had performed all covenants thereunder. Milton P. and Mamie Freeland were next allowed to intervene upon an ex parte order of the court, while the record was as above indicated, and were allowed to set up certain claims to lots deeded them by the other defunct corporation, described as per certain maps alleged to be official and to delineate the subdivision in a specified manner of the property in suit as a cemetery and mausoleum park. In effect, this complaint sought to adjudicate the legality of said maps.

Later, and on March 20, 1928, the court vacated these orders and dismissed both complaints in intervention, basing such action, no doubt, upon the fact that, after said defaults, the intervention was too late, especially as the parties were claiming solely as successors to or under said defendants in default. Appellants filed their notices of appeal on March 21, 1928. The court, however, did not enter final judgment until March 28, 1928. The proceedings granting the orders permitting intervention and the proceedings resulting in said later dismissals are in no wise authenticated, either by bill of exceptions or by a proceeding under section 953a of the Code of Civil Procedure, commonly called a reporter's transcript. See Code of Civil Procedure, § 951, and rule 29 of the Supreme Court.

The judge of the court below authenticates no paper presented as part of the transcript. There are but three things the clerk alone may authenticate, viz. the judgment roll, the order appealed from, and the notice of appeal. Code Civ. Proc., § 951; Martin v. Pacific Gas & Electric Co., 195 Cal. 544, 546, 234 P. 321; Jeffords v. Young, 197 Cal. 224, 227, 239 P. 1054. The signature of the trial judge is necessary to authenticate a record under section 953a, supra. Bell v. Brigance, 194 Cal. 448, 229 P. 27. The same is, of course, true of a bill of exceptions. Sections 650, 651, Code Civ. Proc.

[3, 4] The record tendered purports to be three judgment rolls. How in any one case more than one judgment roll can exist is not explained, but appellants cannot be concerned about judgment rolls, whether they be many or few, for, as unsuccessful interveners, they have no appeal from the judgment. They are not aggrieved by it. The position of these parties is well considered in People v. Pfeiffer, 59 Cal. 89, 91, where it is said: "The appellant was not a party to the action in the court below, because his suit to be made a party was rejected, nor was he injured by the judgment. And what he claims to have been a final judgment was not a judgment against him. He was neither a party nor privy to it. It did not affect his rights; and he was in no way prejudiced by it. Hibernia S. & L. Soc. v. Ordway, 38 Cal. 680; South's Heirs v. Hoy, 3 Bibb (Ky.) 523."

Again, these orders were given and appeals taken before there could legally be a judgment roll; therefore the only two papers authenticated in the record tendered us are the orders and notices of appeal therefrom. Under this situation manifestly no record exists upon which the orders may be reviewed. The minute orders and notices of motion shown here are never authenticated by the clerk. Brown v. Canty, 31 Cal. App. 184, 159 P. 1056. But this observation is equally true in the present situation of the complaint and all other papers therein other than the orders themselves and notices of appeal, as above noted.

This proposition was well disposed of by the language of the late Justice Hart in the case of Britt v. East Side Hardware Co., supra, where at pages 232, 233 of 25 Cal. App. (143 P. 245), it is said: "While an order disallowing an intervention amounts in legal effect to a final judgment as to the proposed intervener (Dollenmayer v. Pryor, 150 Cal. 1, 87 P. 616), it seems to be settled that, where an appeal is taken from such order, the record thereon must be authenticated by a bill of exceptions containing all the papers and documents used in that particular proceeding and upon which the trial court acted in making the order. This conclusion is in accord with rule XXIX of the Supreme Court (160 Cal. lvi, 119 P. xiv), which provides: 'In all cases of appeal from the orders of the superior court, the papers and evidence used or taken on the hearing of the motion must be authenticated by incorporating the same in a bill of exceptions, except where another mode of authentication is provided by law.' We know of no other mode provided by law for authenticating the record on a motion such as the one resulting in the order from which this appeal has been taken than by a bill of exceptions. It can hardly be said that there is, within the contemplation of section 670 of the Code of Civil Procedure, a judgment roll in a proceeding on a motion for leave to intervene in an action, where the motion has been denied; hence, the certificate of the clerk of the trial court, certifying that 'the foregoing is a true copy of the transcript of the judgment roll in the above entitled cause' is not an authentication of the record on the motion. There is, in strictness, no judgment roll until the action has been tried and a decision therein reached on the merits. We cannot, therefore, conceive how it could be held that the certificate of the clerk to a record of the nature of the one before us can amount to anything, in so far as it purports to be evidence of the authenticity of such record. As stated, the only proper mode for authenticating a record on an appealable order is by a bill of exceptions, as required by rule XXIX of the Supreme Court. (160 Cal. lvi, 119 P. xiv.) It follows that all that we are authorized to review on this appeal are the papers and documents embraced in and authenticated by the bill of exceptions which is printed in the transcript. In other words, we cannot, in the consideration of this appeal, examine the pleadings of the original parties or any other documents contained in the transcript that are not embodied in the bill of exceptions. Thus confined in our consideration of the record before us, we cannot say that the court below erred in refusing to permit the appellant to intervene in this action."

[5] But, treating the papers tendered as a proper and complete transcript, the orders appealed from must be sustained. As noted above, the interveners claim only from or under defendants already in default. This precludes them from intervening as a matter of right Default in this instance is equivalent to trial within the meaning of section 387 of the Code of Civil Procedure. See Hibernia, etc., v. Churchill, 128 Cal. 633, 61 P. 278, 79 Am. St. Rep. 73. This is especially true where the party seeking to intervene is merely the successor to or claims under the party in default. Martin v. Lawrence, 156 Cal. 191, 193, 103 P 913. See, also, Mack v. Eummelen, 31 Cal. App. 508, 160 P. 1096.

We concur: WASTE, C. J.; SHENK, J.; RICHARDS, J.; CURTIS, J.; LANGDON, J.; SEAWELL, J.

206 Cal. 445

COPE v. SUTTER COUNTY. (Sac. 3963.)

Supreme Court of California. Feb. 9, 1929.

1. Counties 🔑127—County board of supervisors could not rescind contract with engineer for preparation of bridge plans and specifications, in absence of compliance with statute (Pol. Code, § 4041).

County board of supervisors could not rescind contract with engineer for preparation of plans and specifications for extension of bridge after engineer's preparation of two sets of plans, where there was no compliance with Pol. Code, § 4041, empowering board to reject lowest bid and order work done under supervision of county surveyor or engineer.

2. Counties 🔑129—Fact that bridge plans contained corporation's name held not to warrant finding that they were not prepared by engineer hired for that purpose.

In action by engineer against county for county's breach of contract to hire engineer to prepare plans and specifications and superintend construction of bridge, fact that name of corporation appeared on plans and specifications did not warrant court's finding that plans were not prepared by defendant, where his testimony that he prepared them was not contradicted.

3. Counties 🔑129—Finding that bridge plans submitted by engineer to county supervisors were incomplete and objectionable held not sustained, where supervisors ordered payment of substantial sum on plans submitted.

Finding, in action by civil engineer against county for breach of contract to employ him for preparing plans and specifications and superintending construction of bridge, that plans furnished were incomplete and not acceptable to county supervisors, was not sustained, where evidence showed that $2,000 was ordered to be paid engineer after submission of plans, and $2,000 after amendments thereto, and where plans were not rejected, but merely disregarded by supervisors.

4. Counties 🔑127—County held not entitled to terminate at will contract for employment of engineer to superintend construction of bridge.

County board of supervisors *held* not entitled to terminate at will contract employing engineer to prepare plans and specifications for, and to superintend construction of, bridge, where there was no provision in contract permitting county to discontinue the work or discharge the engineer.

5. Counties 🔑129—County which disregarded engineer hired to submit plans and superintend construction of bridge, and built bridge under others' plans, held liable for breach of contract.

County, having employed civil engineer to prepare plans and specifications for, and to superintend construction of, bridge, *held* liable for breach of contract to engineer, who submitted plans, and was ready to carry out his part of contract, where board of supervisors went ahead with building of bridge under plans submitted by county surveyor without declaring engineer's work insufficient or engineer incompetent.

6. Counties 🔑113(2)—Contract of old board of county supervisors, executed after election, held binding on newly elected board.

Contract of old board of supervisors, made between time new board was elected and the time such new board took office, was binding on the new board and was not against public policy as depriving new board of its legislative function since in legal contemplation the new board is identical with board entering into contract.

7. Counties 🔑122(1)—County's contract for employment of one not licensed architect for preparation of plans for bridge held valid (Pol. Code, § 4041).

Contract between county supervisors and civil engineer for preparation of plans and specifications and estimates for proposed bridge *held* not void on ground that engineer was not a licensed architect, since Pol. Code, § 4041, gives supervisors general authority to employ any one thought to be competent to do the work.

8. Counties 🔑129—Engineer held entitled to damages for contract price less cost of performance on county's repudiation of contract hiring him to prepare plans and superintend construction of bridge.

Civil engineer, who proved contract with county engaging him to prepare plans and specifications and to superintend construction of bridge, performance thereof on his part by preparing the plans and offering to superintend construction, and county supervisors' refusal to proceed with their part of contract, established prima facie case, entitling him to damages, in suit against county for full contract price, less the cost of performance.

9. Counties 🔑129—Burden to prove mitigation of engineer's damages on county's breach of contract employing him to superintend construction of bridge was on county.

Where engineer, employed by county to prepare plans for, and superintend construction of, bridge, proved performance of contract on his part and county's repudiation, burden to prove facts in mitigation of damages, representing the full contract price, less cost of performance, was on county.

In Bank.

Appeal from Superior Court, Sutter County; K. S. Mahon, Judge.

Action by Erle L. Cope against the County of Sutter. Judgment for defendant, and plaintiff appeals. Reversed, with directions. Superseding opinion in 267 P. 141.

Joe G. Sweet and Hadsell, Sweet & Ingalls, all of San Francisco, for appellant.

Arthur Coats and Lawrence Schillig, both of Yuba City, and W. H. Carlin, of Marysville, for respondent.

CURTIS, J. This action, originally appealed to this court, was subsequently transferred to the District Court of Appeal in and for the Third Appellate District. That court rendered an opinion reversing the judgment, and a petition was filed in this court asking for a hearing herein, which petition was granted. At the time of the consideration of said petition by this court, we were in doubt as to the effect of section 4041 of the Political Code upon the right of the board of supervisors to rescind a contract entered into by said board with the plaintiff and hereinafter set out. The order for a transfer was made largely for the purpose of giving opportunity for further consideration of the effect of said section 4041 upon the rights of the parties under said contract.

By this contract of December 5, 1922, the plaintiff was employed by the board of supervisors of the defendant to prepare plans and specifications for the extension of the Nicolaus bridge situate in said county. After two sets of plans had been prepared by him and submitted to the board of supervisors, the board, without rejecting either of said sets of plans, passed a resolution directing the county surveyor of said county to prepare plans for said bridge, and upon plans, so prepared by the county surveyor, the board of supervisors, after advertising for bids, let the contract for the construction of said bridge, and under this contract the bridge was constructed according to the plans prepared by said county surveyor.

[1] Section 4041 of the Political Code provides that after the board of supervisors has adopted plans for the construction of a bridge, or other improvements therein mentioned, and has advertised for bids, as required by said section, "if the board of supervisors shall be advised by the county surveyor or engineer that the work can be done for a sum less than the lowest responsible bid, it shall then be their privilege to reject all bids and to order the work done or structure built by day's work, under the supervision and direction of the said surveyor or engineer." It is apparent that the provisions of this section of the Code have no bearing upon the rights of any of the parties to the present action. The board of supervisors made no attempt to proceed under the terms of the section just quoted. Had it done so, a different question might be presented for our determination. The facts before the court, as will more clearly appear from their discussion hereinafter, show that the members of the board after entering into the contract with plaintiff, and after plaintiff in accordance with said contract had prepared two sets of plans for the construction of said bridge, changed their minds and determined to have the county surveyor instead of the plaintiff prepare said plans. There is nothing to be found in the provisions of said section 4041 of the Political

Code that would in any way justify this course of action on the part of the board of supervisors.

The board was given "the privilege" of constructing the bridge under the direction of the county surveyor and by day's labor only after bids had been received, and the county surveyor had advised the board that the improvement could be constructed for a sum less than the lowest bid. The evidence shows that the proceedings for the construction of said bridge had never reached that stage after which the board would have been authorized to act under the privilege provided for by said section, and, furthermore, that the board never attempted to act under the authorization of said privilege. Therefore, the provisions of said section 4041 cannot in any way afford defendant any defense to said action.

All other questions presented on this appeal are sufficiently dealt with and satisfactorily determined in the opinion of the District Court of Appeal written by Justice pro tem. Preston, while acting as a member of said court. This opinion we adopt as the opinion of this court, and it is as follows:

This is an appeal by plaintiff, Erle L. Cope, from a judgment in favor of defendant, County of Sutter, in an action brought by plaintiff to recover damages for breach of contract.

The plaintiff and appellant is a civil engineer. On December 5, 1922, he was employed by the board of supervisors of Sutter county to prepare plans and specifications for, and to superintend the construction of, a bridge to be built by the county and known as "Nicolaus causeway." The contract of employment was in writing, and is as follows:

"This agreement made and entered into this 5th day of December, 1922, by and between Erle L. Cope, of Berkeley, Cal., and A. E. Schellenger, acting for and on behalf of the county of Sutter, and in the capacity of chairman of the board of supervisors of Sutter county, witnesseth:

"That, whereas it is necessary to extend the Nicolaus bridge from the present truss spans westerly to the river levee; and

"Whereas, at a regular meeting of the board of supervisors of the county of Sutter held on the 15th day of November, 1922, said board of supervisors decided to build this extension of reinforced concrete, and instructed Erle L. Cope to prepare plans and specifications for and to have borings made for said bridge; and

"Whereas, at a regular meeting of said board held on the 5th day of December, 1922, the chairman of the board was authorized to enter into a contract with Erle L. Cope, civil engineer, to draw plans and specifications and to superintend the construction of said bridge:

"Now, therefore, said Erle L. Cope hereby agrees to and with said county of Sutter to draw all plans and specifications and superintend the construction of a reinforced concrete bridge from the end of the present truss spans of the Nicolaus bridge westerly to the river levee, said bridge to be complete in all respects, including approaches, and to be in accordance with the requirements of the state reclamation board. Said plans and specifications to include copies not exceeding fifteen (15) in all, and to be complete with drawings and working plans in all respects for receiving bids for such construction.

"It is understood that by superintendence is meant that said Erle L. Cope shall make a visit to said bridge during the building thereof as often as required, and that he will at all times give his advice to said board concerning the construction of said bridge.

"And it is further understood that the inspectors on construction shall be selected by, and work under the direction of, said Erle L. Cope, and shall be paid by the county of Sutter.

"It is further agreed that, if said board chooses to make alterations or extensions in connection with said bridge, said Erle L. Cope will provide plans and specifications for such work, and shall superintend the same.

"And said county of Sutter, acting by and through the chairman of said board, hereby agrees that if, said Erle L. Cope shall fulfill all the terms and agreements of his employment herein contained, then it will pay said Erle L. Cope six (6) per cent. of the cost, said cost is understood to be the lower of engineer's estimate or accepted bids of said bridge with approaches as follows, to wit: Two thousand ($2,000) dollars on February 6, 1923, or on such earlier date that plans and specifications may be adopted by said board of supervisors; two thousand ($2,000) dollars on June 4, 1923; and the balance thereof monthly when payment is made for labor or materials, in the proportion that said payment bears to the total cost of the work.

"In witness whereof said parties have hereunto set their hands this 5th day of December, 1922. Erle L. Cope. A. E. Schellenger, as Chairman of the Board of Supervisors of the County of Sutter."

In accordance with the terms of this agreement, the appellant prepared plans and specifications and estimates of cost for the construction of this proposed bridge and also, at the request of said board of supervisors, prepared amended or supplemental plans and specifications, etc. The original plans and specifications, and estimates of costs, were filed with the said board of supervisors on February 6, 1923. The amended plans, specifications, and estimates were prepared by the appellant and filed with said board on March 5, 1923. None of these plans and specifications, etc., have ever been rejected, nor does it appear from the record that any of them were actually approved or adopted by said board of supervisors. The testimony shows that the two sets of plans and specifications were merely "ordered filed and taken under advisement by the board."

After appellant filed the original plans and specifications on February 6, 1923, he presented his claim to said board for $2,000; it being the first payment called for under the contract. The board passed the claim and ordered it paid, but the auditor refused to draw his warrant upon the treasurer therefor, and appellant instituted mandamus proceedings against the auditor, in which proceedings appellant finally prevailed, and received from the county this payment of $2,000. Cope v. Flannery, 70 Cal. App. 738, 234 P. 845.

After the decision in Cope v. Flannery, the second payment of $2,000, called for in the contract, was allowed by the board of supervisors, and paid by the auditor without litigation. Therefore, up to date, appellant has received $4,000 on account of said contract.

After filing the amended plans and specifications in March, 1923, appellant attended many meetings of the board of supervisors and insisted that he be allowed to proceed with his contract. He also wrote many letters to the board, requesting that he be allowed to proceed with the contract and superintend the construction of the bridge. The board of supervisors, however, entirely ignored appellant and his plans and specifications and said contract, and on January 7, 1924, passed the following resolution:

"On motion, it was ordered that William Shearer, the county surveyor, be and he is hereby instructed and directed to prepare plans for a grade and bridge across Barrow Pit, at the approach of Nicolaus bridge."

Thereafter, plans and specifications were prepared by Mr. Shearer, the county surveyor, adopted by the board, and the bridge was constructed according to such plans and specifications at a cost of $169,850. The bridge was constructed at the same general location as contemplated in appellant's plans and specifications, but entirely according to the plans and specifications, and under the supervision, of the county surveyor.

After the board of supervisors had placed the superintending of the construction of the bridge entirely in the charge of Mr. Shearer, the county surveyor, appellant still insisted that he be allowed to carry out his contract and superintend the construction of the bridge, so, on March 16, 1925, said board of supervisors passed the following resolution:

"On motion, it was ordered that Mr. Erle L. Cope be notified that Mr. William Shearer, county surveyor, will continue as representative and engineer of the county, on the construction of the 'Nicolaus causeway,' and that the contractor on said construction is not authorized to recognize any other person as such engineer and representative of the county. The foregoing order passed and adopted by unanimous vote of all members of said board."

This resolution was served upon appellant, and he was ordered off of the job. Appellant made no further attempt to superintend the work or attend any further meetings of the board of supervisors or have anything further to do with the construction of said bridge, but on the 1st day of June, 1925, presented his claim, which is the basis of this action, to the board of supervisors for $5,610, claiming that this amount is due him under the contract, calculated as follows:

Total fees, 6% of $166,000	$9,960 00
Less payments	4,000 00
	$5,960 00
Less expenses to fulfill	$ 350 00
Balance being damages sustained	$5,610 00

This claim was rejected by the board of supervisors, and this action followed. The case was tried by the court sitting without a jury, and the court made findings and rendered judgment in favor of the defendant.

The execution of the contract is admitted.

[2] Appellant strenuously insists that the material findings of the court are not supported by the evidence. The court, among other things, found that the plans and specifications for the bridge were prepared by Cope, Rand, Means Company, a corporation, under the supervision of the appellant, and not by the appellant, and for this reason appellant had violated the contract. The only testimony upon this question was that given by the appellant, which is as follows:

"By the Court: Under whose direction were they drawn (plans and specifications)? A. My direction, and a good part of it was drawn by me personally.

"Mr. Sweet: And are these the amended plans that you allege in your complaint you filed with the board of supervisors? A. Yes, sir."

It is true that the name of Cope, Rand, Means Company appears on the plans, but that is no proof that the plans were not prepared by, or under the direct supervision of, appellant, as he testified, and there is no testimony in the record that Cope, Rand, Means Company had anything to do with the original plans and specifications or the amended plans and specifications. Furthermore, these plans were before the board of supervisors when they ordered the two $2,000 payments made to appellant, and no objection whatever was then raised by the board that the plans and specifications were not prepared by appellant.

[3] The court also found "that said plans and specifications were incomplete and objectionable to said board of supervisors, and not satisfactory or acceptable to them, and were in violation of the terms of said contract." These plans and specifications were filed, and the board of supervisors made no formal order either approving or rejecting the same, but ordered appellant's claim for

$2,000 paid. The board requested amended plans and specifications, which were furnished, and then the board ordered that appellant's second claim for $2,000 be paid. No other conclusion can be drawn from this action of the board than that the plans and specifications furnished by appellant were satisfactory to, and approved by, them. It would be unreasonable to assume that the board of supervisors would pay $4,000 of the county's money after receipt of the plans and specifications, and amended plans and specifications, if the same were not satisfactory, or were in violation of the contract. In view of this affirmative action by said board, certainly it could not be successfully contended that they rejected the plans, or that such plans and specifications were unsatisfactory to them, simply because no formal order of approval was entered on their minutes. The fact that the board called for amended plans is no evidence of dissatisfaction. The contract, on this point, provides:

"It is further agreed that if said board chooses to make alterations or extensions in connection with said bridge, the said Erle L. Cope will provide plans and specifications for such work and shall superintend the same."

This simply indicates that the board reserved the right in the contract to have several sets of plans and specifications for the proposed bridge prepared, if necessary, in order to meet any changes or alterations that might be made in the construction of the bridge, which is a very common occurrence in the building of a bridge such as contemplated by said board. Therefore we are unable to find any evidence in the record that would support the finding that the plans and specifications furnished by appellant were incomplete or not acceptable to the said board of supervisors.

Other findings made by the trial court are also unsupported by the evidence. None of the supervisors testified in this case, and respondent has not pointed out any evidence that would in the slightest degree support the findings, and from a careful search of the entire record we are unable to discover any, but, on the contrary, find that all the evidence supports the contention of appellant except on the question of damages, which we will refer to later.

[4, 5] Respondent contends that the board of supervisors had the right to terminate the contract at any time because there was no provision in the contract that the owner may not discontinue the work or discharge the engineer. There is no merit in this contention. There is no provision in the contract which permits the owner to discontinue the work or discharge the engineer, and, in the absence of such provision in the contract, it could certainly not be terminated and the engineer discharged without cause. Furthermore, the board of supervisors did not abandon the project; on the contrary, they built the bridge upon plans later prepared by the county surveyor. Neither did the board of supervisors declare the work of appellant insufficient or that the appellant himself was incompetent. They simply ignored the appellant altogether, as though he had no contract whatever with them, and proceeded without regard to their responsibility under the contract.

[6] Respondent also contends that, as the contract was made in December, between the time a new board was elected in November, and the time such new board took office in January, 1923, such contract is against public policy, because the outgoing board has contracted in advance what the new board shall do, and the new board thereby deprived of their legislative function, discretion, and power to act for the best interests of the county, in case the new board deems the bids too high or the plans unsatisfactory. There is no merit in this contention. In contemplation of law, it is wholly immaterial that the new board of supervisors had nothing to do with entering into the contract with appellant. In legal contemplation, the new board of supervisors is the same board that entered into the contract. California Highway Commission v. Riley, 192 Cal. 97, 218 P. 579. See, also, Cope v. Flannery, supra.

[7] The respondent contends, and the trial court found, that the contract was void because the appellant was not a licensed architect at the time he prepared the plans and specifications for said bridge. Respondent has cited no authority, and made no argument, in support of this finding. Section 4041 of the Political Code, which deals with the power of boards of supervisors to build bridges, etc., contains no provision that the board of supervisors, in securing plans and specifications and estimates for any proposed bridge, shall only employ licensed architects. Supervisors are given general authority, and may employ any one who, in their judgment, is competent to do the work. Cope v. Flannery, supra.

[8, 9] Appellant contends that the proper measure of damages is the full contract price, less the cost of performance, and offered evidence at the trial in support of this theory. His evidence tended to show that he had been damaged in the sum of $5,960. The county surveyor testified that, even under appellant's theory of damages, appellant would only be entitled to approximately $3,000.

No other testimony was offered on the question of damages; still, the trial court found that appellant had not been damaged in any sum whatever.

We are of the opinion that, when appellant has proven the contract, the performance thereof on his part by preparing and filing with the board of supervisors the plans and specifications, his offer to superintend the construction of the bridge, and respondent's refusal to proceed with the contract, then he has established at least a prima facie case, entitling him to recover as damages the full contract price, less the cost of performance. The record reveals that all these matters were fully established by appellant. This being true, then the burden was cast upon respondent to prove facts in mitigation of those damages. Vitagraph, Inc., v. Liberty Theatres, 197 Cal. 694, 699, 242 P. 709, and cases there cited. The finding of the court that "appellant has suffered no damages whatever" cannot stand, and it was incumbent upon the trial court to find the actual damages sustained by appellant from the evidence before it.

The judgment is reversed.

We concur: WASTE, C. J.; RICHARDS, J.; SHENK, J.; SEAWELL, J.; PRESTON, J.; LANGDON, J.

96 Cal. App. 682

SCHELLING v. THOMAS et al. (Civ. 6574.)

District Court of Appeal, First District, Division 2, California. Feb. 11, 1929.

1. **Appeal and error ⚷659(4)—Proof not made below cannot be inserted in transcript on suggestion of diminution of record.**

A suggestion of diminution of the record is only for the purpose of correcting an error of defect in the transcript, and not for inserting therein proof not made below.

2. **Appeal and error ⚷891——Application for taking additional evidence by appellate court for additional finding refused, where relative to matter not in issue below and immaterial (Code Civ. Proc. § 956a, as added by St. 1927, p. 583).**

A motion, if considered an application for taking under Code Civ. Proc. § 956a, as added by St. 1927, p. 583, additional evidence for additional finding by appellate court, will be refused; it being relative to an issue not raised by the pleadings or at the trial and to a matter which is immaterial.

3. **Husband and wife ⚷267(4)—Incumbrance of community property is not void because by husband alone, but voidable only at instance of wife (Civ. Code, § 172a).**

Noncompliance with provision of Civ. Code, § 172a, that wife must join husband in instrument incumbering community property, does not make the instrument void, but only voidable, and that only at the instance of the wife, and so not by holder of later incumbrance.

4. **Mortgages ⚷32(4)—Instrument agreeing to turn over property to another till he is released from note signed as accommodation held equitable mortgage.**

Instrument whereby T. agrees to turn over all his described property to S. till S. is released from note which as accommodation maker he has signed with T. *held* an equitable mortgage.

5. **Mortgages ⚷13—It is immaterial that mortgagor's title to the property was subsequently acquired (Civ. Code, § 2930).**

That mortgagor required title to mortgaged property subsequent to execution of mortgage is immaterial, in view of Civ. Code, § 2930.

6. **Mortgages ⚷244(2)—First mortgage, void against subsequent mortgagee in good faith and for value whose mortgage is first recorded, is also void against subsequent mortgagee's assignee having knowledge of first (Civ. Code, §§ 1214, 1215, 1217).**

Under Civ. Code, §§ 1214, 1215, notwithstanding section 1217, making a mortgage void against a subsequent mortgagee in good faith and for value whose mortgage is first recorded, assignee of the recorded subsequent mortgagee has like precedence, though taking with knowledge of the prior mortgage.

Appeal from Superior Court, Humboldt County; Warren V. Tryon, Judge.

Action by W. J. Schelling against Rexford Thomas and others. Judgment for plaintiff, and defendant L. J. Conley appeals. Affirmed.

J. Logan Beamer and Henry L. Ford, both of Eureka, for appellant.

Mahan & Mahan, of Eureka, for respondent Schelling.

Nelson & Ricks, of Eureka, for respondent Tooby.

LUCAS, Justice pro tem. This is an appeal taken by defendant and cross-complainant L. J. Conley from a judgment and decree of foreclosure and sale in favor of plaintiff and respondent W. J. Schelling and defendant and cross-complainant E. N. Tooby.

The facts are that on September 22, 1922, respondent Schelling signed, as an accommodation maker, a $1,000 promissory note with defendant Rexford Thomas, thereby enabling the latter to borrow $1,000 from the First National Bank of Eureka. On the same date Rexford Thomas executed and delivered to respondent the following instrument:

"I hereby agree to turn over all my property, namely one timber claim No. 816932, and my lot and two buildings at McKee's mill to W. J. Schelling until such time he is released from my note, held by the First National Bank of Eureka. I also agree to pay him eight percent int. of principal on note.

"Rexford Thomas."

At the time the agreement was executed, Thomas stated it was given as security on his property for the respondent's liability under the said $1,000 note.

Subsequently, and on April 27, 1923, Thomas wrote upon this agreement the words: "This agreement is to hold good for $1000 and

---

⚷For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

interest"—signed his name thereto, and acknowledged the instrument before a notary public. It was placed on record in the county recorder's office on the same day at 59 minutes past 10 a. m.

On September 22, 1922, at the time said writing was executed, the said Thomas held a patent to timber claim No. 816932, and was occupying and in possession of a lot and two buildings at McKee's mill, but was not yet the owner of the lot.

Schelling testified that the $1,000 borrowed from the bank as above stated was used by Thomas in the construction of the said buildings on the McKee's mill lot. Subsequent to the construction of the buildings, and by deed dated December 28, 1922, acknowledged January 4, 1923, and recorded April 25, 1923, Norine McKee and Ernest M. McKee, her husband, deeded to Thomas the lot above referred to.

On January 15, 1923, Thomas negotiated a loan of $2,000 from appellant L. J. Conley, and as security therefor gave Conley a trust deed to the property involved herein, which trust deed was signed by Thomas and by "Clara Thomas, his wife." The trust deed was recorded on April 27, 1923, at 47 minutes past 1 p. m. Conley testified that the $2,000 was used by Thomas in purchasing the McKee lot.

On April 24, 1923, to secure a further loan of $600, Thomas and "Clara Thomas, his wife," executed a mortgage on the same premises to Homer B. Douglas and Arnie M. Douglas. The mortgage was recorded April 25, 1923. In consideration of the sum of $600, this mortgage was assigned by the Douglases to defendant E. N. Tooby on October 3, 1923. The assignment was recorded October 10, 1923.

No part of the principal of any of the foregoing notes was ever paid.

It was stipulated at the trial that at the time Douglas and wife assigned their mortgage to Tooby, the latter knew of the existence of the Conley deed of trust.

On April 25, 1924, the Conley deed of trust was foreclosed, and Conley received a trustee's deed to the premises. The rights of Schelling and Tooby being undetermined, the said Schelling, on June 11, 1925, brought the present action to have the writing of September 22, 1922, herein first above referred to, declared to be a mortgage on the timber claim mentioned therein and upon the said McKee's mill lot, prayed judgment for the sum of $1,000 and interest alleged to be secured thereby, and asked that the property be sold in payment of the moneys due thereunder. Both Conley and Tooby, being made defendants, filed answers and cross-complaints setting out their respective claims of interest in the property.

In its judgment, the trial court found that Tooby had a first lien on the property arising out of the assigned Douglas mortgage; that the writing of September 22, 1922, was in fact a mortgage creating a second lien thereon, and that the interest of Conley created by his trustee's deed was subject to said two prior liens. Sale was decreed, and the proceeds thereof ordered applied in accordance with the above findings.

Appellant Conley urges as grounds for reversal: (1) That the writing of September 22, 1922, did not create a valid mortgage on the premises involved in this action; (2) that since respondent Tooby took the assignment of mortgage from Douglas and wife with knowledge of the existence of the Conley deed of trust, the Tooby lien is subject to said deed of trust; and (3) errors of law occurring at the trial.

These errors, it is contended, consist in the court overruling appellant's demurrer. The demurrer should have been sustained, it is urged, because the instrument relied upon by plaintiff as a mortgage is void, having been executed by Rexford Thomas alone, while the complaint alleges that Rexford Thomas and Clara Thomas are husband and wife; and because the said instrument is not effective as an equitable mortgage for the reason that it fails to show a consideration; and, further, because it cannot be enforced against an innocent third party.

[1-3] In briefing the case, counsel entered into a controversy as to whether the said Rexford Thomas was in fact a married man. The complaint is silent on the subject other than by reference made in the title of the cause, "W. J. Schelling, plaintiff, v. Rexford Thomas, Clara Thomas, *his wife*," etc., and the allegation that *said* defendant Clara Thomas has or claims to have some interest in the mortgaged premises. In this answer and cross-complaint, defendant Tooby sets up his claim of interest by virtue of a mortgage executed and delivered by "Rex Thomas and Clara Thomas *his wife*," etc., and the answer and cross-complaint of defendant and appellant Conley contains similar language. No proof of the marriage of Rexford Thomas being made at the trial below, appellant has moved this court for a "diminution of of the record" by having inserted in the transcript a certified copy of the marriage certificate of Rexford Murray Thomas and Clara Etta Hunter, showing their marriage on September 1, 1922.

Such a motion will not lie. A suggestion of diminution of the record is only for the purpose of correcting an error or defect in the transcript. Even considering the motion as an application under the provisions of section 956a of the Code of Civil Procedure (added by St. 1927, p. 583) for permission to introduce additional evidence, such application would have to be refused on the ground that no community property issue was raised by the pleadings nor at the time of trial, and on the further ground that the evidence sought to be adduced is immaterial. The offer is made for the purpose of attempting to prove that the McKee's mill lot was the community property of Rexford Thomas and wife. This is unimportant. If separate property, Thomas could deal with it alone; if community property, the alleged mortgage of September 22, 1922, is not, as contended by appellant, void by reason of the failure of Thomas' wife to join therein. The provisions of section 172a of the Civil Code as it existed in 1922, providing that the wife must join with the husband in executing any instrument by which community property is sold or incumbered, has been held to make the instrument not void but voidable, and this only at the instance of the wife. Goodrich v. Turney, 44 Cal. App. 516, 519, 186 P. 806; Rice v. McCarthy, 73 Cal. App. 655, 664, 239 P. 56. In this case the wife of Rexford Thomas (if it be conceded that she was such) was made a party to the action and defaulted, thereby waiving her right, if any she had, to contest the validity of the transfer. This being a personal right, no one else can claim the benefits of the section by seeking to enforce such rights for her.

[4, 5] Coming now to the other points raised by appellant, the court is of the opinion that the writing of September 22, 1922, was an equitable mortgage.

"Every express agreement in writing, whereby the party clearly indicates an intention to make some particular property therein described a security for a debt, creates an equitable lien upon the property, which is enforceable. The form of the writing is not important, provided it sufficiently appears that it was thereby intended to create a security. If that intention appears, it will create a mortgage in equity, or a specific lien on the property so intended to be mortgaged." Higgins v. Manson, 126 Cal. 467, 469, 58 P. 907, 908 (77 Am. St. Rep. 192); Title Ins. Co. v. California Development Co., 171 Cal. 173, 152 P. 542.

"An equitable lien upon real property is enforceable against the property in the hands not only of the original contractor, but of his heirs, administrators, executors, voluntary assignees and purchasers or encumbrancers with notice, actual or constructive. Upon recording an instrument creating an equitable mortgage or lien, the lien becomes a matter of record, and notice is thus given to all the world that the title is encumbered, so that any one subsequently dealing with the property would deal with it subject to the lien." 19 Cal. Jur. 734, 735.

The instrument in question clearly indicates the intention of the parties to make the property mentioned therein security for a debt, and the property is described with sufficient particularity. The execution of the instrument was in good faith, for a valuable consideration, as shown upon the face of the writing, and the money secured thereby went into a portion of the property thereby incumbered. It was executed prior to the execution of the Conley trust deed, and was recorded prior to the recordation of said trust deed. Contrary to the last of appellant's contentions in attacking the validity of the instrument, the fact that the record title to the McKee's mill lot was not in Thomas at the time the instrument was executed is immaterial, in the light of section 2930, Civil Code, which provides that: "Title acquired by the mortgagor subsequent to the execution of the mortgage, inures to the mortgagee as security for the debt, in like manner as if acquired before the execution."

[6] The remaining point for consideration, namely, that, since defendant Tooby took the assignment of the Douglas mortgage with knowledge of the existence of the Conley deed of trust, it is subject thereto, the court believes to be without merit.

Appellant relies upon the provisions of section 1217 of the Civil Code, namely, that an unrecorded instrument is valid as between the parties thereto and those who have notice thereof, and cites certain supporting authorities. These authorities, however, are readily distinguishable from the case at bar, in that in each instance the subsequent conveyance was taken with knowledge of the existence of a prior unrecorded instrument.

In the case under consideration, it is not contended by appellant that at the time the Douglases made the $600 loan that they, or either of them, had any knowledge of either the prior unrecorded equitable mortgage of the respondent Schelling or of the Conley deed of trust. Such being the case, their mortgage, having been taken in good faith and recorded prior to the Schelling deed of trust, constituted a prior lien thereto. Conley could not make the Douglas mortgage secondary to his, because his unrecorded instrument, while valid between himself and Rexford Thomas, was invalid as against the Douglases, who took without notice. By the assignment of the Douglas mortgage, Tooby took all rights of the Douglases, including the right of priority.

Section 1214 of the Civil Code rather than section 1217 is more properly applicable to the case at bar: "Every conveyance of real property" (and under the provisions of section 1215, Civil Code, the word "conveyance" includes mortgages) * * * "is void as against any subsequent * * * mortgagee of the same property, * * * in good faith and for a valuable consideration, whose conveyance is first duly recorded. * * *"

In construing a statute similar in effect the case of Coonrod v. Kelly (C. C. A.) 119 F. 841, is authority for the rule which Jones on Mortgages (8th Ed.) vol. 1, p. 827, and other textwriters have seen fit to adopt: "The assignee of a mortgage takes all the rights of his assignor, and if, in the hands of the assignor, it was entitled to priority over another mortgage under the statute because of its priority of record, and of the fact that it was taken by the assignor for a full consideration, and without notice that the other mortgage had in fact been previously executed, it has the same priority in the hands of the assignee, although he may have taken it with knowledge of the facts."

This we believe to be the correct rule. Were it otherwise, the owner and holder of a negotiable instrument secured by a first lien against real property (Tooby in the present instance) might frequently be unable to negotiate the note and assign the mortgage because the purchaser thereof would receive no better than a second, or, as in this case, a third, mortgage. We feel certain that no such anomalous condition was contemplated by the Code.

The motion for diminution of the record is denied, and the judgment appealed from is affirmed.

We concur: KOFORD, P. J.; STURTEVANT, J.

96 Cal. App. 689

CAMPBELL v. SMITH. (Civ. 3574.)

District Court of Appeal, Third District, California. Feb. 12, 1929.

1. Factors 🔑18—Factor could not claim ownership of goods under consignment contract providing for retention of ownership by principal until sold.

Where contract pursuant to which goods were consigned to factor provided that they were to remain property of principal and subject to its control until sold by factor, latter could not claim ownership of goods consigned to him.

2. Replevin 🔑11(2)—Demand held unnecessary, where defendant alleged ownership and right of possession.

Where defendant in claim and delivery action set up ownership of property and right of possession in himself, proof of demand for possession before action was unnecessary.

3. Replevin 🔑91—Instruction authorizing verdict for defendant for return of property or value thereof held error.

Where factor against whom claim and delivery action for possession of goods was brought owned only part of the goods and such ownership was question of fact for jury, *held* that instruction that, if defendant had right of possession, verdict should be for defendant or for value of property, was erroneous, since, if defendant had only special interest in property which entitled him to possession thereof, verdict should have been for return of such property or for value of such special interest and not whole value of property.

4. Factors 🔑47(2) — On claim and delivery, factor to whom principal was indebted held to have general lien entitling him to property or indebtedness and detention damages (Civ. Code, § 3053).

Under Civ. Code, § 3053, factor has general lien on property in his possession on consignment for all that is due him from principal, and on claim and delivery action against factor, if principal was indebted to factor, latter was entitled to return of property or amount of indebtedness in case delivery could not be had and damages for the detention.

Appeal from Superior Court, Los Angeles County; Walton J. Wood, Judge.

Action by W. S. Campbell against W. Tyler Smith, wherein defendant filed a cross-complaint. Judgment for defendant, and plaintiff appeals. Reversed.

Joseph Scott and A. G. Ritter, both of Los Angeles, for appellant.

Bordwell, Mathews & Wadsworth, of Los Angeles (Odell S. McConnell, Ray W. Bruce, and John H. Mathews, all of Los Angeles, of counsel), for respondent.

FINCH, P. J. This is an action to recover personal property, consisting of automobile tires and tubes, in which action the plaintiff claims the delivery of the property and it was given into his possession prior to the trial. The case was tried before a jury, which returned a verdict in favor of the defendant for the return of the property and fixed its value at $30,000. Judgment was entered accordingly, and the plaintiff has appealed. The plaintiff is the assignee and agent of the Falls Rubber Company, which will be referred to herein as the company.

By the terms of a consignment agreement between the company, as party of the first part, and the defendant, as party of the second part, dated September 28, 1922, the latter became the del credere agent, or factor, of the former in Los Angeles and surrounding territory "solely for the sale on commission of the consigned tires and tubes of its manufacture." Some of the terms of the agreement are as follows:

"(4) That said party of the first part agrees to furnish and consign to the party of the second part * * * such tires and tubes as in the opinion of the party of the first part will meet the requirements of the trade of the party of the second part, * * * not exceeding $25,000 in value at list price, such tires and tubes so furnished and consigned to be and remain the property of the party of the first part, and subject to its control until sold by the party of the second part in the regular course of business upon the terms and conditions set forth in the aforesaid schedule of prices, terms and conditions.

"(5) That party of the first part will allow to party of the second part by way of reimbursement * * * and as commission * * * all the surplus amounts realized from said sales, over and above the net amounts specified in the aforesaid schedule of prices, terms and conditions.

"(6) In consideration whereof the party of the second part hereby promises and agrees: * * *

"(10) To make all sales and deliveries from the stock of the said consigned tires and tubes for the account of the party of the first part. * * *

"(17) To guarantee and does hereby guarantee payment for all goods sold from said consigned stock of tires and tubes and guarantee the credit of all persons to whom said sales are made, and to accept the aforesaid commission as consideration therefor. * * *

"(20) It is mutually agreed by and between the parties hereto, on the consideration aforesaid: * * *

"(26) That the party of the first part shall have the right at any and all times to enter in or upon the premises where said tires and tubes are, to inventory, audit, and examine said tires and tubes, and to remove the same if it so desires. * * *

"(29) Upon failure of either party to comply with and perform all of the terms and provisions of this contract on the part of either party to be performed, the same shall at once terminate; and either party may terminate this contract at any time by giving to the other party sixty days notice of its intention so to do.

"(30) That this contract is to be in full force and effect for a period of ten years unless sooner terminated by the acts of the parties as herein provided.

"(31) That the full and entire agreement between the parties hereto is contained in this writing and supersedes all previous contracts between said parties."

The company made large shipments of tires and tubes to the defendant, and as he sold them he made weekly reports to the company. Commencing in February, 1924, he sent with the reports his trade acceptances in payment of goods sold. In June, 1924, he had on hand under consignment from the plaintiff a stock of tires and tubes of the estimated value of about $18,000. At that time he gave the company trade acceptances in the total amount of $18,000, payable as follows: July 18, $3,000; August 22, $3,000; September 15, $6,000; September 30, $6,000. The defendant testified:

That the company's representative told him to sign these trade acceptances "to take care of the inventory on the floor. * * * I told him that I doubted whether I could make payments on those. 'Well,' he says, 'If you can't, * * * give us plenty of time and we will send you a check from the factory.' * * * I paid $9,000 out of the $18,000. * * *

"Q. That money came from the sales of stock on the floor, did it? A. Yes.

"Q. And the other nine thousand they sent money enough to pay, is that correct? A. Yes, sir."

The defendant pledged tires of the value of $3,000 to secure the repayment of money which he borrowed. He did not inform the company that he had pledged them. He testified that by giving these trade acceptances he considered that he became the owner of the tires and tubes in stock, although he did not so state "to anybody at that time." The trade acceptances contained the following: "The obligation of the acceptor hereby arises out of the purchase of the goods from the drawer." After giving these trade acceptances, the defendant received other tires and tubes from the company on consignment. Half or more of the tires and tubes in stock in June, 1924, and of which defendant contends he became the owner, were sold by him before this suit was commenced. A witness for the plaintiff testified that he "checked over the records and * * * found there were 99 tires left in December that were on hand about June 8th," and that their wholesale value was the sum of $1,500. This specific testimony was not contradicted except by the defendant's general estimates. Witnesses testified that the market values of tires and tubes were greater at the time of the trial than in December, 1924, but there is no evidence to support the finding of the jury that property taken in this action by the plaintiff, to which the defendant had any plausible claim of ownership, was of a value even approaching $30,000.

December 10, 1924, the tires and tubes in defendant's possession were taken under a writ of attachment in a suit brought against him by a former partner, and the sheriff took possession of the defendant's place of business and closed it. Two days later this action was commenced.

Both parties allege ownership of the property and right to the possession thereof. Respondent contends that the complaint does not state a cause of action, but it does not appear upon what theory the judgment in favor of the defendant can be affirmed on the mere ground that the complaint is insufficient. The defendant interposed a general demurrer to the complaint, which was overruled, and the case was tried on the theory that the complaint states a cause of action. The complaint appears to be sufficient as against a general demurrer.

[1] Respondent contends that "whether or not the execution and delivery of such trade acceptances constituted payment for said tires and tubes is a question of fact * * * for determination by the jury." This may be conceded in so far as applicable to the stock on hand when the trade acceptances in the

sum of $18,000 were given, but there is no logical theory upon which the defendant can claim ownership of the tires and tubes subsequently consigned to him. Respondent does not contend that the original agreement between the company and himself was terminated or abandoned. At the trial, his counsel said: "We do not think that the agreement was canceled, but we take the position it was modified." The only modification claimed in respondent's brief to have been made, which is material in this case, is that, by giving the trade acceptances in June, 1924, he became the owner of the tires and tubes then in his possession.

[2, 3] This action and two others, in both of which W. P. Cline, who was an agent and assignee of the company, was plaintiff and respondent herein was defendant, all growing out of the transactions between the company and the defendant, were tried together, before the same jury. Appellant contends that the court erred in giving the following instructions in this case:

"If you believe from the evidence that no demand was made by W. S. Campbell for the possession of the property before he commenced the action in replevin on December 12, 1924, then, in that action, you must bring in your verdict for the defendant.

"You are instructed that if at the time of the filing by plaintiff of said actions in claim and delivery, defendant had the right to the possession of the property described in the complaint, then you are instructed to bring in a verdict in favor of defendant in each of said claim and delivery actions for the return of said property to defendant or for the value thereof as of the present date."

Both of these instructions are prejudicially erroneous. The defendant having set up ownership of the property and right of possession in himself, proof of demand before action was unnecessary. Drinkhouse v. Van Ness, 202 Cal. 359, 373, 260 P. 869. The second instruction quoted is erroneous for several reasons. At most, the defendant owned only a part of the property. It was a question of fact for the jury whether he was the owner of that part. If he had only a special interest in the property which entitled him to the possession thereof, then the verdict should have been for the return of the property or for the value of such special interest, not the whole value of the property.

[4] "As a general rule, although the factor has possession of the goods consigned, and is a del credere factor, until the goods are sold by him to a bona fide purchaser the general title to or property in the goods remains in the principal, and he has the right to direct and control their sale or disposition; and unless there is a special contract in regard to returning the goods, the principal may repossess himself of the goods at any time before sale on payment of his indebtedness to the factor." 25 C. J. 377; 11 R. C. L. 758; Mechem on Agency (2d Ed.) § 2561. The agreement in this case expressly provides that title and ownership of the property shall remain in the company, with the right "to remove the same if it so desires." The defendant had a general lien on the property in his possession on consignment for all that was due him from the company. Civ. Code, § 3053. If the company was indebted to the defendant, he was entitled to the return of the property or the amount of the indebtedness, in case delivery could not be had, and damages for the detention. Respondent relies on Riverside Portland Cement Co. v. Taft, 192 Cal. 643, 648, 221 P. 357, 359, in which case it is said: "The general rule in this state is well settled that the respondent was entitled to have all of the attached property taken under the replevin bond returned, and if it cannot be returned, then to have a judgment for the value of the whole. Only the right of possession is involved in the replevin action." The replevin action referred to was a suit by a third party claimant of attached property, who "gave a claim and delivery bond and took the property into his possession," against the sheriff who had levied on it, and in which action judgment went against such claimant. The sheriff, of course, was not the general owner of the property, but he was "responsible over to the owner for the excess in value of the property above the judgment and costs" in the attachment suit. Loosemore v. Baker, 175 Cal. 420, 422, 166 P. 26, 27. In such a replevin action "only the right of possession is involved," but, where the alleged right of possession is based on ownership, it is necessary to prove either a general or special property in the subject-matter of the suit. Young v. Matthew Turner Co., 168 Cal. 671, 676, 143 P. 1029. "Where, in an action of replevin by the general owner of property against one who has a special interest therein, the property has been delivered to the plaintiff, the true value to be assessed and recovered by the defendant—where the suit goes in his favor—is the value of his special or limited interest in the goods recovered." Pico v. Martinez, 55 Cal. 148; Keiser v. Levering, 29 Cal. App. 41, 44, 154 P. 281; Griffith v. Reddick, 41 Cal. App. 458, 461, 182 P. 984; Connell v. Hogg, 181 Cal. 730, 731, 186 P. 134; Wilkerson v. Thorp, 128 Cal. 221, 226, 60 P. 679; Bibb v. United Grocery Co., 73 Fla. 589, 74 So. 880; 34 Cyc. 1568; Cobbey on Replevin (2d Ed.) § 971; Wells on Replevin (2d Ed.) § 584. The same rule is applied in actions for conversion. Corey v. Struve, 170 Cal. 170, 173, 149 P. 48; Conolley v. Power, 70 Cal. App. 70, 76, 232 P. 744. In California C. F. Association v. Ainsworth, 134 Cal. 461, 464, 66 P. 586, 587, it is said that, if the owner of a special or limited interest in property should recover from the general owner thereof its full value, he would hold the excess above the value of his special interest for the use of the other party and be immediately liable there-

for, and, "to avoid circuity of action, it is the policy of the law that the rights of both parties shall be settled in one suit."

It is not probable that the other errors of which appellant complains will be repeated at the retrial of the action, they being covered in a general way by what has been said herein, and a specific discussion thereof is not deemed necessary.

The judgment is reversed.

I concur: PLUMMER, J.

---

96 Cal. App. 697

CLINE v. SMITH et al. (Civ. 3575.)

District Court of Appeal, Third District, California. Feb. 12, 1929.

1. Factors 🔑6—Provision in contract for consignment of goods to factor for termination on 60 days' notice held valid and binding.

Provision in contract for consignment of goods to factor that either party could terminate contract on 60 days' notice is valid and binding on the parties.

2. Evidence 🔑448—Letter part of negotiations preceding or accompanying execution of contract, neither uncertain nor ambiguous, held inadmissible, in absence of fraud or mistake (Code Civ. Proc. § 1856; Civ. Code, § 1625).

Where terms of contract for consignment of goods to factor were neither uncertain nor ambiguous, under Code Civ. Proc. § 1856, and Civ. Code, § 1625, in absence of fraud or mistake, letter which was part of negotiations preceding or accompanying execution of contract was inadmissible as evidence of terms of contract.

3. Factors 🔑5—Contract for consignment of goods to factor held not modified by letter written by principal to factor.

Letter written by principal to factor, but not attached to or in any manner referred to in contract of consignment, did not have effect of modifying contract, especially in view of provision in contract that full and entire agreement between parties was contained in contract, which supersedes all previous contracts between parties.

4. Trial 🔑253(10)—Instruction authorizing consideration of fact that consignment contract had eight years to run held erroneous, in view of contract provision authorizing termination on 60 days' notice.

Where contract for consignment of goods to factor authorized its termination by either party on 60 days' notice, instruction in claim and delivery action against factor, authorizing jury, in estimating factor's damages, to consider that contract had eight years to run at time of its termination by principal, was erroneous.

Appeal from Superior Court, Los Angeles County; Walton J. Wood, Judge.

Action by W. P. Cline against W. Tyler Smith, wherein defendant filed a cross-complaint against plaintiff and the Falls Rubber Company. From a judgment for defendant on his cross-complaint, plaintiff and cross-defendant appeal. Reversed.

Joseph Scott and A. G. Ritter, both of Los Angeles, for appellants.

Bordwell, Mathews & Wadsworth, of Los Angeles (Odell S. McConnell, Ray W. Bruce, and John H. Mathews, all of Los Angeles, of counsel), for respondent.

FINCH, P. J. This is one of the actions arising out of the contract and transactions set forth in Campbell v. Smith (No. 3574) 274 P. 758, to which reference is hereby made for a more complete statement of facts. The plaintiff in this action is the assignee and agent of the Falls Rubber Company.

The complaint is in three counts, on three trade acceptances executed by defendant in favor of the Falls Rubber Company. The jury found in favor of the plaintiff for the amount of these trade acceptances, and judgment was entered accordingly. The defendant has not appealed from the judgment, and the facts upon which it is based need not be further considered.

By cross-complaint, the defendant set up a cause of action against the plaintiff and the Falls Rubber Company for damages on account of the termination by that company of the contract set forth in the Campbell Case and its refusal to furnish tires and tubes as provided therein. By a separate verdict and a separate judgment, the defendant was awarded damages on his cross-complaint in the sum of $25,000. The plaintiff and the company have appealed from the judgment. The trial court gave the following instructions, among others, to the jury:

"14. Unless the power of an agent is coupled with an interest in the subject of the agency, it may be terminated by its revocation by the principal, *within a reasonable time after the consideration was given for the agency*, and under such circumstances no liability exists on the part of the principal for such termination. * * * The agency of Mr. Smith under said contract was not an agency coupled with an interest, and * * * plaintiff had a right under paragraph 27 of its contract, to terminate the contract at any time upon sixty days' notice to defendant."

"31. If the defendant and the cross-complainant is entitled to recover in this case for injury to his business, the measure of damages for such injury is such sum as will compensate him therefor, and in arriving at such sum you should consider evidence introduced on his behalf of profits earned by him under said contract with plaintiff, also any increase in the sales of said business from the time the business was started until the filing of plaintiff's suit, and you should also consider what the future would bring in the way of profits to defendant and cross-complainant from a business established as shown by the evidence, *and also that his contract had eight years to run.*"

[1-3] Instruction 14 was given at the plaintiff's request, except the part thereof italicized herein, which was added by the court. Instruction 31 was given at the request of the defendant and cross-complainant. Appellants contend that the italicized parts of both instructions are erroneous. In respondent's brief it is said: "The Falls Rubber Company had the power to revoke the agency and to terminate the contract, but it did not have the right to do so after agreeing not to for a period of ten years, until the expiration of that time." Paragraph 29 of the agreement provides that "either party may terminate this contract at any time by giving to the other party sixty days notice of its intention so to do." It is unnecessary to cite the numerous authorities holding that such a provision in a contract is valid and binding upon the parties. Attention, however, is directed to A. Leschen & Sons Rope Co. v. C. T. Patterson & Co., 130 La. 557, 58 So. 336, because it involves a state of facts in legal effect the same as those of this case. In that case the contract provided: "This agreement can be cancelled by either party by giving thirty days' notice to the other party" The objection that the length of notice was unreasonably short was overruled and the provision quoted was held binding upon the parties to the contract. Respondent contends that the agreement was modified by the following letter:

"Mr. Tyler Smith, 1242–44 South Flower St., Los Angeles, Calif. Subject: Sixty Day Clause. Dear Sir:—In reference to the second paragraph of your letter wherein you refer to paragraph (29) on Contract, termination of agreement in sixty days, the writer wishes to give the explanation of this paragraph himself. We have been in business since 1909 and we have never as yet withdrawn a contract from a distributor or a representative, but upon mutual consent. All our agreements are based upon the confidence we have in our distributor or agent more than they are on the legal points, but for your information should we happen to get hold of a crook, we certainly would not wish to tolerate him for one year. For that reason the writer has insisted upon that sixty day clause in every contract. You will find this same term used in contracts with companies that are not worth over five hundred dollars. Where there are so many contracts outstanding you can readily understand if they were not standardized it would make an endless job to keep them in mind and the writer will give you his word of honor that you need have no concern as to the termination of this contract without you are amply and amicably taken care of and I trust that this will allay your mind of any uneasiness with regard to being disturbed so long as you represent us faithfully as you have in the past. With best wishes for your success we remain Very truly yours, The Falls Rubber Company. M. J. O'Donnell, president."

The defendant, referring to the agreement and the foregoing letter, testified: "At the time this agreement was executed it was signed by me here in Los Angeles. At the time that it was signed, at the time that it was executed by me, the circumstances concerning its execution were that I had returned from the factory; they mailed the contract to me for signature here; previous to signing it I had written them objecting to certain clauses; they answered this with a letter which was satisfactory to me. I signed the contract, returned it to the factory; they signed it at the factory and returned it to me. * * * I objected to the sixty-day clause and received his (O'Donnell's) assurance in another letter which I considered was a supplement to the contract." The context shows that by the words "another letter" the witness meant the letter of October 5, 1922, quoted herein. His own letter to the company, to which the letter of October 5 was an answer, was not produced, and no attempt was made to show the contents thereof, other than by his statement that he "objected to the sixty-day clause." He did not further explain the nature of his objection. Whether the objection was to the length of the notice of election to terminate the contract or to any option at all to terminate it does not appear. In the company's letter of October 5, 1922, it is said: "Should we happen to get hold of a crook, we certainly would not wish to tolerate him for one year." It may be inferred from this statement, in the absence of other evidence, that the defendant had asked the company to change the provision as to notice of election to terminate the contract from sixty days to one year. It is unnecessary, however, to base the decision on such an inference.

The letter of October 5th emphasized the sixty-day clause and made it clear that the company insisted upon its retention in the contract. After the receipt of that letter, the defendant could have been in no doubt as to the meaning of the provision in question, and the very fact that he objected to it shows that he understood its meaning.

Respondent relies on the following statement contained in the letter: "The writer will give you his word of honor that you need have no concern as to the termination of this contract without you are amply and amicably taken care of and I trust that this will allay your mind of any uneasiness with regard to being disturbed so long as you represent us faithfully as you have done in the past." It is contended that this letter and the formal contract must be construed together as one instrument, and that, "aside from telling Smith in positive terms that there would be no termination of the contract without he was 'amply and amicably taken care of,' the letter further promised that Smith would not be disturbed so long as he represented the company faithfully." It appears from the defendant's testimony that the letter was a part of the negotiations preceding or accompanying the execution of the contract. In the absence of fraud or mistake, it was inadmissible as evidence of the terms of the contract, which were neither uncertain nor ambiguous. Code Civ. Proc. § 1856; Civ. Code, § 1625. The formal contract executed by the parties provides: "(20) It is mutually agreed by and between the parties hereto, on the consideration aforesaid: * * * (31) That the full and entire agreement between the parties hereto is contained in this writing, and supersedes all previous contracts between said parties." This is more than a mere admission that the instrument contains the entire agreement between the parties. It is a covenant to the effect that neither party is to be bound by any agreement or understanding not contained in the writing. The letter was not attached to the contract or in any manner referred to therein.

[4] The italicized parts of both instructions quoted are prejudicially erroneous. Paragraph 29 gave either party the right to terminate the contract "at any time," by giving the required notice, and the jury, in estimating defendant's damages, if any, had no right to consider, contrary to the plain provisions of the contract, that it "had eight years to run." In view of the company's right to terminate the contract at any time on sixty days' notice, there is not sufficient evidence to warrant a judgment in favor of the cross-complainant for anything like $25,000.

The judgment is reversed.

I concur: PLUMMER, J.

---

96 Cal. App. 703

CLINE v. SMITH. (Civ. 3576.)

District Court of Appeal, Third District, California. Feb. 12, 1929.

1. Replevin 🔑83—Factor, having only special interest in consigned goods, could not, in claim and delivery action against him, recover in excess of value of such special interest.

If, under contract for consignment of goods to factor, principal was general owner of goods, and factor was owner of special property or interest therein, factor's right of recovery in claim and delivery action against him could not exceed value of such special interest in case return of property could not be had.

2. Replevin 🔑11(2)—Demand for possession before suing held unnecessary, where defendant alleged ownership and right of possession.

Where defendant in claim and delivery action set up ownership of property and right of possession in himself, proof of demand for possession before action was unnecessary.

Appeal from Superior Court, Los Angeles County; Walton J. Wood, Judge.

Action by W. P. Cline against W. Tyler Smith, wherein defendant filed a cross-complaint. Judgment for defendant, and plaintiff appeals. Reversed.

Joseph Scott and A. G. Ritter, both of Los Angeles, for appellant.

Bordwell, Mathews & Wadsworth, of Los Angeles (Odell S. McConnell, Ray W. Bruce, and John H. Mathews, all of Los Angeles, of counsel), for respondent.

FINCH, P. J. This is one of the actions growing out of the contract and transactions set forth in Campbell v. Smith (No. 3574) 274 P. 758, this day decided by this court, to which reference is hereby made for a more complete statement of facts. The plaintiff herein is the assignee and agent of the Falls Rubber Company. He prosecutes this action to recover possession of automobile tires and tubes of the alleged value of $8,000. He took possession of the property under a claim and delivery bond before the trial. Verdict and judgment went for the defendant for the return of the property or its value in the sum of $8,000. The plaintiff has appealed from the judgment.

[1] This action and the Campbell Case and another action between the parties hereto were tried together before the same jury. The facts involved in this action are largely the same as those in the Campbell Case. Some of the tires and tubes, for the recovery of which this action was brought, had been pledged by defendant as security for money borrowed by him, and others had been distributed by him among retail dealers. The defendant claimed ownership of a part of this property by reason of the trade acceptances for $18,000 which he gave the company, as set forth in the Campbell Case. In respondent's brief it is said: "It was our contention at the trial of this case, and we still hold to that view, that whether or not the execution and delivery of such trade acceptances constituted payment for said tires and tubes is a question of fact * * * for determination by the jury." The instructions to the jury, however, rendered the determination of that question immaterial. In the instruction set forth at length in the Campbell Case, expressly made

applicable to both cases, the court told the jury that, if the "defendant had the right to the possession of the property," he was entitled to a verdict for its return or "for the value thereof as of the present date." If, as stated in the Campbell Case, the plaintiff was the general owner of the tires and tubes and the defendant was the owner of a special property or interest therein, then the latter's right of recovery cannot exceed the value of such special interest, in case a return of the property cannot be had.

[2] The court instructed the jury that "when a person has lawfully come into possession of the property of another it is a necessary prerequisite that a demand be made before a claim and delivery action can be commenced," and the court refused to give an instruction requested by the plaintiff to the effect that no demand was necessary, "inasmuch as defendant in his answer * * * has asserted title and a right of possession in himself." Under the circumstances stated, the instruction given is erroneous, and the one refused should have been given. Drinkhouse v. Van Ness, 202 Cal. 359, 373, 260 P. 869. It is unnecessary to repeat the discussion and the citation of authorities in the Campbell Case. They are equally applicable to the facts of this case.

The judgment is reversed.

I concur: PLUMMER, J.

96 Cal. App. 610

WISEMAN et al. v. SKLAR et ux. (Civ. 5770.)

District Court of Appeal, Second District, Division 1, California. Feb. 4, 1929.

Appeal and error 🔑150(2)—Plaintiff's appeal will not be dismissed because of assignment of his interest in judgment to coplaintiff, by clerk, pursuant to order of court.

Appeal by a plaintiff will not be dismissed on the ground that he, having assigned his interest in the judgment to his coplaintiff, is no longer interested in the result of the appeal, the assignment not having been made by him personally and voluntarily, but by the clerk for him, in consequence of an order of the trial court, so that, since the outcome of the appeal is uncertain, appellant may still be pecuniarily interested in the litigation.

Appeal from Superior Court, Los Angeles County; Frank C. Collier, Judge.

Action by E. C. Wiseman and another against Joseph Sklar and wife. There was judgment for plaintiffs, and defendants and plaintiff Sidney J. Kass appealed. On motion to dismiss appeal of defendant husband. Motion denied.

Andreani & Haines, John L. Bisher, Jr., and Fred W. Morrison, all of Los Angeles, for appellants Sklar.

Edward Brody, of Los Angeles, for appellant Kass.

William Ellis Lady, of Los Angeles, for respondent Wiseman.

HOUSER, Acting P. J. Motion by respondent (who was one of the plaintiffs in the lower court) to dismiss appeal taken by one of the appellants (who also was a plaintiff in the lower court), on the ground that said appellant, having assigned his interest in the judgment to respondent, is no longer interested in the result of the appeal. However, since it appears that the assignment in question was not made by such appellant personally and voluntarily, but that, in consequence of an order of the trial court, such assignment was made in behalf of said appellant by the clerk of the court; and, since the outcome of the appeal is uncertain, it is clear that said appellant, notwithstanding his involuntary assignment of the judgment, may still be pecuniarily interested in the litigation.

The motion to dismiss the appeal is denied.

We concur: YORK, J.; CRAIL, Justice pro tem.

96 Cal. App. 671

WARFIELD v. KRUEGER. (Civ. 6534.)

District Court of Appeal, First District, Division 1, California. Feb. 8, 1929.

1. Damages 🔑87(2)—Actual damages must be found as predicate for recovery of exemplary damages.

Actual damages must be found as predicate for recovery of exemplary damages.

2. Appeal and error 🔑1056(6)—Plaintiff, failing to establish right to compensatory damages for assault, malicious prosecution, and false imprisonment, held not injured by exclusion of evidence on exemplary damages.

Where jury found in favor of defendant sued for assault, malicious prosecution, and false imprisonment, it must be assumed that plaintiff suffered no actual damage, and plaintiff was not injured by exclusion of evidence of arrest after commencement of action, offered for purpose of proving malice in support of claim for exemplary damages, which were not recoverable in any case, unless plaintiff established right to compensatory damages.

3. Appeal and error 🔑1056(6)—Plaintiff, failing to show actual damage for assault, malicious prosecution, and false imprisonment, held not injured by exclusion of evidence of defendant's financial condition.

Where plaintiff, suing for assault, malicious prosecution, and false imprisonment, failed to show that he suffered actual damage, exclusion of evidence of defendant's financial condition was not injurious, since wealth or lack of wealth of defendant was immaterial, in absence of showing of actual damage.

4. Pleading ⚷369(3)—Malicious prosecution and false imprisonment cannot exist on same facts, and requirement that plaintiff elect was not error.

Malicious prosecution and false imprisonment cannot exist on same state of facts, as they are inconsistent with each other, since, if arrest was without lawful authority, it could not be a case of malicious prosecution, and, if under lawful process, there was no false imprisonment, and hence requirement that plaintiff elect on which count he should proceed was not error.

5. Action ⚷45(3) — False imprisonment and malicious prosecution might be united, if acts complained of were based on different facts (Code Civ. Proc. § 427).

If acts complained of had been based on different facts, causes of action for false imprisonment and malicious prosecution might be united under Code Civ. Proc. § 427.

Appeal from Superior Court, City and County of San Francisco; Louis H. Ward, Judge.

Action by Henry Warfield against William F. Krueger. Judgment for defendant, plaintiff's motion for new trial was denied, and plaintiff appeals. Affirmed.

Henry Warfield, in pro. per.

Sylvain D. Leipsic and Henry Heidelberg, both of San Francisco, for respondent.

TYLER, P. J. Action for damages for assault, malicious prosecution, and false imprisonment. Plaintiff appears in propria persona. By a third amended complaint he charged, under various counts, that defendant, a police officer, arrested him on several occasions, and that said arrests were made maliciously and without probable cause. He also alleged that, at the time of making one of the arrests, defendant struck him on the arm. Actual and exemplary damages were prayed for. Defendant denied all the allegations of the complaint. It appeared at the trial, which was had by jury, that plaintiff was in the habit of addressing the public on a certain street corner, he having at some time secured a permit from a police officer so to do, on condition that he would not violate the laws of the state or the United States. Plaintiff testified as to the arrests and the manner in which they were made. Defendant on his behalf testified that he bore no malice toward plaintiff, but had in taking him into custody on different occasions acted simply in the performance of his duties and under the instructions of his commanding officer that he was not to permit disturbances of the peace or the blockading of the sidewalks. This officer testified that he had received protests from the merchants doing business in the vicinity of plaintiff's activities, and that plaintiff caused disturbances of the peace and congestion on the sidewalks to such an extent that pedestrians could not pass thereon when plaintiff was speaking. These merchants were also witnesses, and they testified that plaintiff's acts caused disturbances and a complete blocking of the streets. It also appeared in evidence that plaintiff had been found guilty of one of these charges, and had been given a suspended sentence thereon, and that he had been dismissed on others. At the conclusion of the trial the jury rendered a verdict in favor of the defendant. Motion for new trial was made and denied. The appeal is taken from the judgment and order. In support thereof appellant claims that the court erred in refusing to admit evidence of an arrest of the same character made after the commencement of the action. This evidence was offered to prove malice in support of the claim for exemplary damages. It is further claimed that the court likewise erred in forcing plaintiff to elect upon which count he should go to trial; the court concluding that false arrest and malicious prosecution could not be joined, except where they arose out of a different set of facts. Refusal to allow evidence of defendant's financial condition and the giving and refusal to give certain instructions to the jury is also complained of.

[1-3] Upon the first objection it appears from the record that, before closing his case, plaintiff, for the purpose of proving malice in support of his claim for exemplary damages, offered evidence of another arrest of plaintiff by defendant at the same place and upon the same charge made after the commencement of the action. This offer was rejected by the trial court as being inadmissible for the purpose, and was excluded. We fail to see in what manner plaintiff was prejudiced by the ruling. Actual damages must be found as a predicate for the recovery of exemplary damages. 2 Sutherland on Damages (4th Ed.) § 406. The jury having found in favor of defendant, it must be assumed that plaintiff suffered no actual damage. Plaintiff was not injured therefore by the exclusion of evidence that went to enhance that to which he was found not to be entitled. Exemplary damages not being recoverable in any case, unless plaintiff establishes his right to compensatory damages, a plaintiff is not injured by the action of the trial court in excluding evidence directed to the recovery of exemplary damages where he fails to establish a right to compensatory damages. Chavez v. Times-Mirror Co., 72 Cal. App. 694, 237 P. 1085. What we have said applies with equal force to the contention that the court erred in excluding evidence of defendant's financial con-

dition. Where there is no actual damage, the wealth or lack of wealth of a defendant is immaterial.

[4, 5] Nor is there any merit in the claim that the court erred in compelling plaintiff to elect upon which counts he should proceed. Malicious prosecution and false imprisonment cannot exist upon the same state of facts. If the one lies upon the facts the other does not, as they are inconsistent with each other. If the arrests were without lawful authority, it was not a case of malicious prosecution; and, if under lawful process, there was no false imprisonment, the imprisonment being by lawful authority. Both cannot exist, upon the same state of facts. Davis v. Pac. Tel., etc., Co., 127 Cal. 312, 321, 57 P. 764, 59 P. 698. Had the acts complained of been based upon different facts, the causes of action, no doubt, could have been united under the provisions of section 427 of the Code of Civil Procedure.

We have examined the instructions given and refused, and we find no error in the court's ruling upon the subject.

Judgment and order affirmed.

We concur: KNIGHT, J.; CASHIN, J.

---

96 Cal. App. 674

BOUEY v. PORTERFIELD et al.★
(Civ. 3660.)

District Court of Appeal, Third District, California. Feb. 11, 1929.

Rehearing Denied March 13, 1929. Hearing Denied by Supreme Court April 11, 1929.

1. Fraud ⚷12—Promise is actionable fraud, where made without intention of performing it, but not where made in good faith (Civ. Code, § 1572, subd. 4).

Mere failure to perform promise made in good faith does not constitute actionable fraud, but promise made without any intention of performing it is actionable fraud, under Civ. Code, § 1572, subd. 4.

2. Evidence ⚷595—Intention not to perform promise is matter of inference from facts proven.

In action for fraud, based on failure to perform promise, the failure to perform is a matter of inference from the facts proven.

3. Fraud ⚷22(1)—Opportunity for investigation does not preclude recovery for fraud.

Opportunity for investigation does not, of itself, prevent recovery in action for fraud.

4. Fraud ⚷59(1)—Plaintiff, induced to make investment by fraudulent promises, held entitled to recover amount invested.

Plaintiff, who was induced to invest a certain sum in business to be incorporated by defendants by defendants' promises to invest certain amounts and to promote certain industries, without any intention of performing such promises, *held* entitled to recover amount invested in action for fraud.

5. Money received ⚷17(1)—Count held not to state cause of action for money had and received.

Count *held* insufficient to state cause of action for money had and received, in that there was no allegation that the money was had and received for the use or benefit of the plaintiff.

6. Appeal and error ⚷1170(3)—Insufficiency of complaint, which could have been amended on objection, held not ground for reversal (Const. art. 6, § 4½).

Failure of complaint, pleading cause of action for money had and received, to allege that the money was had or received for the use or benefit of the plaintiff, *held* not ground for reversal, under Const. art. 6, § 4½, where defendants did not point out such defect, since, if they called court's attention to the defect in the complaint, it could have been amended.

Appeal from Superior Court, of Los Angeles County; John L. Fleming, Judge.

Action by John J. Bouey against Walter L. Porterfield and others. Judgment for plaintiff against certain defendants, and defendant Porterfield appeals. Affirmed.

Harry M. Irwin and Marcus C. Clark, both of Los Angeles, for appellant.

Charles E. Putnam and Charles W. Hackler, both of Los Angeles, for respondent.

JAMISON, Justice pro tem. This action was tried upon the amended complaint of respondent, which contained three counts. In the first count thereof respondent seeks rescission of a contract entered into between himself and defendants Porterfield and Deyot upon the ground of fraud and fraudulent representations; in the second count he seeks judgment against defendants for money had and received; and in the third count he seeks to set aside the contract and for return of money advanced by him thereon upon the ground of fraud practiced upon him by said Porterfield and Deyot, and for failure of consideration. The action was dismissed as to the Porterfield Company, and judgment was rendered in favor of respondent against Porterfield and Deyot. Porterfield alone appeals. The facts of the case are as follows:

Through an advertisement inserted in the Los Angeles Times respondent met the defendant Deyot and appellant Porterfield. They told him they were incorporating the Porterfield Company, and were looking for a bright young man to learn the business, a general brokerage business, in which said corporation was to engage; that they wanted this young man to put in $5,000; that they were going to incorporate said company for $25,000, and one-third of the stock would be issued to each of them; that they had $400,000 worth of bonds of the Imperial Gypsum Company; that they were going to finance the erection of a terminal warehouse

---

★Rehearing denied. Hearing denied by Supreme Court.

to the amount of $150,000, and were going to finance the Whitewater Cement Company; that Deyot and Porterfield would each put into said company $8,333.33 in cash; and that all money advanced by each and all of the parties would be returned to them out of the dividends and earnings of said company within 90 days; that by reason of these representations respondent was induced to pay over to said Deyot and Porterfield $3,850, and that immediately after these representations were made, and on January 18, 1924, Porterfield and Deyot, as parties of the first part, and respondent, as party of the second part, entered into a contract to the effect that said parties would incorporate the Porterfield Company, with a capital of $25,000, divided into $2,500 shares; of the par value of $10 per share; the business of the corporation to be dealing in all kinds of securities and promotion of California industries. Porterfield was to be president and treasurer of said corporation, and Deyot to be vice president and general manager, and respondent to be secretary and assistant general manager thereof, under the supervision of Deyot. Respondent was to have a salary of $250 per month.

The contract further provided that each of the said parties was to purchase one-third of the capital stock of said corporation at par value; that Deyot and Porterfield were each to pay $8,333.33 cash for their respective thirds of said capital stock when the company was incorporated; that respondent was to pay $8,333.33 for his third of said capital stock as follows: $3,500 upon the execution of the contract and the remainder of said $8,333.33 to be paid in payments of $50 per month and the dividends declared by the corporation, until the said $50 per month and dividends completed the payment of the said sum of $8,333.33, nothing being said in the contract regarding the additional $350 paid by respondent to Porterfield and Deyot. When the $3,850 was paid over by respondent, Porterfield deposited it in a bank and drew checks against the same in the name of W. L. Porterfield, treasurer, although the by-laws of said corporation provided that all of its checks should be signed by the treasurer and countersigned by the president, vice president, or secretary.

Neither Porterfield nor Deyot ever paid over any part of the $8,333.33 each of them had agreed to pay as the purchase price for the capital stock of said corporation. Up until a few days prior to June 25, 1924, Porterfield gave respondent to understand that he intended to and would pay the said $8,333.33 for both himself and Deyot. A few days prior to said last-named date Porterfield informed respondent that he did not intend to pay and would not pay the purchase price of said capital stock, or any part thereof, and thereupon, on said 25th day of June, 1925, respondent served upon said Deyot and Porterfield notice of the rescission of the said contract and demanded the return of the money he had paid to them. None of the capital stock of said corporation had been issued and delivered to respondent. The company had done no business, nor had respondent received anything of value from said corporation, or from Deyot or Porterfield, under said contract, or otherwise, except a part of his said salary. On July 23, 1924, respondent Deyot and Porterfield prepared and signed articles of incorporation for said company, and thereafter said company was duly incorporated.

The trial court found that the statements and representations of Deyot and Porterfield that they would each purchase one-third of the capital stock of said corporation and pay $8,333.33 therefor, that they had $400,000 of the bonds of the Imperial Gypsum Company to sell, $150,000 to finance the erection of a terminal warehouse, or were going to finance the Whitewater Cement Company, and that respondent's investment would be returned to him within 90 days, were all untrue, false, and fraudulent, were known to said Deyot and Porterfield to be false and untrue; that their said promises were made without any intention on their part of performance, and were made for the purpose and with the intent of causing and inducing respondent to pay the $3,500 in cash; and that, relying upon the said representations and believing them to be true, respondent paid over to said Deyot and Porterfield the said sum of $3,500; and all of these findings are supported by the evidence.

The court further found that, at the time respondent entered into the contract with Deyot and Porterfield, he had had no experience in the business then being conducted by them, nor any knowledge or experience in the business that would be carried on by the corporation, nor of similar business, nor of the value of the capital stock of said corporation, and for information upon said matters respondent was compelled to rely and did rely upon the statements and representations of Deyot and Porterfield, and this finding is fully supported by the evidence. The court also found, and this finding is supported by the evidence, that the shares of the capital stock of said corporation, which respondent purchased as aforesaid, were wholly worthless, and without any value, and that ever since its purchase by respondent such stock has not been, nor is it now, of any value whatever.

[1, 2] Mere failure to perform a promise made in good faith does not constitute actionable fraud. However, a promise made without any intention of performing it is actionable fraud. Subdivision 4, § 1572, Civ. Code; Rheingans v. Smith, 161 Cal. 362, 119 P. 494, Ann. Cas. 1913B, 1140; California Credit Corporation v. Carpenter, 77 Cal. App. 18, 246 P. 126. And the intention not to perform a

promise is a matter of inference from the facts proven. Holiday v. Tolosano, 39 Cal. App. 151, 178 P. 170. In the case of Henry v. Continental Building, etc., Ass'n, 156 Cal. 680, 105 P. 965, the court said: "A party inducing another to contract in reliance upon estimates or opinions professedly based upon alleged facts known to the party stating them to be nonexistent will not be permitted to escape responsibility by the plea that he was merely declaring his opinion."

[3, 4] Appellant claims that respondent had the opportunity of discovering, and should have known and discovered, the falsity of the representations of Deyot and Porterfield, if, in fact, the said representations were untrue. There is no evidence that respondent had such opportunity. The contract was drawn up and the money paid over immediately after the false representations and the false promises were made to respondent. Even though oportunity for investigation was open to respondent, this, of itself, would not prevent his recovery in this action. Bigelow, in his work on Fraud, vol. 1, § 523, says: "The proposition has now become very widely accepted at law, as well as in equity, that a man may act upon positive representations of fact, notwithstanding the fact that the means of knowledge were specifically open to him." And Pomeroy's Equity Jurisprudence, § 896, also lays down the rule that the mere existence of opportunities for examination are not sufficient to prevent reliance upon fraudulent representations assumed to be within the knowledge of the party making them.

In the case of Teague v. Hall, 171 Cal. 668, 154 P. 851, the Supreme Court of this state said: "This view of the law has been repeatedly declared in the decisions in this state"—and, among the numerous cases cited in support thereof, calls attention to the case of Ruhl v. Mott, 120 Cal. 668, 53 P. 304, wherein the court said: "It is true that where one is justified in relying, and in fact does rely upon false representations, his right of action is not destroyed because means of knowledge were open to him." We think the court's finding to the effect that, by reason of the false representations and false promises made to him by Deyot and Porterfield, he was induced to pay over and did pay over to the said Deyot and Porterfield the sum of $3,850, is supported by the evidence.

[5] Appellant strongly insists that the case should be reversed because the second count of the complaint does not state a cause of action, in that it is for money had and received, and no allegation is therein made that the money was had or received for the use or benefit of respondent. The consideration of this contention is important only by reason of the fact that the first and third counts mention only the sum of $3,500 as having been paid over to Deyot and Porterfield, and that in no place in the amended complaint, except in the second count thereof, does this additional $350 appear. The judgment of the court was for the sum of $3,850. No demurrer was interposed to the amended complaint. However, at the beginning of the trial, defendants objected to the introduction of any evidence upon the ground that the complaint did not state facts sufficient to constitute a cause of action, the alleged defect in the second count not being pointed out or mentioned. There is no doubt but that the second count was defective in failing to state that the money was had or received for the use of respondent. Fox v. Monahan, 8 Cal. App. 707, 97 P. 765; Rand v. Columbian Realty Co., 13 Cal. App. 444, 110 P. 322.

Just why the contract entered into between the parties stated that upon its execution respondent should pay to Deyot and Porterfield only the sum of $3,500, instead of $3,850, is not shown. Apparently, after the contract was drawn up and before the money was paid over, the amount to be paid by respondent was changed to $3,850, for the check or draft that was given to Porterfield was dated January 18, 1924, the day the contract was executed, and was for the sum of $3,850, which included the $3,500 named in the contract. In the case of Slaughter v. Goldberg, Bowen & Co., 26 Cal. App. 318, 147 P. 90, which was an action for damages brought by the administrator for the death of plaintiff's intestate, the complaint failed to show the existence of heirs. The action for the death being statutory, the personal representative of deceased is permitted to bring the action merely as a statutory trustee for the benefit of heirs, and in the absence of heirs, no action lies, and no cause of action would be stated, unless the complaint alleged the existence of heirs. In that case judgment went for the plaintiff and the court refused to reverse the case, on the authority of section 475 of the Code of Civil Procedure, and in doing so said: "In the case here the trial proceeded in all respects as though the pleadings sufficiently presented the issue as to there being heirs and precisely as it would had the complaint contained the allegation which it is insisted it should have contained. Why, then, should the case go back to have the complaint amended, as it is manifest that the proofs would have been the same? How can it be said that defendant has sustained 'substantial injury and that a different result would have been probable if such error * * * had not occurred'?"

[6] In the case under consideration, when the general objection was made by Porterfield and Deyot to the introduction of any evidence, because the complaint did not state a cause of action, they pointed out that the the matters set forth in the first count of the complaint failed in certain particulars to state a cause of action. Had they pointed out

the particular objection to the second count that appellant now urges, there can be no doubt that the complaint would have been amended so as to cure the defect. In the case of Texas & Pac. Ry. Co. v. Lacey (C. C. A.) 185 F. 226, the court said: "If there were no statutes or local decisions to sustain the view, we would hold, nevertheless, that a defendant would not be permitted to successfully urge the alleged defect" in the count "in this court after entering a general denial and trying the case on the merits in the lower court and having failed to suggest the alleged defect in" the lower "court."

We are satisfied that this case was fully and fairly tried, and the error alleged in the second count of the complaint did not prejudice the substantial rights of the appellant, and that the same did not affect the result of the action, and from an examination of the entire cause we are of the opinion that the said error has not resulted in a miscarriage of justice. Under the authority conferred by section 4½ of article 6 of the Constitution, we feel that we should not reverse the judgment for the alleged error appearing in the second count of the complaint.

The judgment is therefore affirmed.

We concur: FINCH, P. J.; PLUMMER, J.

UNITED STATES FIDELITY & GUARANTY CO. v. MATTHEWS et al.★
(Civ. 3662.)

District Court of Appeal, Third District, California. Jan. 28, 1929.

Hearing Granted by Supreme Court Feb. 25, 1929.

Descent and distribution 🔑87—Assignee of distributive share took subject to claims against estate then existing and administration expenses, not to administrator's debt accruing after assignment.

Where heir on death of ancestor was not indebted to deceased or estate, assignee of distributive share of heir, who was also administrator of estate, took assignment subject only to such debts or claims against estate as then existed and to expenses of administration, and hence assignment took precedence over debt owing by administrator to estate which accrued after assignment.

Appeal from Superior Court, Lassen County; H. D. Burroughs, Judge.

On petition for rehearing. Petition denied. For former opinion, see 273 P. 822.

Horace W. B. Smith and P. R. Lund, both of San Francisco, for appellant.

J. E. Pardee, of Susanville, for respondents.

PER CURIAM. Appellant has filed a petition for a rehearing in this case, in which it insists that this court erred in holding that the assignment by George W. Wilson of his distributive share in his father's estate, of which estate he was administrator, took precedence over a debt owing by said Wilson to said estate, which debt accrued after said assignment.

We are of the opinion that, inasmuch as under the laws of this state the title to the property vests in the heir upon the death of the ancestor, and that at the date of such vesting and at the date of said assignment the said George W. Wilson was not indebted to his father or to said estate, the assignee of said distributive share took the same subject only to such debts or claims against the estate as then existed and subject to the expenses of administration.

The petition for a rehearing is denied.

96 Cal. App. 460

PANZER-HAMILTON CO. v. BRAY et al.
(Civ. 5331.)

District Court of Appeal, Second District, Division 1, California. Jan. 29, 1929.

1. Corporations 🔑630(6)—Corporation which had forfeited charter had no power to assign judgment subsequently obtained.

Corporation which had forfeited its corporate charter had no power to assign judgment, which it obtained in action instituted subsequent to the forfeiture of its charter.

2. Appeal and error 🔑1008(1)—District Court of Appeal will not be justified in disturbing trial court's implied finding that corporation obtaining judgment after forfeiting charter had not assigned judgment, under evidence.

District Court of Appeal would not be justified in disturbing implied finding of trial court that corporation, which, subsequent to time it forfeited charter, obtained judgment, had not assigned it, where party claiming to be assignee merely testified that he had obtained consent of other parties to proceedings to enforce execution of judgment which corporation had recovered, though it be assumed capable of assignment under St. 1905, p. 493, and Civ. Code, § 400.

3. Corporations 🔑630(6)—Notice of appeal by corporation from vacation of order allowing it judgment in action instituted after it forfeited charter held nullity (Code Civ. Proc. § 385).

Notice of appeal by corporation, though assumed under Code Civ. Proc. § 385, to be proper appellant, from cancellation and vacation of order allowing it judgment in action instituted after it forfeited its corporate charter for nonpayment of state corporation license tax, *held* nullity.

★Superseded by opinion of Supreme Court 279 P. 655.

4. Judgment 🔑16—Court was without jurisdiction to render judgment for plaintiff corporation, which had, before action, forfeited charter.

Court was without jurisdiction to render judgment for corporation, which was plaintiff in action instituted by it after it had forfeited its corporate charter.

5. Judgment 🔑489—Judgment for plaintiff corporation, which had, before action, forfeited charter, held subject to collateral attack.

Judgment for plaintiff corporation, which had, previous to instituting action, forfeited its corporate charter for nonpayment of state license tax, *held* subject to collateral attack.

6. Estoppel 🔑3(3)—Though complaint, in action by corporation which had forfeited charter, alleged corporation's existence, defendants, not denying it by answer, were not estopped from doing so on subsequent motion to vacate judgment for plaintiff (St. 1905, p. 493).

Though complaint, in action by corporation which had forfeited its charter, alleged corporation's existence, defendants, not denying such existence by answer, were not estopped from asserting nonexistence of such corporation on subsequent motion to have judgment rendered for plaintiff corporation vacated; St. 1905, p. 493, providing for forfeiture of charter, also providing that no corporation shall do business by virtue of its charter without a state license therefor.

Appeal from Superior Court, Los Angeles County; John M. York, Judge.

Action by the Panzer-Hamilton Company against Louise R. Bray and another. Judgment against defendants was subsequently, on their motion, canceled and vacated, and plaintiff appeals. Appeal dismissed.

H. L. Sacks, of Los Angeles, for appellant.
Meserve & Meserve and Roy P. Dolley, all of Los Angeles, for respondents.

HOUSER, J. In consequence of the fact that in 1907 the plaintiff corporation failed to pay its state corporation license tax, its corporate charter was at that time forfeited. Six years later, without its status having been changed in any way, the then pretended corporation commenced an action against defendants, in which, among other things, the corporate existence of the plaintiff was alleged. Defendants answered the complaint, but failed to deny the allegation regarding the corporate existence of the plaintiff. Thereafter judgment was rendered in said action against defendants. In 1925, some 12 years after the action was commenced, under the provisions of section 685 of the Code of Civil Procedure, one Strangman, claiming to be "an officer and assignee of the *plaintiff*," procured an order from the superior court authorizing the issuance of an execution in the matter of said judgment. Thereafter, based upon the records and files in the action, on motion of defendants (which on the hearing thereof was supported by oral and documentary evidence), the court canceled and vacated its former order therein. The *plaintiff* then gave notice of appeal "from the *judgment* made and entered * * * on the 7th day of July, 1925, in favor of the defendants and against plaintiff, and from the whole thereof."

Each of the several points presented on appeal depends upon the situation presented by the fact that, prior to the time when the original action was commenced, the corporation plaintiff had forfeited its charter. It is respondents' contention that, having lost its charter, the corporation in itself had no power whatsoever—either in the first instance to commence the action; or, secondly, to assign the judgment which it recovered against defendants; or, finally, to give notice of or to perfect an appeal from the order in question.

Appellant's contention that the act is unconstitutional, in that its effect is confiscatory of the life and property of the corporation without giving it its day in court, is completely answered by the case of Kaiser L. and F. Co. v. Curry, 155 Cal. 638, 654, 103 P. 341.

[1, 2] That upon the forfeiture of the license of a corporation it is dead, and, consequently, rendered incapable of performing any act, is attested by a long line of authorities in this state. See Rossi v. Caire, 186 Cal. 544, 549, 199 P. 1042; Sharp v. Eagle Lake Lumber Co., 60 Cal. App. 386, 389, 212 P. 933; Crossman v. Vivienda Water Co., 150 Cal. 575, 580, 89 P. 335; Newhall v. Western Zinc Min. Co., 164 Cal. 380, 128 P. 1040; Van Landingham v. United Tuna Packers, 189 Cal. 353, 208 P. 973. It therefore becomes apparent that the corporation itself had no power to assign the judgment. But if, under the provisions of statutes amendatory of the original statute (Stats. 1905, p. 493), or under the provisions of section 400 of the Civil Code, power on the part of the board of directors of such a corporation to make an assignment be assumed, the evidence adduced on the hearing of the motion to vacate the order which authorized the issuance of the writ lacked convincing force to show that any attempt had been made by the directors acting as such trustees to assign the judgment.

The most that appeared was that, in answer to a leading question to the alleged assignee of the judgment, he had categorically answered "Yes" to a question as to whether he had "obtained the consent of either one of the other parties (presumably the trustees) to the proceedings * * * to enforce the execution of this judgment," but that such "consent" was not in writing. Also, that the "*interests of the other members* of the board of directors" had been assigned to him. On cross-examination, in explanation of such answers, the witness testified that all he had was "one slip of paper where we sold tools, that is all"; that he had "no books, assignments, writings, or papers of any kind relative to the collection of this judgment by any parties whatever. * * *" "Q. Have you that assignment with you? A. Sale of the tools. Q. That is all you have, an assignment which is the sale of the tools? A. Yes; just a sale of the tools. Q. And that is all you have? A. Yes, sir." In view of the foregoing evidence, we would not be justified on appeal in disturbing the implied finding of the trial court that there was no assignment of the judgment.

[3] But if it could be conceded that the attempted assignment of the judgment was legally sufficient, the procedure in perfecting the appeal was inadequate. Even assuming that, under the provisions of section 385 of Code of Civil Procedure, in an appeal arising from circumstances such as have been set forth herein, either the person in whose favor the original judgment was rendered, or his assignee, might properly be the appellant, nevertheless the situation here presented is, first, that under the authorities hereinbefore cited, as a matter of law, the corporation *could not* appeal, and as a matter of fact, the assignee *did not* do so. Although the corporation was dead, no substitution of the members of its board of directors as trustees for the defunct corporation appears to have been made in the proceedings. The notice of appeal was given in behalf of the *plaintiff* corporation—not by its trustees, or even by its alleged assignee.

In the case of Aalwyn's Law Institute v. Martin, 173 Cal. 21, 159 P. 158, in principle it is held that when a corporation has failed to pay its license tax, and by reason thereof its charter has been forfeited, the corporation is dead, and that in its behalf the trustees of the corporation are the only persons or representatives who have any standing in court. It is therefore manifest that, as the corporation itself had no power or capacity to act in the premises, and as its directors, acting as trustees for the corporation, gave no notice of appeal, the notice purporting to emanate from the corporation was a nullity. Venable Bros. v. Southern Granite Co., 135 Ga. 508, 69 S. E. 822, 32 L. R. A. (N. S.) 446.

[4, 5] With reference to the status of the judgment recovered by the corporation after its existence had been legally terminated the case of Crossman v. Vivienda Water Co., 150 Cal. 575, 89 P. 335, is authority to the effect that the trial court was without jurisdiction to render the judgment and that such judgment was subject to collateral attack. To the same effect see Newhall v. Western Zinc Min. Co., 164 Cal. 380, 128 P. 1040; Sharp v. Eagle Lake Lumber Co., 60 Cal. App. 386, 212 P. 933; McPhee v. Reclamation District, 161 Cal. 566, 119 P. 1077.

[6] The contention by appellant that, because the complaint in the action contained an allegation of the existence of the corporation, which was not denied by the answer of the defendants, the respondents are estopped from now asserting the nonexistence of the corporation, is controverted by the several rulings in the cases last cited. In principle it should be plain that estoppel of the classification of that here under consideration would require knowledge on the part of the person claimed to be estopped of the facts upon which the estoppel depends. 10 Cal. Jur. 632; Newhall v. Western Zinc Min. Co., 164 Cal. 380, 128 P. 1040; Wheaton v. North British & M. I. Co., 76 Cal. 415, 18 P. 758, 9 Am. St. Rep. 216.

It is equally clear that estoppel cannot operate as against positive law or public policy. "The doctrines of estoppel and waiver do not in general apply in transactions that are forbidden by statute or that are contrary to public policy." Montsdoca v. Highlands B. & T. Co., 85 Fla. 158, 95 So. 666. "An estoppel can never be invoked in aid of a contract which is expressly prohibited by a constitutional or statutory provision." Deer Creek Highway Dist. v. Doumecq Highway Dist., 37 Idaho, 601, 218 P. 371. Although the statute providing for the forfeiture of the charter of the corporation (Stats. 1905, p. 493) contains no express provision by which the corporation is forbidden to bring an action after its charter has been forfeited, the statute does contain a provision by which it is provided that: "No corporation * * * shall do or attempt *to do any business* by virtue of its charter, * * * in this state, without a state license therefor." Section 1. Also, that "* * * any person or persons who shall exercise any powers under the charter of any such corporation after the same shall become forfeited to the state, * * * shall be guilty of a misdemeanor." Section 9. In addition thereto, by the several decisions to which attention has been directed it is judicially determined that a corporation whose charter has been forfeited is powerless to perform any corporate act.

To permit appellant's contention to prevail in effect would be tantamount to a recognition of an equitable principle which in its foundation is lacking in at least two substantial elements.

The appeal is dismissed.

We concur: CONREY, P. J.; CRAIL, Justice pro tem.

206 Cal. 494

ALLRED v. ORTH et al. (L. A. 9539.)

Supreme Court of California. Feb. 14, 1929.

1. Damages 🔑62(2)—Failure to secure medical attention for long period after injury did not prevent recovery for negligence, where plaintiff adopted treatment which physicians would have advised.

Failure of plaintiff, sustaining severe sprain and partial fracture of knee bone, to select medical aid for period of 11 months after injury, *held* not to prevent recovery for negligence, where he gave limb complete rest, as skilled physicians would have advised, and there was no imperative need of putting limb in a cast.

2. Innkeepers 🔑14¼—Hotel keepers, failing to maintain lights in passageway, were negligent per se as to guest's invitee (State Housing Act, § 66).

Proprietors of hotel and rooming house, failing to keep any lights in passageway extending to rooms, were guilty of negligence per se as to invitee of guest in hotel, under State Housing Act (St. 1923, p. 781) § 66.

3. Innkeepers 🔑14¼—Invitee of guest, falling over edge of unlighted passageway, held not precluded from recovery against hotel keepers, on ground of contributory negligence or patent defect.

Invitee of hotel guest, falling over edge of unlighted passageway on return from guest's room after dark, *held* not precluded from recovery against hotel keepers on ground of contributory negligence, or that injury arose from patent defect, since invitee, who was unfamiliar with premises, was not chargeable with knowledge of guest.

Department 1.

Appeal from Superior Court, Los Angeles County; John L. Fleming, Judge.

Action by Ray Allred, administrator of the estate of S. E. Allred, deceased, against John G. Orth and another. Judgment for plaintiff, and defendants appeal. Affirmed.

Haas & Dunnigan and H. E. Forster, all of Los Angeles, for appellants.

Thos. L. Clay, of Los Angeles, for respondent.

SEAWELL, J. On February 15, 1924, the appellants, John G. Orth and Mary Paul, were engaged in conducting a hotel and rooming house in the city of Los Angeles, consisting of 248 rooms. On February 15, 1924, at about the hour of 7 o'clock p. m., respondent, evidently a man past middle life, upon the invitation of a guest of said hotel and rooming house, called upon said guest upon a matter of business. Respondent had never before been upon said premises, and upon arriving at said hotel and rooming house he informed the clerk at the desk that he had come to call upon said guest, and the clerk thereupon requested a bystander to conduct respondent to said guest's room. He was so conducted the greater portion of the way, and directed as to the balance of the way. Some 36 feet of the passageway, which extended through a court, was along and over a porch 4 feet in width. Said porch and passageway was built at an elevation of some 16 inches above the ground surface. One side of the porch abutted against the wall of the building, while the other side was open and without guard rail or any obstruction that would afford reasonable protection to persons using said porch from unwittingly walking off of the same under the darkness of night. Respondent transacted the business he had with said guest within a minute or two, and started to retrace his steps along the unlighted way, which he had traversed a few minutes before, and in so attempting his misdirected steps led him over the edge of the porch and he fell to the ground, sustaining painful and serious injuries. Upon striking the ground, respondent's left foot and ankle were thrown backward and under the body, in such a position that the weight of his body was thrown thereon, causing a severe sprain and producing a partial fracture of the lower end of the fibula. X-ray plates, taken some months thereafter, showed that the bone had united, leaving traces of some enlargement of the bone where it overlaps the ankle joint, and indications that the injured member would probably never completely regain its former flexible state. Immediately after he received said injuries, respondent was taken to the emergency hospital, where he was given first aid, and on the following day he was taken to his quarters, where he was confined to his bed for a period of 3 months, suffering more or less pain. Thereafter, for several months, he was able to walk only with the aid of crutches. For a period of about 11 months he received no skilled medical attention, and the only treatment his limb received consisted of the application of liniments, ointments, hot applications, masseur treatment, and other homelike treatments. During this period he employed for a short time a Chinese herbalist, who applied poultices made from herbs to reduce the inflammation. Later he attended a clinic, and was assigned to a department where he was treated for a period of 2 months by a physician.

[1] Appellants claim that respondent did not exercise reasonable diligence in caring for his injuries and in selecting medical and surgical aid. He was told by the attendants at the emergency hospital that he had suffered a sprain of the ankle. However, he adopted the best method that could have been adopted, and one that skilled physicians would have advised, according to the testimony of the physician called by appellants, which was giving the limb complete rest. The evidence of the physicians is that the fracture was only partial, and did not extend the whole distance across the bone, and, this being so, there was no imperative need of putting the limb in a cast. Appellants suffered no prejudice by respondent's failure to employ a surgeon at an earlier period or at all. The court's award was for general damages only, except the small sum of $70 allowed for drugs and treatment, and no compensation was charged against appellants for respondent's loss of time.

[2, 3] The only other point made by appellants is that the injury arose from a patent defect, for which a guest at a hotel or his invitee is not entitled to recover. Respondent was entirely unfamiliar with the premises. The "porch," as it is referred to in the case, is actually and in fact a passageway generally used by guests and others in passing from one portion of this building to another, and is equipped with electric light fixtures. It was necessary for respondent to use said passageway in visiting said guest. The sun set on February 15, 1924, at 5:40 p. m. That said passageway was not only insufficiently lighted, but that it was not lighted at all, was proved by an overwhelming preponderance of the evidence. Appellants were guilty of negligence per se. The act commonly known as the State Housing Act (Stats. 1923, p. 781), provides:

"Sec. 66. In every apartment house or hotel there shall be installed and kept burning from sunset to sunrise throughout the year artificial light sufficient in volume to properly illuminate every public hallway, passageway, public stairway, fire escape egress, elevator, public water-closet compartment, or toilet room. The provisions of this section shall not apply to an apartment house built with not more than two apartments above the first floor thereof."

The only artificial light visible to a person on said passage was a dim secondary light reflected from the crevices of the doorway through which he had passed in going to said guest's room, and which he was attempting to reach at the time he was injured. To charge the invitee, who was totally unfamiliar with the premises, with the knowledge which the guest who resided therein possessed of said premises, would be a distortion of legal principles. Respondent's conduct, in the light of the circumstances of the case, cannot be said to be such a departure from the normal conduct of a person similarly situated as to impute to him contributory negligence. As a matter of fact, while contributory negligence on the part of respondent is argued to an extent, it was not made an issue in the pleadings, and, if it had been, a finding against the contention would be fully supported by the evidence.

Clearly the findings of the court on every material issue presented by the case are amply supported by the evidence.

Judgment affirmed.

We concur: CURTIS, J.; PRESTON, J.

206 Cal. 475

BRYSON v. NATIONAL TRAVELERS' CASUALTY CO. OF DES MOINES, IOWA. (L. A. 9597.)

Supreme Court of California. Feb. 14, 1929.

1. **Insurance 🔑361—Insurance company, issuing receipt which authorized salesmen to collect first year premiums, was estopped to deny agent's authority to collect premium for additional insurance.**

Where receipt, issued on form printed by insurance company for use of its agents and given to insured, recited that salesmen were permitted to collect first year payments only, insurance company was estopped, in suit on accident policy for accidental death, to deny that its agent had authority to collect sum from insured which was to be used for additional insurance.

2. **Insurance 🔑361—Insurance company, failing to assert forfeiture in reply to letter stating payment had been made agent, was estopped to assert forfeiture for agent's want of authority.**

Where insured, after receiving notices of delinquency, wrote to insurance company that he had paid agent for new or increased indemnity policy which he had not received, and inquired if agent had remitted the amount to the company, company, by failing to claim forfeiture in its reply and merely asking insured to get in touch with agent, was estopped to declare rights of insured forfeited for nonpayment of premiums on account of agent's want of authority.

3. **Insurance 🔑310(2)—Pending negotiations with policyholder concerning premium paid agent, insurance company could not declare forfeiture without extending further opportunity for payment.**

Insurance company, while negotiating with policyholder concerning premium which insured paid to agent which it was claimed agent failed to remit, and before reasonable time elapsed for insured's reply to letter requesting insured to take the matter up with the agent, was not entitled to declare forfeiture of the policy for nonpayment of premiums without extending further opportunity for payment.

4. **Insurance 🔑361—Policy was not forfeited for nonpayment of premium by delinquency notices, where insured had paid agent full amount.**

Where insured made payment to agent for new and increased indemnity policy, which was sufficient to meet all his obligations, and company's receipt showed salesmen were permitted to collect first year payments, there was no breach of any obligation on part of insured, and notices of delinquency were ineffective to suspend or forfeit insurance contract for nonpayment of premiums, and finding of trial court in plaintiff's favor in action on policy for accidental death was justified.

In Bank.

Appeal from Superior Court, Los Angeles County; John L. Fleming, Judge.

Action by Frank Bryson, as administrator of the estate of Bruno Cosco, against the National Travelers' Casualty Company of Des Moines, Iowa. Judgment for plaintiff, and defendant appeals. Affirmed.

George W. Seith, Louis P. Pink, and Page, Nolan, Rohe & Hurt, all of Los Angeles, for appellant.

Andreani & Haines and John L. Bisher, Jr., all of Los Angeles, for respondent.

PRESTON, J. Action by the administrator of the estate of Bruno Cosco, deceased, to recover upon a policy of accident insurance following the accidental death by drowning of said Bruno Cosco; said action being opposed by defendant upon the ground that said policy had lapsed and all rights thereunder had been forfeited because of nonpayment of the premium due thereon. The court gave judgment for plaintiff, finding that at the time of said death said policy had not lapsed nor had any rights thereunder been forfeited for nonpayment of premium, or at all, but that at said time said policy of insurance was in full force and effect. Defendant has appealed. The sole question is with respect to the sufficiency of the evidence to support said findings above set forth.

The facts, established largely by documentary evidence and almost undisputed, follow:

The policy was dated July 25, 1923. As consideration it named a premium of $5 to be paid upon issuance and a further annual premium of $12 to be paid in quarterly installments starting October 25, 1923. Said Bruno Cosco duly made the initial payment of $5, and thereafter on October 25, 1923, also paid the first quarterly installment. Thereafter and prior to January 23, 1924, the due date of the second quarterly installment, to wit, on January 3, 1924, he gave to the soliciting agent for said insurance company his check for $24, payable to the company, for the purpose of having said policy raised from $25 to $50 weekly indemnity. Said payment was accompanied by his application for the larger policy, in which, answering the question as to whether he was carrying accident and health insurance in other companies, it was stated: "Pacific Mutual $25.00 week and National Travelers Casualty Ass'n $25 per week *which this will replace*." In return said agent gave him a receipt on the regular printed form issued by the company acknowledging a first payment on his said application; the receipt also recited that salesmen were permitted to collect first year payments only.

The application for an increased policy was rejected by the company; however, said agent deliberately neglected to communicate this fact to the insured, nor did he return his money to him. Explaining this action, he testified:

"There was a sort of partial understanding between Mr. Cosco and myself—he didn't know that this application had been rejected and I didn't dare tell him, at least didn't want to tell him * * * because he was rejected on ticklish grounds. The Company said they would not accept him because he was an Italian. * * *

"Q. The situation was that he gave you $24.00 to apply on the premium of a new policy of insurance which he understood would take the place of the policy then outstanding? A. Yes, sir. * * *

"Q. You didn't tell him at any time that the policy had been rejected? A. No.

"Q. You did tell him that as long as the other policy was issued that would take the place of the one he had made? A. Yes."

Thereafter on three separate occasions said insurance company sent to the insured from its head office notices informing him that there was due and payable on January 23, 1924, the sum of $7 to cover the quarterly installment due on the accident policy here involved and also a quarterly installment due on a health policy which he held in said company. The second notice, among other things, stated: "If payment has already been made, no attention to this notice is necessary, but be sure it has—take no chance." On January 24th the company wrote him, asking for an explanation of his delinquency, and also sent him a final delinquent notice which stated that reinstatement of his insurance could be made by sending in the amount due.

On March 4th said insured wrote the company, stating that on January 3d he had paid said $24 to their representative to have his policy raised from $25 to $50, but as he had received many letters regarding delinquency, he wanted to know whether said agent had ever turned the money in to the company. The company's reply, dated March 10th, dispatched from Des Moines, stated that no money had been received from their representative, asked for his name and address, and suggested that the insured ascertain from him why the matter had not been taken care of, for as it then stood said insurance was delinquent, saying nothing, however, about declaring a forfeiture under the terms of the policy. Six days later, to wit, on March 16, 1924, said insured was drowned, and thereafter the public administrator presented said claim, the subject of this action, for recovery upon said accident policy, with the aforesaid result.

[1] The record leaves us with no doubt that this insured was led by said agent to believe, and rested in his belief, that his insurance was paid for and would be continued in full force and effect either until a further payment became due upon the old policy or the new policy should be issued to take its place. The company not only had full notice that its agent secured said application for additional insurance, but in fact examined and passed upon it. No claim is made that the agent was not then representing said company to secure applications for insurance and to collect first payments thereunder. The company contends that his authority to receive premiums extended no further than to permit him to collect the original or initial payment; hence, even if it be conceded that said $24 was intended to apply upon the old policy, said agent was without authority to make the collection. However, the receipt itself issued on the form printed by said company for use of its agents and given to this insured, as above noted, recites: "Salesmen are permitted to collect first year payments only. * * *" Certainly, therefore, the company is estopped to deny that its agent had authority to collect said sum and to apply it as a first payment upon the new policy, if issued to replace the old, or if not issued, to receive and apply it as a payment upon the policy then in force, as in either instance it would be in full or partial settlement of the premium due for the first year of the life of the policy upon which it was applied.

Under these circumstances, knowing that an amount amply sufficient to meet all his obligations had been paid, said insured was not at fault in disregarding the notices from the company until he could find time to inquire about the matter. The situation is not altered by the fact that the first notice stated "Salesman not authorized to accept this payment," for the payment had already been accepted by the salesman and the above understanding had already been had with him. Furthermore, the second notice reassured said insured by stating that if payment had already been made, no attention to the notice was necessary.

[2, 3] Again, appellant, by its own act, estopped itself to declare the rights of the insured forfeited when, in response to his letter of March 4th, which was to the effect that he had paid $24, that he was to get a new or increased indemnity policy but had not re-

ceived it and wanted to know if the agent had remitted said amount to the company, it replied on March 10th, saying nothing about a forfeiture, but, on the contrary, asking said insured to get in touch with the agent and ascertain why he had not taken care of the matter. Before an unreasonable time elapsed for a reply, the insured was drowned. It requires no citation of authority to support the conclusion that appellant, while negotiating with a policyholder about the premium and with pending matters unfinished, could not declare a forfeiture of the policy without extending a further opportunity for payment of the amount due.

[4] In short, there having been no breach of any obligation on his part to be performed by said insured, said notices were ineffective to suspend or forfeit for nonpayment of premium his said insurance contract, and we hold that the findings of the court below, to the effect that at the time of his death said policy was in full force and effect, have abundant support in the evidence.

As authority for the holding we here make, see Knarston v. Manhattan L. Ins. Co., 124 Cal. 74, 56 P. 773; Bank of Anderson v. Home Insurance Co., 14 Cal. App. 208, 111 P. 507; Knarston v. Manhattan L. Ins. Co., 140 Cal. 57, 73 P. 740; Faris v. American Nat. Assur. Co., 44 Cal. App. 48, 185 P. 1035; Frank & Co. v. New Amsterdam C. Co., 175 Cal. 293, 165 P. 927.

The judgment is affirmed.

We concur: WASTE, C. J.; CURTIS, J.; LANGDON, J.; SHENK, J.; SEAWELL, J.; RICHARDS, J.

---

206 Cal. 461

WIKSTROM v. YOLO FLIERS CLUB et al.
(Sac. 4093.)

Supreme Court of California. Feb. 13, 1929.

Abatement and revival ⟹55(3)—Purchaser's cause of action for damages for fraud in misrepresenting acreage was assignable and survived purchaser's death; "thing in action;" "arising out of violation of a right of property" (Civ. Code, §§ 953, 954).

Purchaser's cause of action for damages for fraud of vendor's agent in misrepresenting quantity of valuable acreage in part of tract where other part of tract was considered by all parties to be worthless *held* assignable at common law, and, under Civ. Code, §§ 953, 954, was assignable, and survived death of purchaser as being a "thing in action" within section 953, and as "arising out of violation of a right of property," within section 954.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Chose in Action.]

In Bank.

Action by Andrew Wikstrom against the Yolo Fliers Club and another. From an adverse judgment, plaintiff appeals. On defendants' motion to dismiss the appeal. Motion denied.

Armfield & Eddy, Elmer W. Armfield and Arthur B. Eddy, all of Woodland, for appellant.

Huston, Huston & Huston, of Woodland, for respondents.

PRESTON, J. Respondents have moved the dismissal of the appeal herein, contending that the action has abated. Appellant died on September 28, 1928, and his executor has been substituted in his stead herein.

The complaint charges the sale by respondent club through the respondent Pratt, its vice president and agent, to appellant, of a tract of land of 152.44 acres in Yolo county. Taking the complaint as true, a portion of the tract of land so purchased lies north of a certain fence, and was by all the parties considered worthless. It was to be donated in the deed conveying the portion thereof south of said fence, which last-mentioned portion was bought and sold at a price of $210 per acre. The deed, as written and delivered, called for the said 152.44 acres, for which appellant paid the whole purchase price of $210 per acre. The survey later made showed only 109.2 acres thereof were south of said fence; the balance of 43.24 acres lay north of the fence in the zone overflowed by the waters of Cache creek, being the land which, according to the complaint, was to be donated with the purchase.

Other allegations of the complaint were that respondent Pratt, who had also been the confidential agent of appellant in other matters, deceived appellant in this behalf respecting said acreage south of said fence, well knowing that he was collecting for respondent club the full price per acre for the worthless area as well as for the area intended to be purchased, and well knowing also that appellant understood that all of the sum paid was to apply to the purchase of land lying south of said fence. The prayer of the complaint was for a return in damages of an amount equivalent to $210 per acre for said 43.24 acres of land, or $9,080.40.

The suit was not commenced until some four years after completion of the transaction, but appropriate allegations tolling the statute are found in the complaint, showing the discovery of the fraud and commencement of this action within the statutory period allowed thereafter for suit. The court found the existence of fraud, but held the action was barred by the statute. The propriety of this finding and decision of the court is the chief question on the merits in the appeal.

This statement is ample to show without doubt that the cause of action is assignable; that it survived in this case and passed to the personal representative of appellant. Under the common law of England, including the exceptions, found in the statute of 4 Edw. III, c. 7, and in the later statute of 4 Wm. IV, c. 42, and also including later development of it, the rule of assignability seemed to be: "As regards particular results, it is pretty generally held in America that the only causes or rights of action which are not transferable or assignable in any sense are those which are founded upon wrongs of a purely personal nature, such as slander, assault and battery, negligent personal injuries, criminal conversation, seduction, breach of marriage promise, malicious prosecution, and others of like nature. All other demands, claims and rights of action whatever are generally held to be transferable. In conformity with the principle just stated the following demands, claims, and rights of action have been held to be assignable: Causes of action arising from the breach of a contract of any kind (except the breach of a promise to marry); causes of action arising from torts which affect the estate rather than the person of the individual who is injured. Under the latter head are claims arising from the carrying away or conversion, of personal property, from the fraudulent misapplication of funds by the officer of a bank, from negligent or intentional injury done to personal property or upon real estate. In view of the general tendency to recognize the transferability of rights of action growing out of injuries done in respect of one's property or estate, it is somewhat curious to note that it is commonly held that the right of action for fraud and deceit is not assignable. But where *property* is obtained by a deceit or fraudulent device of any sort, the cause of action is assignable, for here the injury is done in respect of the particular property which is wrongfully acquired." Street's Foundations of Legal Liability, vol. III, pp. 86, 87.

Under this doctrine, without reference to a statute, it has been held that a cause of action ex delicto for injuries to personal or real property is assignable. Haynes v. Halliday, 151 Tenn. 115, 268 S. W. 130, 131; Pomeroy's Remedies and Remedial Rights, § 147; Sayre v. Detroit, etc., R. Co., 205 Mich. 294, where, at page 314 (171 N. W. 502, 509), the court approves the following language: "'The position is that the right of action for a tort is not the subject of assignment; and this we understand to be the general rule' [citing cases]. 'But this rule applies only to those torts which are merely personal, and which, on the death of the person wronged, die with him; while torts for taking and converting personal property, or for injury to one's estate, and generally, all such rights of action for tort as would survive to the personal representatives, may, it seems, be assigned so as to pass an interest to the assignee which he can enforce by suit at law' [citing cases]."

In fact, in California, without reference to the statutory enactments, this court, in Rued v. Cooper, 109 Cal. 682, 693, 34 P. 98, 101, approved language as follows, based upon a consideration of the English and American cases then in existence: "Assignability of things in action is now the rule; nonassignability, the exception; and this exception is confined to wrongs done to the person, the reputation, or the feelings of the injured party, and to contracts of a purely personal nature, like promises of marriage." We have no doubt that, under the above general doctrine alone, the cause of action in question must be held assignable and to have survived. Lazard v. Wheeler, 22 Cal. 139.

But, supplementing said general doctrine, it must be said that sections 953 and 954 of the Civil Code have lifted many of the restrictions imposed by the rule of the common law upon this subject. There can be little doubt that the cause of action set forth in the complaint here is a "thing in action," under said section 953, and arises "out of the violation of a right of property," under said section 954, and is expressly made assignable and declared to survive the death of the owner by the latter statute. That these statutes were intended to liberalize the common-law rule was expressly held in Morris v. Standard Oil Co., 200 Cal. 210, 214, 252 P. 605. See, also, to the same effect, Dibble v. San Joaquin L. & P. Corp., 47 Cal. App. 112, 117, 190 P. 198, and Stapp v. Madera Canal & Irrigation Co., 34 Cal. App. 41, 47, 166 P. 823.

Another statement worthy of note in this behalf is that assignability and survivorship are by the last-mentioned Code section placed upon the same footing. Mr. David Dudley Field, who proposed to the New York Civil Code a section identical with said section, said of it: "This section is proposed to establish one rule for the assignability and the survivorship of things in action." Cases proving the tendency of the doctrine to assignability found among our decisions are many. A few may be cited. Simmons v. Zimmerman, 144 Cal. 256, 261, 79 P. 451, 1 Ann. Cas. 850; Perkins v. Sunset Tel. & Tel. Co., 155 Cal. 712, 103 P. 190; Estate of Baker, 170 Cal. 578, 587, 150 P. 989; Stapp v. Madera Canal, etc., Co., supra, at page 46 (166 P. 823); McCord v. Martin, 34 Cal. App. 129, 166 P. 1014; Harris v. Mount Washington Co., 55 Cal. App. 144, 146, 202 P. 903. In other jurisdictions we find ample support for the holding we have announced.

The case of Henderson v. Henshall (C. C. A.) 54 F. 320, is a well-considered case, where an action was brought to recover $30,000 damages alleged to have been sustained by plaintiff in the exchange of lands. It was charged that false representations were made by the defendant whereby plaintiff was induced to exchange lands in Tulare county for lands in Shasta county, all to her damage in the amount sued for. Plaintiff died pending the suit and a special administrator of her estate was substituted. Defendant moved to dismiss the action on the ground that it had abated by the death of the original plaintiff. This motion was denied, and sections 953 and 954 of the Civil Code as well as the general doctrine received consideration. The result of that consideration may be summed up in the following quotation: "If we follow this rule, and construe the provisions of the Code liberally, with a view to effect its objects and to promote justice, we must determine that the cause of action in this case survived to the administrator as assets on his hands, because the wrong which is the subject of the action was not merely a personal injury inflicted upon the decedent, and the damages claimed the measure of her bodily or mental suffering, but the wrong was to the estate of the original plaintiff, whereby it became diminished in value. 'It is now the general American doctrine that all causes of action arising from torts to property, real or personal—injuries to the estate by which its value diminished—do survive and go to the executor or administrator as assets in his hands.' Pom. Rem. & Rem. Rights, § 147. We think, upon principle as well as authority, the cause of action in this case survived to the administrator. Judgment affirmed."

A cause of fraud and deceit similar in principle and related by kindred facts to the one before us is Sherman v. Harris, 36 S. D. 50, 153 N. W. 925, Ann. Cas. 1917C, 675, where Code sections exist identical with the two sections above cited. Our own statutes are construed, and the holding made is in accord with our conclusion here. The decision of the court of Idaho in the case of MacLeod v. Stelle, 43 Idaho, 64, 249 P. 254, related to an action arising out of fraud in the sale of mining stock, and therein it was held that the cause of action survived and was assignable. Likewise in the case of Horton v. Tyree, 102 W. Va. 475, 135 S. E. 597, an action for fraud and deceit, it was held that the action related to the property and not to the person and was assignable. See, also, Sullivan v. Curling, 149 Ga. 96, 99 S. E. 533, 5 A. L. R. 124. See, also, note to said cause, page 130; Harris v. Welch, 148 Wis. 441, 134 N. W. 1041; Metropolitan Ins. Co. v. Day, 119 Me. 380, 111 A. 429; Leavenworth & Son v. Hunter, 150 Miss. 245, 116 So. 593, 596; Porter v. Lane Cons. Corp., 212 App. Div. 528, 209 N. Y. S. 54. The converse of the situation here before us was before the Circuit Court of Appeals of the Ninth Circuit in the case of Houston v. Rosborough (C. C. A.) 295 F. 137, and it was there held that the death of the party committing the fraud and procuring by means thereof the conveyance to him by the plaintiff of certain of his property did not abate an action against his estate, citing Fox v. Hale & Norcross S. M. Co., 108 Cal. 478, 483, 41 P. 328.

This inquiry may be appropriately closed by a reference to the case of McCord v. Martin, supra, at pages 132, 133, of 34 Cal. App. (166 P. 1014). This was an action by an assignee of 25 persons, stockholders in a corporation known as the Lost Hills Mining Company, for damages sustained in making sales of their respective shares of stock on the false representation of a fellow stockholder as to the price reported by him to them that could be obtained for the stock and for fraud and deceit in connection with the transaction. The contention was made that the causes of action were not assignable. The court, in disposing of the contention, among other things, said: "We are unable to give our concurrence to the views of the trial court in sustaining the defendants' demurrers without leave to the plaintiffs to amend upon the ground that the causes of action set forth in the complaint were not assignable. It is true, as the respondents contend, that naked actions for fraud and deceit are not the subject of assignment under long and well-settled rules of equity. But the state of facts set forth in the plaintiffs' amended complaint and above recited does not present a case where the plaintiffs are seeking to recover upon assigned claims for damages for naked fraud and deceit involving no substantial right of property in plaintiffs' assignors. On the contrary, the facts, in our opinion, clearly show that the defendants, by means of their alleged fraudulent and deceitful acts and conduct, were enabled to come into possession of an amount of money representing the difference between eight dollars a share, which the respective stockholdings of plaintiffs' assignors in the Lost Hills Mining Company were really worth and for which they were actually sold, and the sum of five dollars per share, which was all that the plaintiffs' assignors received for their said stock by reason of the defendants' fraudulent and deceitful representations. This sum of money, amounting to the exact damages claimed in this action, was a sum of money which these defendants must be equitably held to have received and retained for the use and benefit of the plaintiffs' assignors, the right to recover which was a substantial part of their cause of action against said defendants. It is not disputed that the form of assignment to plaintiffs was sufficient to cover the entire equitable and property rights and claims of the plaintiffs' assignors in the premises, and was thus a transfer of much more than a mere naked right of action for fraud and deceit, since it included also the right to recover the respective sums of money which the defendants had received for the use and benefit of plaintiffs' assignors and to which in equity they were justly entitled. This being so we are entirely satisfied that these several causes of action were assignable under sections 953, 954, and 1044 of the Civil Code [citing cases]."

We do not regard either the case of Whitney v. Kelley, 94 Cal. 146, 29 P. 624, 15 L. R. A. 813, 28 Am. St. Rep. 106, or Emmons v. Barton, 109 Cal. 662, 42 P. 303, as setting forth any principle in necessary conflict with the views herein expressed; if so, they must give way to the later expressions of this court on the same subject.

The interesting question that, conceding the action does not ordinarily survive, under the powers conferred by section 956a of the Code of Civil Procedure (added by St. 1927, p. 583), we may make contrary findings to those of the court below and direct a judgment nunc pro tunc and thus save abatement of the action, need not be considered.

The motion is denied.

We concur: WASTE, C. J.; RICHARDS, J.; SEAWELL, J.; SHENK, J.; CURTIS, J.; LANGDON, J.

---

206 Cal. 486

FEATHER RIVER POWER CO. v. STATE BOARD OF EQUALIZATION et al.

(S. F. 13194.)

Supreme Court of California. Feb. 14, 1929.

1. Taxation 🔑40(1)—Liberal construction will be indulged to accomplish fair and equal taxation of all property in state.

It is the policy of the law that all property within the state should bear its fair and equal burden of taxation, and a liberal construction will be indulged to accomplish that end.

2. Taxation 🔑490—Decision of body authorized to render decisions, such as state board of equalization respecting classification of property for taxation, will not be set aside, unless it abused power or exceeded jurisdiction (Pol. Code, §§ 3664, 3664a, 3665a, 3665b, 3666; Const. art. 13, § 14).

Decision of body vested with power to render decisions, such as state board of equalization, authorized by Pol. Code, § 3666, to determine finally whether property is operative or nonoperative within sections 3664, 3664a, 3665a, 3665b, and Const. art. 13, § 14, as to state and local taxation, will not be set aside, unless it abused its power or exceeded its jurisdiction.

3. Taxation 🔑490—State board of equalization's decision that power company's hydroelectric properties were subject to local taxation as nonoperative held conclusive (Pol. Code, §§ 3664, 3664a, 3665a, 3665b, 3665c; Const. art. 13, § 14).

Decision of state board of equalization, classifying power company's hydroelectric properties as nonoperative on first Monday in March, as stated in report and tax return filed by company within time required by Pol. Code, § 3665c, and hence subject to assessment for local taxation as of such date, under section 3665b, rather than to gross receipts tax for state purposes, under sections 3664, 3664a, 3665a, and Const. art. 13, § 14, cannot be disturbed by court, where company did not file amended report and return until over two months afterward, nor clearly show particular day on which plant was completed; status of property being matter about which reasonable persons might entertain conflicting opinions.

4. Taxation 🔑485(1)—Burden was on power company, filing amended tax return, listing hydroelectric properties as operative, contrary to original return, to prove such fact (Pol. Code, §§ 3664, 3664a, 3665a, 3665b, 3665c; Const. art. 13, § 14).

Burden was on power company, filing with state board of equalization amended report and tax return, listing its hydroelectric properties as operative on first Monday in March, contrary to original report, filed over two months before under Pol. Code, § 3665c, to prove that such properties were operative on such date, and hence subject only to state gross receipts tax under sections 3664, 3664a, 3665a, and Const. art. 13, § 14, and exempt from local taxation under section 3665b.

5. Statutes 🔑245—Taxation laws are imperative.

Taxation laws are imperative in their requirements.

In Bank.

Application by the Feather River Power Company, a corporation, for a writ of mandate to the State Board of Equalization and the members thereof. Petition denied, and writ discharged.

Robert M. Searls, of San Francisco, for petitioner.

U. S. Webb, Atty. Gen., and Frank Guerena, Deputy Atty. Gen., for respondents.

SEAWELL, J. The hydroelectric properties of petitioner, organized as a public utility corporation, and particularly the Buck Creek plant, had been for three years immediately prior to the first Monday in March, 1928, in the course of construction and were nonoperative property, and therefore subject to assessment and taxation in Plumas county, their situs, for county purposes. Section

3665b et seq., Pol. Code. On or about March 14, 1928, petitioner, within ten days after the first Monday in March, as required by section 3665c of the Political Code, made its report and tax return to the state board of equalization, and furnished a duplicate of said report to the assessor of Plumas county covering so much of its property as was located in Plumas county. Said report and return was verified on March 13, 1928, and described its properties located in said county of Plumas in these words: "Plant in course of construction—See our letter of March 1st." The only portion of said letter which is at all relevant to the subject-matter reads: "This company is now engaged in the construction of a power plant, operation of which will be commenced shortly." By said report, as by its reports of former years, petitioner's properties were rated as being nonoperative. More than two months thereafter, petitioner, claiming that said report was made under a mistake of fact, and was erroneous, in that it reported said properties as being nonoperative, when in fact they were operative, caused the compilation and the listing of certain lands claimed to be operative and in use in the operation of said hydroelectric plant as distinguished from those which were nonoperative, and transmitted, on May 21, 1928, a copy of said lists and accompanying maps to the assessor of Plumas county. On June 8, 1928, petitioner filed with the state board of equalization an amended report and return, claiming that the properties therein described and which are involved in this proceeding, particularly the Buck Creek plant, were operative as of date March 5, 1928, and, therefore were not subject to assessment and taxation by said county of Plumas for county purposes, which tax computed on said properties as nonoperative amounted to approximately $7,000. The county assessor of Plumas county, in a communication to the state board of equalization dated June 20, 1928, refused to recognize said amended report and return on the ground that all of the properties of petitioner located in Plumas county had been placed upon the assessment rolls of that county in accordance with the verified report and return of petitioner made within the time provided by law, to wit, March 13, and that said proposed amended report was filed long after the time provided by law for the filing of said report and return. Other objections not necessary to be stated here were made by said assessor to said proposed amended report. By reason of the objections and protests of said assessor, petitioner appealed to said state board of equalization, and a hearing was had upon said amended report and return on June 26, 1928, and said board of equalization on June 30, 1928, found and decided "that all property of the Feather River Power Company be and the same is hereby declared to be classed as nonoperative as of the first Monday in March, 1928, and, therefore, subject to assessment for local taxation as of that date."

Petitioner thereupon applied to this court for a writ of mandamus to be directed against said board and commanding it to correct and amend its findings and decision by designating as operative property for the year 1928 all of the properties listed as operative in petitioner's said amended report and return filed approximately three months after the expiration of the period within which each corporation or company organized as a hydroelectric utility must file its report for the purposes of assessment and taxation.

Petitioner has presented for our consideration a record of the proceedings had and taken before the state board of equalization which consists of affidavits, records, and testimony of certain witnesses produced by it. All of the hydroelectric energy generated by petitioner on its Buck Creek plant was sold on contract direct to the Great Western Power Company, a public utility, and by it transmitted over its wires to its consumers throughout the northern part of the state. A table prepared by R. E. Ballew, the load dispatcher of the Great Western Power Company, showing the electric current in kilowatt hours purchased by and transmitted to the Great Western Power Company from petitioner's Buck Creek plant, which is a part of the properties of petitioner situate in Plumas county, is made a part of the record. By said table it appears that the first delivery of electric current by petitioner to the Great Western Power Company was made on March 4, 1928, and consisted of 53,000 kilowatt hours of electric current. The same table shows on March 5, 93,000 kilowatt hours; March 6, 173,000; March 7, 124,000. During certain days of said month the electric current ran as high as 358,000 kilowatt hours. On six days of said month, after operations are alleged to have begun, no electric current was furnished by said Buck Creek plant. The Buck Creek plant seems to be one of a group of two other plants and properties, to wit, Grizzly Creek and Milk Ranch Creek, which constitute the hydroelectric system of the Feather River Power Company in Plumas county. T. S. MacDonald, the superintendent of Buck Creek plant of said Feather River Power Company, by affidavit, averred that said power plant was physically and electrically connected with the electric transmission lines of the Great Western Power Company prior to March 5, 1928, and that on March 4, 1928—one day prior to the first Monday in March—said Buck Creek plant began operations and the delivery of electric current to said Great Western Power Company in kilowatt hours, as shown by the statement heretofore referred to. The assistant secretary, who prepared and verified the report and return within the time provided by law, appeared before the state board of equalization, and testified that she had not been informed that there had been any change in the status of the property from what it had been at the times she made the reports for the three previous years. She "presumed that the Great Western Company had their original contract and that they were not required to take any electricity until the plant was entirely completed, that is, not until the Milk Ranch Creek conduit had been finished." She further testified that she did not know the state of completion of the plant on the first Monday in March, and that "there was still construction going on at that time with regard to the Milk Ranch Creek conduit."

The secretary and treasurer of petitioning power company testified that on Sunday, March 4th, the power plant was started, and thereafter continuously operated in the generation of power for public use through the distribution system of the Great Western Power Company. He did state, however, that the Milk Ranch Creek conduit was but a little more than one-half completed on March 5th. As to the uncompleted state of the reservoirs the witness testified: "The reservoirs themselves were operative so far as actual use was concerned, that is, they were all operative because we were using them although they might not have been 100% complete. The portion of the dam that was not completed was then operative because so far as it was completed we were using it." The witness explained that the completion of the plant at an earlier day was delayed by winter storms. On March 3, 1928, a meeting was arranged between the representatives of the Great Western Power Company, which had contracted for all the power generated, and the Feather River Power Company, whereby the former company, which under its contract of 1925 was not obligated to accept power from the latter until it should entirely complete all of the various units in the construction of the whole property, agreed to accept power at once under an agreement and understanding that said Feather River Power Company was not to be relieved of the obligation to complete its plant as it had covenanted to do by its original contract. This agreement to accept power in advance of the completion of petitioner's plant was executed on Saturday afternoon, March 3d.

Said secretary and treasurer testified that he had not learned of the filing of the report by the assistant secretary until on or about May 10th or 15th, on which date he took the matter up and filed the amended report and tax return which culminated in the order made by the state board of equalization that all property of the petitioner be classified as nonoperative as of the first Monday in March. T. S. MacDonald, superintendent of operations for petitioner, testified that the long break in the supply of power in May, 1928, and the variation in the load beginning in early March was occasioned by minor repairs. He also testified that, so far as operative conditions were concerned, the plant could have produced its maximum output on the first Monday in March and that the Milk Ranch Cheek conduit had no direct relation to the plant except as a means of furnishing additional water, of which they then had sufficient.

If the properties of petitioner be classified as operative public utility properties, the tax shall be fixed upon the gross receipts from operation and shall be exclusively for state purposes. Sections 3664, 3664a, Pol. Code. If, on the other hand, they should be classified as nonoperative properties they would be subject to assessment and taxation for county, municipal and district purposes. Section 3665b, Pol. Code. As nonoperative properties, the tax thereon due and payable on the third Monday in October, 1928, would have amounted to approximately $7,000. If operative, no tax for county purposes would be collectible, inasmuch as the gross receipts from operation are defined to include all sums received from business done during the year ending the 31st day of December last preceding (section 3665a, Pol. Code), and said tax on gross receipts is in lieu of all other taxes and licenses, except county and municipal taxes on real estate. No state tax under article 13, § 14, of the state Constitution, could have been imposed as of 1928, for the reason that petitioner was not operating as a public utility at any time during the calendar year 1927.

[1] It is the policy of the law that all property within the state should bear its fair and equal burden of taxation, and a liberal construction will be indulged to accomplish that end.

[2-4] Section 3666 of the Political Code provides that, in case of an issue raised as to whether certain property is operative or nonoperative, the state board of equalization shall fix a time for the hearing and determination of said issue, and shall, "from the evidence presented and from the best information it can obtain," determine whether said property is operative or nonoperative. "Said decision shall be binding upon all parties * * * unless set aside by a court of competent jurisdiction. * * *"

From the above Code section it will be seen that the state board is given wide latitude in the matter of investigation as well as being vested with finality of decision subject to being set aside by a court of competent jurisdiction. The decision of a body vested with the power to render decisions will not, however, be set aside, unless it appears that said body has abused the power reposed in it or has exceeded its jurisdiction. It cannot be said that either a misuse of power or an excess or want of jurisdiction has been shown to exist in the determination of the proceeding herein reviewed.

That the petitioner did not comply with the taxation and revenue laws of the state is admitted. The state and the county assessor of Plumas county were certainly thrown off their guard by petitioner's report and tax return as far as making a satisfactory investigation on the vital day, to wit, the first Monday in March, as to whether or not petitioner's properties were in such a state of completion as to be classified as operative. Two months or more passed, during which period there had been much activity on the part of petitioner in preparing to show that a condition existed on the first Monday in March, 1928, contrary to that which was described in its sworn statement made some two months prior thereto. We have no intention of suggesting that the witnesses who testified in behalf of petitioner willfully or at all misstated the facts as they saw them, but manifestly the state and county were, by petitioner's fault and neglect to act within the time prescribed by law—assuming its report to have misstated the actual condition—deprived of an opportunity of making a timely investigation and presenting their case in the full strength they would have been able to do had they not been lulled into a state of repose by the sworn statement and tax return filed by petitioner. The true situation is not made entirely satisfactory by the record prepared by petitioner. That there was a question existing as to the particular day on which the plant was completed is shown by the evidence adduced by petitioner. Whether the properties were operative on said particular day involved the exercise of judgment on the part of state board of equalization to be formed "from the evidence presented and from the *best information*" that the board could obtain. The burden of proof was upon petitioner. The judgment of the state board should not be set aside, unless it clearly appears that it exceeded its powers or acted arbitrarily in reaching its conclusion. The status of petitioner's properties was a matter about which reasonable persons might entertain conflicting opinions. In such a case the judgment of the board cannot be disturbed.

[5] The revenue laws make no provision authorizing the filing of an amended report such as was offered by petitioner. Taxation laws are imperative in their requirements. If, however, such a procedure is to be countenanced in the interest of justice, the person or corporation invoking the same and who will profit thereby should, as a matter of policy, be required to support its position with clear and convincing proofs. The state board of equalization, upon a consideration of all the evidence before it and from *information* obtainable by it, having made its order that petitioner's properties be classified as "non-operative as of the first Monday in March, 1928, and, therefore, subject to assessment for local taxation of that date," and it not appearing that it exceeded its powers or acted contrary to law in so doing, the petition is hereby denied, and the writ is discharged.

It is so ordered.

We concur: WASTE, C. J.; SHENK, J.; CURTIS, J.; LANGDON, J.; PRESTON, J.; RICHARDS, J.

206 Cal. 513

LEAL v. LEAL. (Sac. 4080.)

Supreme Court of California. Feb. 15, 1929.

1. Divorce ⚷301—In divorce action, court properly excluded testimony as to conduct of disreputable house in another city by mother's cousin, on issue of mother's fitness to have custody of child.

In action for divorce, in which fitness of mother to have custody of minor child was contested, court properly excluded testimony to the effect that cousin of mother and his wife were engaged in business of conducting a disorderly house in another place, where it did not appear that the child would come in contact with cousin, or that mother frequented the house.

2. Divorce ⚷312—Defendant in divorce action could not, on appeal, produce further evidence of plaintiff's unfitness to retain child, without showing that justice required supplementing record (Code Civ. Proc. § 956a, as added by St. 1927, p. 583; Rules of Supreme Court, rule 38).

Defendant, on appeal from interlocutory decree in divorce suit, awarding custody of minor child, *held* not entitled, under Code Civ. Proc. § 956a, as added by St. 1927, p. 583, and Rules of Supreme Court, rule 38, to produce additional evidence with reference to character and fitness of plaintiff to have child's custody, where no showing was made that justice required supplementing of record.

3. Divorce ⚷312—Party appealing from interlocutory divorce decree has no right to trial de novo (Code Civ. Proc. § 956a, as added by St. 1927, p. 583; Supreme Court Rule 38).

Party appealing from interlocutory decree in divorce suit does not, under Code Civ. Proc. § 956a, as added by St. 1927, p. 583, and Supreme Court Rule 38, have right to trial de novo.

Department 2.

Appeal from Superior Court, Yuba County; Eugene P. McDaniel, Judge.

Action by Ruth V. Leal against Edward L. Leal for divorce. From an interlocutory decree, granting plaintiff custody of a minor son, defendant appeals. Affirmed.

Ray Manwell, of Marysville, F. W. Sawyer and Sawyer & Sawyer, all of San Francisco, for appellant.

E. S. Norby and Warren Steel, both of Marysville, for respondent.

SHENK, J. In this action for divorce, the plaintiff was granted an interlocutory decree on the ground of extreme cruelty. She was also awarded the custody of a minor son, born in August, 1923, with the right of the defendant to visit the child at all reasonable times, and to have the custody of said child for a period of one month each year. The plaintiff was granted an allowance of $40 per month for the maintenance, support, and education of the child. The community property of the spouses was also set apart to her. The defendant appeals from the interlocutory decree.

It is urged as grounds for reversal that the evidence is insufficient to support the findings, and that the court erred in its rulings as to the admissibility of certain evidence. The record is presented under the so-called alternative method. Before the cause was placed on the calendar, the defendant had not complied with the requirements of section 953c of the Code of Civil Procedure and rule 8 governing the practice and procedure in this court. When the cause was called for submission, permission was granted to the defendant to supply the deficiency by the filing of a supplement to his opening brief.

[1] It is conceded by the defendant that the evidence was in conflict. From an examination of the record it appears that there is sufficient corroboration of the testimony of the plaintiff to entitle her to a divorce. Likewise from the record it cannot be said that the court abused its discretion in awarding the custody of the minor child to the plaintiff. The contention of the defendant in this regard is that the plaintiff was shown to be an unfit and improper person to have the custody of her offspring. In this connection the defendant attempted to prove that the plaintiff was guilty of improper conduct with her cousin, one Howard Wilson, and that another cousin of the plaintiff and the wife of the latter cousin were engaged in the business of conducting a disreputable house in the city of Sacramento. The court went fully into the question of the alleged conduct of the plaintiff with her cousin Wilson, but excluded the testimony with reference to the character of the business of the other cousin, and we think rightly so. At the time of the trial the plaintiff was living at Challenge, in Yuba county. It was not shown, nor was it attempted to be shown, that the child was caused to be in association with the cousin whose business was sought to be questioned, or with his wife, or that the plaintiff was a frequenter of said alleged disreputable place of business. No other alleged errors are worthy of mention.

[2, 3] A month or thereabouts after this cause was called for submission, the defendant filed an application for leave to produce further evidence in this court with reference to the character and fitness of the plaintiff to have the custody of the minor child. The application is made because of the provisions of section 956a of the Code of Civil Procedure (added by St. 1927, p. 583), and of rule 38 of this court adopted in pursuance thereof. It is apparently the contention of the defendant that, under the powers now vested in this court on appeal, the cause may be tried de novo on the application of a party as matter of right. But such is not the case. The power granted to the court is to authorize the taking of additional evidence when, in the discretion of the court and in the interest of justice, the record presented should be supplemented. Necessarily a proper showing must be made by the applicant, and no sufficient showing is presented.

The application to present further evidence is denied, and the judgment is affirmed.

We concur: LANGDON, J.; RICHARDS, J.

---

206 Cal. 468

CHICO WELL DRILLING CO. v. GIVENS et al. (Sac. 4132.)

Supreme Court of California. Feb. 13, 1929.

1. Evidence ⚷571(1) — On question as to whether well was drilled, so as to install turbine pump, it was court's duty to consider testimony of all expert witnesses qualifying.

Question whether well was drilled by plaintiff straight and plumb enough to permit installation of a deep-well turbine pump, as required by contract, being one to be determined by expert witnesses, it was trial court's duty to consider testimony of all witnesses who qualified as experts in subject.

2. Appeal and error ⚷1011(1)—Trial court's finding on conflicting expert testimony will not be disturbed on appeal.

Finding of trial court on conflicting expert testimony will not be set aside or disturbed by appellate court.

3. Contracts ⚷198(6)—That written contract for drilling well did not mention perforation of casing held immaterial, where perforation was necessary part of drilling.

Where practically undisputed evidence was that perforation of casing of well is considered to be an integral and necessary part of its drilling, fact that written contract for drilling of well did not mention perforation *held* not to affect defendants' rights in respect thereto.

4. Contracts ⚷322(3)—Evidence held to warrant finding plaintiff abandoned drilling of well before completion thereof, precluding recovery.

In action for amount due plaintiff for drilling of well on defendants' land and foreclose lien for cost of said well, evidence *held* to warrant finding that plaintiff never completed the well, but abandoned completion thereof before casing was adequately perforated, precluding recovery.

5. Work and labor 🔑14(3)—Driller having failed to complete well, which could not be used and was of no value, held not entitled to recover reasonable value of services.

Where plaintiff never completed drilling of well, but abandoned it without adequate perforation of casing, and trial court found that well drilled could not be used and was of no value, plaintiff was not entitled to recover for reasonable value of its services.

Department 1.

Appeal from Superior Court, Glenn County; Claude F. Purkitt, Judge.

Action by the Chico Well Drilling Company against Samuel Givens and others. Judgment for defendants, and plaintiff appeals. Affirmed.

Jerome D. Peters, of Chico, for appellant.

H. C. Bell, of Willows, for respondents.

CURTIS, J. Action brought to recover an amount alleged to be due the plaintiff for the drilling of a well upon defendants' land and to foreclose a lien against said land for the cost of said well. The complaint is in two counts, one upon an express contract, and the other is for the reasonable value of services rendered defendants in the drilling of said well. The trial court found for the defendants, and plaintiff has appealed. The sole ground of appeal is that the evidence does not support the judgment. There is no dispute between the parties hereto as to their agreement. It was in writing and bore date March 20, 1924, and provided for the drilling of said well for a stipulated price per foot. The two findings of the court which plaintiff claims do not find substantial support in the evidence are findings 3 and 4, which are as follows:

Finding 3: "That thereafter plaintiff went in and upon the lands of said defendant, Samuel Givens, and partially drilled a well thereon, but did not drill same straight or plumb enough to permit the installation of a deep well turbine pump therein, as required by said contract. That in drilling said well plaintiff excavated large quantities of gravel from the lower levels of said well which resulted in the earth above such excavations caving in and around the casing in said well, and that such excavations and caving were due to the negligence of said plaintiff. That said plaintiff placed casing in said well, but did not install and perforate the same so that the water contained in the ground surrounding said casing could flow into said well. That said plaintiff never completed said well, but removed its drilling tools and outfit from the land of defendant, Samuel Givens, and abandoned the completion of same."

Finding 4: "That by reason of the failure of said plaintiff to drill and case said well in accordance with the requirements and terms of said contract, said well could not be used and was of no value to defendant, who was compelled to drill another well to supply water to his land, and that said plaintiff is not entitled to recover any payment therefor from said defendants, or any of them."

[1, 2] The written contract was executed immediately preceding the acts of the plaintiff which are set forth in said findings 3 and 4. The contract provided, among other things, that, "Above well to be drilled straight and plumb enough to permit the installation of a deep well turbine pump." As to whether the well drilled by the plaintiff complied witn this provision of the contract the evidence presents a sharp conflict. This is admitted to be so by the plaintiff, but it claims that all of the experts called by the defendants, and who testified that a deep well, or turbine pump, could not be installed in the well drilled by the plaintiff with satisfactory results, also stated that they had never observed a deep-well pump installed in a well not plumb, while plaintiff's witnesses, who testified that a turbine pump would work satisfactorily in a well not plumb, all testified from their own personal observations. Plaintiff contends that under these circumstances the testimony of defendants' witnesses was valueless and should have been rejected by the trial court, and that this court cannot give to it any consideration. Plaintiff concedes that the question whether a deep-well pump would work satisfactorily in a slanting well, or a well not plumb, was one to be determined by expert testimony. All of the witnesses testifying upon this question, either for the plaintiff or the defendants, qualified as expert witnesses in their knowledge of the use, operation, and installation of deep-well pumps. The trial court may well have rejected the evidence of those who had no personal experience in the operation of deep-well pumps in slanting wells. But we know of no authority compelling the trial court to refuse to consider such evidence. On the other hand, the question being one to be determined by expert witnesses, it was the duty of the trial court to give consideration to the testimony of all witnesses who qualified themselves as expert witnesses in the subject under investigation. In the present action, the trial court having accepted the evidence of the defendants' witnesses upon the question as to whether a turbine pump could be used in the well drilled by the plaintiff, its finding upon that question will not be set aside or disturbed by this court.

The next objection made by plaintiff to finding 3 relates to that portion thereof wherein the court found that the plaintiff in drilling said well excavated large quantities of gravel from the lower levels of said well, which resulted in the earth above such excavations coming in and around the casing of the well, and that such excavations and caving were due to the negligence of said plaintiff. But slight consideration need be given this objection, as plaintiff admits that "said finding its redundant and may be treated as surplusage." We do not attach any great importance to this finding. We think, however, there is found substantial evidence in the record to support it. There is evidence to show that much more sand ordinarily flows or caves into a slanting well than does in the drilling of a well that is straight or plumb. The amount of sand taken by the plaintiff out of the well drilled for the defendants was placed by some of the witnesses as high as 40 cubic yards. A number of witnesses testified that this amount was excessive in the drilling of a 12-inch well to a depth of 214 feet.

[3, 4] The remaining objection made by plaintiff to said finding 3 has to do with that part of said finding wherein the court found that said plaintiff never completed said well, but removed its tools and abandoned the completion of the same. There is evidence which shows that after the well was drilled it was not adequately perforated. Plaintiff claims that the contract for the drilling of the well did not mention anything about perforation. In this plaintiff is correct, but practically the undisputed evidence in the case is that the perforation of a well is considered as an integral and necessary party of its drilling. The plaintiff apparently conceded this to be so, as its foreman testified that after the drilling was completed he perforated the well under the direction of one of the partners of the Chico Well Drilling Company. But there was further evidence that this perforation was not adequate, and defendants, after notifying the plaintiff to complete the well by perforating it, employed another well driller, who, after attempting to make a proper perforation of the pipe in the well, advised the defendants that it was impracticable, and that it would be cheaper to drill a new well. This was done at a depth of 50 feet and in the same pit in which the first well was drilled and only about 7 feet distant from the first well. In the second well a satisfactory supply of water was obtained. The first well was found to be worthless and was abandoned. This disposes of all the objections made to finding 3, and we think it answers the objection to finding 4. In this latter finding the court found that the well drilled by the plaintiff was of no value and could not be used by defendants. The evidence of R. Parkerson, the well driller employed by defendants to perforate the well after the plaintiff had removed the rig and tools from the scene of the well, sufficiently covers the main facts found by the court in finding 4.

[5] As we have seen, plaintiff also sought to recover for the value of its services in drilling the well, even if its work did not show a compliance with the terms of the written contract between the parties. Neither the evidence nor the findings would justify any recovery by plaintiff on its second cause of action. By finding 4, as we have just stated, the court found that the well drilled by the plaintiff could not be used and was of no value to the defendant. This being so, the plaintiff has not shown that it is entitled to recover anything whatever for the value of its services rendered defendants.

Judgment affirmed.

We concur: SEAWELL, J.; PRESTON, J.

---

206 Cal. 473

CITY OF LONG BEACH v. STEN et al.

(L. A. 8499.)

Supreme Court of California. Feb. 14, 1929.

Eminent domain 🔑265(5)—Court properly disallowed attorney's fees to attorney defending in own behalf condemnation proceeding subsequently abandoned (Code Civ. Proc. § 1255a).

Where city passed ordinance abandoning condemnation proceedings after interlocutory judgment for property owners and duly obtained judgment and order dismissing action against property owners, court properly disallowed costs claimed by another defendant who defended action in propria persona, he being an attorney at law, notwithstanding Code Civ. Proc. § 1255a, providing for attorney's fees on abandonment of condemnation proceedings.

In Bank.

Appeal from Superior Court, Los Angeles County; J. C. Needham, Judge.

Condemnation proceedings by the City of Long Beach against William Ellis Lady and others. The proceedings were abandoned and on allowance of the city's motion to retax costs, the named defendant's claim to attorney's fees was disallowed, and he appeals. Affirmed.

Superseding former opinion in 272 P. 1088.

William Ellis Lady, of Los Angeles, in pro. per.

William Ellis Lady, of Los Angeles, for defendant Theodore J. Sten.

Frank Karr, R. C. Gortner, E. E. Morris, and C. W. Cornell, all of Los Angeles, for defendants Pacific Electric Railway, Union Trust Co. of San Francisco and United States Mortgage & Trust Co.

Bruce Mason, Geo. W. Trammell, Jr., Fred F. White, John K. Hull, and Nowland M. Reid, all of Long Beach, for respondent.

LANGDON, J. This is an appeal from a judgment denying to defendant, William Ellis Lady, attorney's fees in a condemnation proceeding against his own property, which proceeding had been defended by him in propria persona.

The plaintiff filed this action in 1923 in the superior court in and for the county of Los Angeles to condemn certain property in the city of Long Beach, jointly owned by the defendants Sten and Lady. The latter is an attorney at law and appeared and defended on behalf of his co-owner and for himself, personally. An interlocutory judgment in the sum of $19,620 was obtained in their favor, and subsequent to the entry of judgment the plaintiff city passed an ordinance abandoning the condemnation proceedings and duly obtained a judgment and order dismissing the action against defendants. The appellant Lady, on behalf of himself and Sten, filed separate cost bills, claiming, among other items, $1,500 as attorney's fees under section 1255a of the Code of Civil Procedure. Plaintiff moved to retax the costs claimed as attorney's fees, and also moved to retax and disallow the costs claimed by Lady as attorney's fees, on the ground that the latter was an attorney at law and had appeared and defended in his own behalf. The court granted the motion to retax, fixing the amount of the attorney's fee for Sten at $375, and disallowing the attorney's fees as claimed by the defendant Lady.

Section 1255a of the Code of Civil Procedure, relating to the abandonment of condemnation proceedings, provides, in part, as follows: "Upon such abandonment, express or implied, on motion of defendant, a judgment shall be entered dismissing the proceeding and awarding the defendant his costs and disbursements, which shall include all necessary expenses incurred in preparing for trial and reasonable attorney's fees." It is contended by appellant that, the foregoing section having specifically provided for the allowance of costs and reasonable attorney's fees in connection with the abandonment and dismissal of a cause of action by the party initiating it, the mere fact that an attorney happens to be the owner of the property sought to be taken and defends for himself in his professional capacity should not deprive him of just compensation for the time and legal services rendered. The position of appellant is supported by the English cases and by cases in some jurisdictions in this country. However, regardless of which rule may be the more desirable one, there are authorities in this state which we think are so closely analogous to the problem presented in the instant case as to have established a precedent which requires an affirmance of the judgment of the trial court.

In City of Long Beach v. O'Donnell (Cal. App.) 267 P. 585, attorneys were engaged to defend a condemnation proceeding, on a contingent fee to be effective if the property was taken by the city. The proceedings were abandoned later, and it was held defendant could not recover the reasonable value of attorney's services because he had paid no fee nor incurred any liability to pay one. The earlier case of Patterson v. Donner, 48 Cal. 369, is also pertinent. In that case a mortgage provided for the payment of attorney's fees if foreclosure became necessary. The plaintiff in the foreclosure suit was an attorney and his law firm acted as his attorney in the foreclosure proceeding. No recovery for attorney's fees was allowed.

The judgment appealed from is affirmed.

We concur: WASTE, C. J.; PRESTON, J.; CURTIS, J.; SHENK, J.; SEAWELL, J.; RICHARDS, J.

---

206 Cal. 508

CORY v. SMITH et al. (Sac. 4006.)

Supreme Court of California. Feb. 15, 1929.

1. **Waters and water courses ⊂⇒33—Judgment, granting water rights to lower riparian owner because of appropriation prior to patent of upper riparian land, held error without finding appropriation was on public domain.**

In action between upper and lower riparian owners to determine water rights, judgment for lower riparian owner, based on appropriation of water by predecessor before upper riparian land was patented by United States government, *held* erroneous, where court did not find that the diversion of water by predecessor of lower riparian owner was on land which then constituted part of public domain of federal government.

2. **Waters and water courses ⊂⇒21—Appropriator of water on private land acquires no rights against subsequent purchaser from government of land above diversion.**

Diversion or appropriation of water on land held in other ownership than that of United States government gives appropriator no rights as against subsequent purchaser from United States of riparian land situated on stream above point of diversion.

3. **Waters and water courses ⊂⇒33—Finding, that plaintiff's predecessor legally appropriated water, involved conclusion not obviating necessity of finding appropriation on public land to sustain priority.**

In action to determine water rights, declaration in findings, that predecessor in interest of plaintiff legally appropriated water and used same under honest right to claim same since certain year, involved conclusions of law, and did not obviate necessity of finding public character of land on which diversion was made to sustain priority over owner under subsequent patent from government.

4. Waters and water courses ⚿138—Lower riparian owners, appropriating water on private land, could acquire no rights against upper riparian owner by diversion, however long.

Lower riparian owners, appropriating water on privately owned land, could acquire no rights against an upper riparian owner by diversion and user for period required to give title by prescription, or for any period, however long.

5. Waters and water courses ⚿138—Upper riparian proprietor cannot complain of use of water after it passes his land.

Upper riparian proprietor has no cause for complaint or redress concerning use of water after it has passed his land.

6. Waters and water courses ⚿33—Finding, that diversion of water by plaintiff's predecessor was on public land, could not be made under complaint and evidence.

Where complaint, by lower riparian owner to restrain upper riparian owner from diverting water of creek, did not allege that appropriation of water by plaintiff's predecessor in interest was on public lands, and did not describe point of diversion, but only described lands to which water was conveyed for use by ditch alleged to be owned by plaintiff, but not alleging that such land was public lands at time of appropriation by predecessor in interest, and no proof was introduced to show public character of land at point of appropriation, court would not be warranted in making finding that appropriation by plaintiff's predecessor was on public lands.

7. Waters and water courses ⚿33—Lower riparian owner had burden of proving land on which predecessor appropriated water was public land to restrain diversion by upper riparian owner.

In action, by lower riparian owner against upper riparian owner, to restrain diversion of water of creek, burden of proving, that land on which plaintiff's predecessor in interest diverted water was part of public demand necessary to sustain plaintiff's title, *held* on plaintiff.

8. Stipulations ⚿14(1)—Oral stipulation, that plaintiff's title to land was deraigned through patents commencing in 1876, did not establish public ownership of land in 1869, when plaintiff's predecessor appropriated water claimed by plaintiff.

In action by lower riparian owner to restrain diversion of water by upper riparian owner, based on claim that lower owner's predecessor in interest appropriated water before patent of upper riparian land to defendants, oral stipulation, that plaintiff's title was deraigned through patents of 1876, 1877, and 1883, did not establish public ownership of lands, at time of appropriation by predecessor in interest, found to have been made in 1869 or 1870.

In Bank.

Appeal from Superior Court, Siskiyou County; K. S. Mahon, Judge.

Action by Alice G. Cory against John P. Smith and another, in which defendants filed a cross-complaint. Judgment for plaintiff, and defendants appeal. Reversed.

James M. Allen, of Yreka, for appellants.

B. K. Collier, of Yreka, for respondent.

SEAWELL, J. This action involves a contest between lower and upper riparian owners over the waters of Miner creek, a small stream in Siskiyou county. Defendants and cross-complainants, John P. Smith and Frank Smith, upper riparian proprietors, appeal from a judgment decreeing that plaintiff, Alice G. Cory, is the owner of 50 inches of the water in said Miner creek measured under a 4-inch pressure, and that this right is superior to the interest of defendants, and enjoining and restraining defendants from diverting any of the waters of Miner creek or its tributaries, when there is less than 50 inches measured under a 4-inch pressure flowing to and upon the lands of plaintiff.

[1-3] The judgment of the court below was based on a finding that plaintiff, the lower owner, had a superior right to 50 inches of the water of said stream by reason of an appropriation of such a quantity by plaintiff's predecessor in interest in 1869 or 1870. The court further found that the upper riparian land owned by defendants was patented to their predecessor in interest by the United States government in 1889, which was subsequent to the date the appropriation of water was found to have been made by plaintiff's predecessor in interest on the lower lands. The court did not find, however, that the diversion by plaintiff's predecessor in 1869 or 1870 was upon land which then constituted a part of the public domain of the federal government. The absence of such a finding is fatal to the affirmance of the judgment. A diversion or appropriation of water upon land held in other ownership than that of the United States government gives the appropriator no rights as against a subsequent purchaser from the United States government of riparian land situated upon the stream above the point of diversion. Cave v. Tyler, 133 Cal. 566, 65 P. 1089; Holmes v. Nay, 186 Cal. 231, 199 P. 325; The San Joaquin & Kings River Canal & Irrigation Co., Inc., v. Worswick, 187 Cal. 674, 203 P. 999. The declarations in the findings, that the predecessors in interest of plaintiff "legally" appropriated said water in 1869 or 1870 and have used said waters "under an honest right to claim same and of right so to do ever since the year 1869 or 1870," involve conclusions of law, and do not obviate the necessity of a finding as to the public character of the land upon which the diversion was made.

[4, 5] Except as appropriators of water upon publicly owned land, plaintiff's predecessors could acquire no rights by virtue of their diversion as against a subsequent purchaser from the government of riparian lands lying above the point of diversion. As lower riparian owners or as appropriators upon privately owned land, they could acquire no rights against an upper riparian owner by diversion and user for the period required to gain a title by prescription, or for any period, however long. This principle of law is too well settled to merit discussion. Bathgate v. Irvine, 126 Cal. 135, 58 P. 442, 77 Am. St. Rep. 158; Cave v. Tyler, supra; Holmes v. Nay, supra; The San Joaquin & Kings River Canal & Irrigation Co., Inc., v. Worswick, supra. The upper riparian proprietor has no cause for complaint or redress concerning the use of water after it has passed his land. Hence the court's finding, that "plaintiff by reason of being riparian owner of said lands, is justly and legally entitled to have said waters of said Miner Creek flow down stream as said waters have been accustomed to flow since 1869," and is entitled to use the waters which she and her predecessors in interest have used continuously since 1869, embodies an incorrect conclusion of law.

[6, 7] While in certain cases this court will correct or supply findings with a view to rendering the findings sufficient to support a judgment entered in the lower court, the condition of the pleadings and evidence in the instant case is such that we would not be warranted in making a finding to the effect that the diversion by plaintiff's predecessor in interest was upon public land. The complaint fails to state facts showing a right in plaintiff to 50 inches of the waters of Miner creek by virtue of an appropriation in 1869 or 1870, for the reason that it is not alleged that the diversion was made upon public lands. In fact the point of diversion is not described in the complaint. The only lands described therein are the lands to which the water was conveyed for use by the ditch alleged to be owned by plaintiff, and said lands are not alleged to have been public lands at the time the appropriation was made in 1869 or 1870, or at any time. It appears from the evidence, including the maps introduced as exhibits, that the point of diversion from Miner creek was not located upon the lands of plaintiff and her predecessors in interest, but upon other lands to the south thereof, from which the water was carried by the Miner creek ditch to plaintiff's lands. The location of the point of diversion was not definitely fixed by the evidence, and no proof whatever was introduced to show the public character of the land at said point of diversion. The burden of offering such proof was upon plaintiff. Cave v. Tyler, supra.

[8] The oral stipulation made at the opening of the trial, as to plaintiff's title having been deraigned through patents of 1876, 1877, and 1883, related to the lands owned by plaintiff and her predecessors, not to the lands south thereof upon which the point of diversion was located. However, we do not regard said stipulation as satisfactorily establishing the public ownership even of plaintiff's said lands at the time of the appropriation, found by the court to have been made in 1869 or 1870, and there is no other evidence in the record on this point. The "patents" referred to in said stipulation may have been railroad patents, as was the patent through which defendants claimed title to a portion of their lands. Even if plaintiff's lands were patented to plaintiff's predecessor in interest in 1876, 1877, and 1883 by the federal government, and were at the dates of the issuance of said patents in the ownership of the federal government, it was not shown that they were so owned on the earlier date when the appropriation was found to have been made.

Judgment reversed.

We concur: WASTE, C. J.; PRESTON, J.; CURTIS, J.; LANGDON, J.; SHENK, J.; RICHARDS, J.

---

206 Cal. 504

BATE v. JOLIN et al. (L. A. 8673.)

Supreme Court of California. Feb. 15, 1929.

1. Appeal and error ⚿1046(5)—Trial judge's conduct in making sarcastic comments during trial and in denouncing defendants held not as matter of law to deny fair trial.

Conduct of trial judge, sitting without a jury, in making sarcastic comments and questions addressed to defendants when testifying, plainly showing that he entirely discredited their testimony, and when evidence was all in and cause submitted in denouncing defendants personally and ridiculing their testimony, though unjustifiable and shocking to sense of propriety, *held* not as a matter of law to deprive defendants of a fair trial, where he ruled fairly and impartially on admission of evidence offered.

2. Appeal and error ⚿295—Objection that damages are excessive cannot be raised for first time on appeal.

Objection that damages awarded by trial court sitting without a jury are excessive cannot be raised for first time on appeal, but must be presented to the lower court on motion for new trial.

3. Assault and battery ⚿40—False imprisonment ⚿36—$2,515 damages for assault and battery and false imprisonment committed by police officers held not so excessive as to raise presumption of passion and prejudice.

In action for damages against police officers for assault and battery and false imprisonment, in which trial court found that defendants, without provocation, assaulted, violently choked, kicked, struck, and beat plaintiff, and struck him about the head, temple, and eyes with a blackjack, and unlawfully placed him under arrest, judgment awarding plaintiff $2,515 as damages *held* not so grossly disproportionate to compensation reasonably warranted by facts as to shock sense of justice and raise presumption that it was result of passion and prejudice, though it was for total sum prayed for by plaintiff.

In Bank.

Appeal from Superior Court, Los Angeles County; Charles S. Burnell, Judge.

Action by James H. Bate against William J. Jolin and others. From a judgment for plaintiff, defendants appeal. Affirmed.

Jess E. Stephens, City Atty., and Chas. B. MacCoy and Jerrell Babb, Deputy City Attys., all of Los Angeles, for appellants.

Kemp, Mitchell, Silberberg & Davis and Pierce Works, all of Los Angeles, for respondent.

WASTE, C. J. The defendants, five police officers of the city of Los Angeles, appeal from a judgment against them, rendered by the court sitting without a jury, in an action for alleged assault and battery and false imprisonment. The lower court found that the defendants, without cause or provocation, wrongfully and unlawfully, and with great force and violence, set upon and assaulted plaintiff, and violently choked, kicked, struck, and beat plaintiff and struck him about the head, temple, and eyes with a blackjack, and unlawfully placed him under arrest, all to his damage in the sum of $2,515. Judgment for that amount was entered in plaintiff's favor and against all the defendants.

On this appeal three contentions are urged: First, that the evidence is insufficient to justify the findings and decision of the court; second, that excessive damages appear to have been allowed under the influence of passion and prejudice; and, third, irregularities in the proceedings of the court occurring during the trial, which, appellants contend, show such an abuse of discretion on the part of the trial court as to prevent the defendants from having had a fair and impartial trial. The third and last specification of error is addressed to the alleged "personal misconduct on the part of the judge during the trial."

At the time of the assault, which was committed when the five police officers arrested the plaintiff, the latter was a regularly employed janitor at the Los Angeles county courthouse, and a deputy sheriff, under due appointment. He had on his person a regularly numbered deputy sheriff's badge and another similar badge presented by the board of supervisors of the county in appreciation of faithful service. He was on his way home, at 11 o'clock at night, after attending a meeting of a lodge of which he was a member. The record contains an abundance of evidence from which it appears, as was held by the trial court, that "an unwarranted, inexcusable and cowardly" assault was committed on him. The defendants were at the time part of a large detail of the Los Angeles police department known as "crime crushers," specially assigned, during the prevalence of a "crime wave," for duty in plain clothes for the purpose, among other things, of picking up all suspicious characters on the streets at night. Two of the defendants accosted the plaintiff, who, because of their lack of uniforms and badges, supposed they were robbers or highwaymen, and attempted to get away from them. No warrant had been issued for the arrest of the plaintiff, but he was seized and beaten by the five policemen—three having joined the two who first accosted him—forced into an automobile, and taken to the police station, where he was quickly identified by other police officers and allowed to go home. The marks and bruises on his head and face caused by the beating were plainly visible at the time.

The defendants sought by their testimony to place all blame for the assault on the plaintiff by testifying that he resisted being arrested after they had shown him their police badges and had told him who they were. There is a direct conflict in the evidence as to what actually took place. The testimony of the plaintiff is corroborated by the testimony of disinterested bystanders, who were drawn to the spot by the hysterical shouts of the plaintiff, who called loudly for "help."

[1] A careful study of the record discloses a situation in which, while the trial judge during the whole trial was very skeptical of the story of the occurrence as told by the different defendants, he ruled fairly and impartially on the admission and nonadmission of the evidence offered. The record is replete, as charged by the appellants, with sarcastic comments and questions, sometimes bordering on the ridiculous, addressed by the judge to the defendants when testifying, which plainly show that he entirely discredited their testimony. Various remarks addressed to counsel tend the same way. Any doubt in the matter was dispelled by the language of the judge in announcing the judgment of the court when the evidence was all in and the cause submitted. He denounced the defendants personally and ridiculed their testimony. His remarks, as reported, are a vitriolic mixture of correct statements of law relating to arrests and personal abuse of the defendants. Delivered, as they were, by one clothed with and protected by judicial position and authority, they shock the sense of propriety of the members of this court, as they would the sense of fitness of

any appellate tribunal called to sit in judgment on this appeal.

While it was to be expected that on appeal complaint would be made of the action of the trial judge, we cannot, as matter of law, say that the defendants were not given a fair trial. It was the duty of the judge of the court below to determine and pass upon the credibility of the parties and other witnesses who testified in the case. The fact that the judge seems to have concluded very early in the case that the defendants were not, in his opinion, telling the truth, and to have so intimated in the unusual manner referred to, does not appear to have influenced the trial of the cause in any other particulars. The issues were fairly presented and well met. There is much evidence in the record to support the findings, and it was believed by the trial court. As already indicated, we may judge from the transcript that all the evidence the parties had, or at least that they deemed necessary to introduce, was presented in due and orderly fashion. The so-called irregularities in the proceedings of the court during the trial do not appear to have prevented a fair and impartial trial.

[2, 3] There remains, therefore, as the final question, whether or not excessive damages were allowed to the plaintiff as the result of passion and prejudice engendered in the mind of the trial judge against the defendants. We deem it unnecessary to consider under what circumstances an officer of the law may arrest a citizen without a warrant. For such a discussion see People v. Kilvington, 104 Cal. 86, 92, 93, 37 P. 799 (43 Am. St. Rep. 73); Michel v. Smith, 188 Cal. 199, 205, 206, 205 P. 113; People v. Gays, 54 Cal. App. 460, 462, 202 P. 43; Murphy v. Murray, 74 Cal. App. 726, 241 P. 938; 3 Cal. Jur. 120, § 6. The point that damages are excessive cannot be raised for the first time on appeal, but must be presented to the lower court on the motion for a new trial. Mohn v. Tingley, 191 Cal. 470, 492, 217 P. 733. While in this case notice of intention to move for a new trial, on the grounds here urged on appeal, was given, there is no record that the motion was ever made. Notwithstanding that fact, while plaintiff was given judgment for the total sum prayed for, the amount of the recovery is not, of itself, so grossly disproportionate to any compensation reasonably warranted by the facts found to be true as to shock the sense of justice and raise at once a presumption that it is the result of passion and prejudice rather than honest and sober judgment. 8 Cal. Jur. 834, § 88.

Despite the unjustifiable conduct of the trial court, we cannot say, in view of the evidence of the severe beating that the plaintiff received, that there was an abuse of the legal discretion lodged in the lower court.

The judgment is affirmed.

We concur: SHENK, J.; SEAWELL, J.; CURTIS, J.; PRESTON, J.; LANGDON, J.; RICHARDS, J.

206 Cal. 524

In re HASTINGS' ESTATE. (Sac. 4179.)

Supreme Court of California. Feb. 21, 1929.

1. Appeal and error ⟹1010(1)—Trial court's finding, supported by evidence, that documents, pictures, etc., relied on, were not genuine, is binding on Supreme Court.

Trial court's finding, supported by evidence in record, that documents, pictures, etc., relied on to establish relationship to decedent of one petitioning for recovery of money distributed to state, were not genuine, and that petitioner was not an heir of decedent, is binding on the Supreme Court.

2. Appeal and error ⟹170(2), 203(3)—Petitioner, not attacking constitutionality of act nor qualification of expert witness called thereunder, waived all objections, though she was incompetent represented by guardian (Code Civ. Proc. § 1871, as added by St. 1925, p. 305).

Petitioner, not interposing objection in trial court that Code Civ. Proc. § 1871, as added by St. 1925, p. 305, providing for calling of expert witnesses by court, is unconstitutional, nor that witness, called to give expert opinion on certain questioned documents, was not qualified, waived all objections to such action, though she was an incompetent, appearing by guardian.

In Bank.

Appeal from Superior Court, Sacramento County; Malcolm C. Glenn, Judge.

In the matter of the estate of Harry A. Hastings, deceased. On a petition by Lucretia Lowhone for recovery of money distributed to the State of California. From a judgment denying the petition, petitioner appeals. Affirmed.

Robert W. Jennings and W. Le Roy Brown, both of San Francisco (C. H. Sooy, of San Francisco, of counsel), for appellant.

U. S. Webb, of San Francisco, and Thomas H. Christiansen, of Sacramento, for the State.

LANGDON, J. This is an appeal from a judgment of the superior court in and for the county of Sacramento, denying appellant's petition for the recovery of money distributed to the state of California in the matter of the estate of Harry A. Hastings, deceased. In a trial extending over many days, appellant sought to establish her heirship as a cousin of the deceased, who had died in San Francisco, Cal., in 1918, intestate and unmarried. The estate was administered by the public administrator, and, as no one appeared as heir at law or next of kin, the proceeds were distributed to the state of California.

The record is voluminous, and we shall not discuss it at great length. Petitioner's case falls, logically, into two parts:

[1] First, her proof of the existence of and her relationship to a boy named Harry Hastings, whom she last saw about 30 years ago in Illinois. Conceding that this portion of the case is established without conflict, it is unavailing without the establishment of the controlling fact that this boy and the decedent are one and the same person. Upon that latter point, while there are some circumstances lending color to petitioner's claim, the documents, pictures, etc., which were relied upon by her to establish the connection between herself and decedent developed into the storm center of the case. The record contains many hundreds of pages regarding their authenticity, and the trial court, sitting as a jury, has found against their genuineness and against the claim of petitioner that she was an heir of deceased. That finding is binding upon this court for there is evidence in the record to support it.

[2] The appellant also contends that section 1871, Code of Civil Procedure, as added by St. 1925, p. 305, providing for the calling, by the court, of expert witnesses, is unconstitutional. This point is raised because the trial court called a disinterested witness to give his expert opinion upon certain questioned documents offered in the case. The power of the court to appoint an alienist in a homicide case under this section of the Code of Civil Procedure, was approved by this court in People v. Cornell (Cal. Sup.) 263 P. 216. Furthermore, in the instant case, no objection was interposed either as to the court's right to appoint or that the witness appointed was not qualified, and all objections to such action of the trial court were waived, therefore. While it is contended that such waiver does not occur in the instant case because the petitioner is an incompetent, appearing by guardian, we think such contention is without merit. In the case of Newport v. Hatton, 195 Cal. 132, 231 P. 987, the court said: "An infant is ordinarily bound by acts done in good faith by his guardian ad litem or counsel in the course of his suit to the same extent as a person of full age." To the same effect is the case of Thompson v. Maxwell Land Grant, etc., 168 U. S. 451, 18 S. Ct. 121, 42 L. Ed. 539.

There are no other matters requiring consideration, and the judgment is affirmed.

We concur: WASTE, C. J.; CURTIS, J.; PRESTON, J.; SHENK, J.; RICHARDS, J.; SEAWELL, J.

---

206 Cal. 497

Ex parte GRAY. (Cr. 3164.)

Supreme Court of California. Feb. 15, 1929.

1. Constitutional law 🔑205(5), 230(3)—Druggists 🔑2—Statutes 🔑79(1)—Statute requiring sales of original package medicines other than patent medicines to be made under supervision of registered pharmacists held not unconstitutional (St. 1905, p. 540, § 12, as amended by St. 1907, p. 768, § 4, and page 541, § 13, as amended by St. 1909, p. 1015, § 4, and page 542, § 16, as amended by St. 1927, p. 1140; Const. art. 1, §§ 11, 21; art. 4, § 25; Const. U. S. Amend. 14).

St. 1905, p. 540, § 12, as amended by St. 1907, p. 768, § 4, and page 541, § 13, as amended by St. 1909, p. 1015, § 4, and page 542, § 16, as amended by St. 1927, p. 1140, requiring all sales of original package medicines other than patent or proprietary medicines to be made by or in presence and under direct and immediate supervision of registered pharmacists, *held* not unconstitutional as grant of special privilege and denial of equal protection of the law in violation of Const. art. 1, §§ 11, 21, art. 4, § 25; Const. U. S. Amend. 14.

2. Health 🔑21—Police regulation for protecting public health, if tending to effect its object, will be sustained.

Police regulation for protection of public health will be sustained if by any fair construction it has tendency to effect its object.

3. Druggists 🔑1—State may regulate sale of domestic remedies in original package in same manner as other kinds of remedies.

State has same right to regulate sale of domestic remedies in original package of manufacturer as it has to regulate sale of any other kinds of medicines and remedies.

4. Druggists 🔑1—Medicines are not removed from realm of regulation merely because put in sealed packages with directions for use.

That medicines or remedies are usually put in sealed packages or containers, with directions as to their use, *held* not alone sufficient to remove them from realm of regulation.

5. Druggists 🔑2—Statute authorizing board of pharmacy to issue permits to general dealers in rural districts having store within three miles of registered pharmacists to sell simple household remedies held valid (St. 1905, p. 542, § 16, as amended by St. 1927, p. 1140).

St. 1905, p. 542, § 16, as amended by St. 1927, p. 1140, authorizing board of pharmacy in its discretion to issue permits to general dealers in rural districts, where store of such general dealer is not less than three miles distant from store of registered pharmacist, to sell certain simple household remedies and drugs, *held* valid.

In Bank.

Application by William W. Gray for writ of habeas corpus, directed to the Chief of Police of City of Sacramento. Writ discharged, and petitioner remanded.

J. M. Inman and P. G. West, both of Sacramento, for petitioner.

U. S. Webb, Atty. Gen., Robert W. Harrison, Chief Deputy Atty. Gen., for respondent.

Neil Cunningham, Deputy Atty. Gen., and W. Bruce Philip, of San Francisco, amicus curiæ, for respondent.

PER CURIAM. Petitioner was taken into custody under a warrant of arrest issued out of the justice court of Sacramento township, charging him with the commission of a misdemeanor, to wit, violation of an act regulating the practice of pharmacy. Stats. 1905, c. 406, p. 535, and amendments thereto. The complaint on which the warrant issued charged petitioner more specifically with having dispensed certain household drugs, to wit, tincture of arnica, spirits of camphor, almond oil, distilled extract witch-hazel, syrup of ipecac, syrup of rhubarb, hive syrup, sweet spirits of nitre, tincture of iron, saltpeter, Rochelle salts, senna leaves, carbonate of magnesia, seidlitz powders, quinine, cathartic pills, camomile flowers, caraway seed, chlorate of potash, moth balls, plasters, salves, ointments, peroxide of hydrogen, gum camphor, blue ointment, asafœtida, saffron, anise seed and Epsom salts (in less than ten-pound quantities), contrary to sections 13 and 16 of the act. In this proceeding it is petitioner's contention that said sections 13 and 16 are unconstitutional and void, as granting special privileges and denying the equal protection of the law in a manner not reasonably intended to protect the public health, and therefore violative of sections 11 and 21 of article 1 and section 25 of article 4 of the State Constitution and the Fourteenth Amendment of the Federal Constitution.

Petitioner concedes it to be established that, for the preservation of public health and safety, the state may regulate and place proper restrictions upon the practice of pharmacy, and may prescribe qualifications to be possessed by those engaged in that profession, and that in the exercise of its police power it may also regulate the manufacture, compounding and sale of drugs, medicines and poisons, where such regulation in any way reasonably tends to protect the public health, safety or morals. He insists, however, and rightly so, that any such regulation must be of a reasonable nature and calculated in some way to promote such protection. This brings us to a consideration of the pertinent provisions of the act.

Section 13 (as amended by St. 1909, p. 1015, § 4) reads: "Any proprietor of a pharmacy, who shall fail, or neglect to place in charge of such pharmacy a registered pharmacist, or any proprietor, who shall by himself or any other person, permit the compounding of prescriptions, or the vending of drugs, medicines, or poisons, in his or her store, or place of business, except by or in the presence and under the direct, immediate and personal supervision of a registered pharmacist, or any person, not being a registered pharmacist, who shall take charge of, or act as manager, of any pharmacy, or store, or who, not being a registered pharmacist, retails, compounds, or dispenses drugs, medicines, or poisons, shall be guilty of a misdemeanor. * * *"

Section 16 (as amended by St. 1927, p. 1140) is as follows: "The Board of Pharmacy shall issue a permit to general dealers in rural districts in which the conditions, in their judgment, do not justify the employment of a registered pharmacist, and where the store of such general dealer is not less than three miles distant from the store of a registered pharmacist; which said permit shall authorize the persons or firm named therein to sell in such locality, but not elsewhere, and under such restrictions and regulations as said board may from time to time adopt, the following simple household remedies and drugs, in such manner and form as may be hereafter authorized by said board, as follows, to wit:

"Tincture of arnica, spirits of camphor, almond oil, distilled extract witch-hazel, syrup of ipecac, syrup of rhubarb, hive syrup, sweet spirits of nitre, tincture of iron, Epsom salts, Rochelle salts, senna leaves, carbonate of magnesia, seidlitz powders, quinine, cathartic pills, camomile flowers, caraway seed, chlorate of potash, moth balls, plasters, salves, ointments, peroxide of hydrogen, gum camphor, blue ointment, asafœtida, saffron, anise seed and saltpeter, and such other remedies or drugs as the board may from time to time designate.

"The board shall charge an annual fee of five dollars in advance for such permit, and it shall be unlawful for any dealer to sell any drugs or ordinary household remedies without complying with the requirements of this section. Whenever a registered pharmacist shall establish a pharmacy within three miles by the shortest road from the place of business of such dealer, no further license shall be granted, and the license already issued shall be void; provided, that the following drugs, medicines and chemicals may be sold by grocers and dealers generally without restriction, viz.:

"Glauber salts, vaseline, turpentine, condition powders, cream of tartar, carbonate of soda, bay rum, essence of Jamaica ginger, essence of peppermint, ammonia, alum, castor oil, bicarbonate of soda, chloride of lime, glycerine, witch-hazel, sheep dip, borax, sulphur, bluestone, copperas, flaxseed, insect powder, fly-paper, ant poison, squirrel poison, gopher poison, and poultry vermifuge; and arsenical poisons used for orchard spraying, when prepared and sold only in original and unbroken packages and labeled with the official poison labels; provided, that this act shall not prevent the sale of Epsom salts in original packages of not less than ten pounds when plainly and properly labeled 'For live stock only and not for medicinal purposes' in letters not less than one-half inch in height."

Gray is not a registered pharmacist, and his place of business is less than three miles distant from the store of a registered pharmacist. Section 12 (as amended by St. 1907, p. 768, § 4) provides that the act is without application to "registered, trade-marked or copyrighted proprietary medicines," and section 11 declares that every proprietor or manager of a pharmacy or drug store is responsible for the quality of all drugs, chemicals and medicines sold or dispensed by him, "except those sold in the original package of the manufacturer and except those articles or preparations known as patent or proprietary medicines."

Petitioner cites State v. Childs (Ariz.) 257 P. 366, 54 A. L. R. 736, in which a statute containing provisions substantially identical with the foregoing sections of the California act was declared unconstitutional in so far as it attempted or purported to restrict to registered pharmacists the sale of patent or proprietary medicines or medicines sold in the original package of the manufacturer. It was there held that the sale of such patent or proprietary medicine or medicines sold in the original package of the manufacturer did not require the exercise of expert skill and, in the absence of responsibility on the seller's part to the buying public, afforded no particular protection or safeguard to the public health. The Arizona court based its conclusion, in the main, on the reasoning of State v. Donaldson, 41 Minn. 74, 42 N. W. 781, also relied on by petitioner.

[1-4] While there is much that is persuasive in the reasoning of these decisions, we are not prepared to follow them and declare unconstitutional the provisions of our pharmacy statute requiring, with one exception not here involved, all sales of original package medicines, other than patent or proprietary medicines which are expressly excepted from the operation of the act, to be made by or in the presence and under the direct and immediate supervision of a registered pharmacist. A police regulation for the protection of the public health will be sustained if, by any fair construction, it has a tendency to effect its object. All of the authorities recognize that the state has as much right to regulate the sale of domestic remedies in the original package of the manufacturer as it has to regulate the sale of any other kinds of medicines and remedies. The mere fact that such medicines and remedies are usually put in sealed packages or containers, with directions as to their use, should not alone be sufficient to remove them from the realm of regulation. A person purchasing such original package medicines might well rely, as it was intended he should rely, upon such directions and administer the medicine accordingly; and, while the directions upon any particular original package medicine might be, and probably are, correct and safe, medicines of a dangerous character might be put up and sold in the same manner, with directions not safe, and not approved by a pharmacist, and thus the statutory province of the pharmacist be usurped to the detriment of the public. It is our opinion, therefore, that the Legislature, in the exercise of its police power, may properly and reasonably confine and restrict the sale of original package medicines, other than patent or proprietary medicines which are expressly declared to be without the operation of the act, to registered pharmacists.

In State v. Zotalis, 173 Minn. 132, 214 N. W. 766, decided long after State v. Donaldson, supra, the defendant, who conducted a confectionery store, was convicted of illegally selling aspirin. In affirming the judgment of conviction the court declared: "The statute should be sustained if enacted with reasonable reference to public health or welfare. If intended merely to give a monopoly to pharmacists or druggists by restricting sales to them it is not sustainable. It is only sustainable as a police measure.

"The Legislature thought that the dangers incident to its sale justified regulation and that a restriction of sales to pharmacists or to those under their supervision was effective. It is true that no technical skill is required in making a sale. This does not prove the statute invalid. As remarked by the trial court, the pharmacist knows where to procure a pure and genuine article and his prescribing physicians will require him to furnish a pure drug. It is not questioned that the sale of drugs, medicines and poisons may be regulated in the exercise of the police power. State v. Donaldson, 41 Minn. 74, 42 N. W. 781. * * * The restriction of the sale of aspirin as provided by the statute is within the legislative discretion. * * *" Other authorities sustaining the right of the Legislature to restrict the sale of original package medicines and so-called harmless household remedies to registered pharmacists, are: State Board of Pharmacy v. Matthews, 197 N. Y. 353, 90 N. E. 966, 26 L. R. A. (N. S.) 1013; People v. Abraham, 16 App. Div. 58, 44 N. Y. S. 1077; State v. Foutch, 155 Tenn. 476, 295 S. W. 469, 471, 54 A. L. R. 725; Board of Pharmacy v. Abrammoff, 141 A. 587, 6 N. J. Misc. Rep. 437.

[5] Provisions similar to section 16 of our act, wherein the board of pharmacy is authorized in its discretion to issue permits to general dealers in rural districts, where the store of such general dealer is not less than three miles distant from the store of a registered pharmacist, to sell certain so-called simple household remedies and drugs, have been repeatedly upheld. State v. Foutch, supra, page 470 of 295 S. W. (155 Tenn. 476); State Board of Pharmacy v. Matthews, supra, pages 968, 969 of 90 N. E. (197 N. Y. 353);

State v. Donaldson, supra, page 782 of 42 N. W. (41 Minn. 74); State v. Zotalis, supra, page 767 of 214 N. W. (173 Minn. 132). In State v. Donaldson, supra, it is held: "Doubtless, the use of impure medicines or dangerous drugs is just as injurious to those who buy them one mile from a drug store as to those who buy them within that distance; and, if this was the only thing to be taken into the account, the discrimination would be purely arbitrary. But the legislature had to deal with this as a practical question, and had a right to take into consideration the convenience of the public. In sparsely settled districts, frequently there is no pharmacy or drug store near at hand. In case of sickness it is often absolutely necessary to obtain medicinal remedies promptly, in order to save life. The question was, how far was it practicable to protect the public from the sale of impure or dangerous medicines and drugs, and at the same time have due regard to the convenience of those living at a distance from a drug store? To meet the requirements of the situation, the Legislature made an exception so as to allow shopkeepers whose place of business is more than a mile from a drug or apothecary shop to deal in and sell the commonly used medicines and poisons, if put up by a registered pharmacist; thereby protecting the public, especially in the centers of population where they most need it, as far as practically consistent with the convenience and necessities of those living in rural districts. We do not think that such a distinction is either arbitrary or unreasonable."

The writ is discharged, and the petitioner remanded.

---

206 Cal. 515

BROWN v. HAPPY VALLEY FRUIT GROWERS, Inc., et al. (Sac. 4123.)

Supreme Court of California. Feb. 20, 1929.

1. Venue 🔑66—Averment of third person's residence in affidavit for change of venue is sufficient, though based on information and belief (Pol. Code, § 52, subd. 7, and § 1239, subd. 10).

Averment as to place of residence of third party in affidavit on motion for change of venue is a sufficient averment of fact, though based on information and belief, since question of residence is largely dependent on the intent of the person whose residence is subject of inquiry, under Pol. Code, § 52, subd. 7, and section 1239, subd. 10.

2. Venue 🔑41—Failure of one defendant to consent did not defeat right of others to change of venue, where uncontradicted affidavit alleged on information and belief that none of defendants were residents (Pol. Code, § 52, subd. 7, and § 1239, subd. 10; Code Civ. Proc. § 395).

Under affidavit on motion for change of venue under Code Civ. Proc. § 395, which stated that none of defendants were residents of county in which suit was brought, and that at least two of them were residents of another county, motion for change of venue should have been granted, though one of defendants did not join in, or consent to, the change, where averment of nonresidence of all defendants, though based on information and belief, was not contradicted, in view of Pol. Code, § 52, subd. 7, and section 1239, subd. 10.

3. Venue 🔑41—Right of nonresident defendants to have case transferred is not defeated by consent of other nonresident defendants (Code Civ. Proc. § 395).

Consent of certain defendants residing outside county where the action is brought cannot take away from other nonresident defendants right to have cause transferred to the county of their residence, under Code Civ. Proc. § 395.

4. Venue 🔑5(3)—Action to set aside judgment for fraud and restrain defendants from asserting title to local property sold to satisfy judgment held transitory and not to recover realty (Code Civ. Proc. § 392).

Action against nonresidents to set aside judgment entered in superior court of another county on ground of fraud and collision, and to enjoin defendants from asserting title to real property, located in county in which suit was brought, and sold to satisfy the judgment, *held* personal and transitory action, triable in county where defendants resided, and not action for the recovery of real estate, under Code Civ. Proc. § 392.

5. Venue 🔑16½—Plaintiff cannot, by uniting local and transitory causes, compel defendants to have both matters tried outside county of their residence (Code Civ. Proc. § 392).

Plaintiff cannot, by uniting by his complaint matters which form the subject of personal action with other matters which form the subject of local action, under Code Civ. Proc. § 392, compel defendants to have both matters tried in county other than that in which defendants reside.

6. Courts 🔑476—One court will not generally interfere with judgment of another court of co-ordinate jurisdiction.

Where courts are given co-ordinate jurisdiction, one court will not interfere with the judgment of another court, unless the exigencies of the situation are so exceptional as to demand summary intervention of equity side.

7. Courts 🔑481—Court will not entertain jurisdiction of suit to set aside earlier judgment entered in court of co-ordinate jurisdiction, where process issued under former judgment had been fully executed.

Court of one county will not, in suit by subsequent judgment creditor, entertain direct attack on former judgment against corporation, entered in court of co-ordinate jurisdiction, where execution sale was had under the former judgment and process had spent its force before filing of present suit.

Department 1.

Appeal from Superior Court, Shasta County; Walter E. Herzinger, Judge.

Action by J. Harry Brown against the Happy Valley Fruit Growers, Inc., and others. From an order denying motions for change of venue, defendants appeal. Reversed.

R. Lee Chamberlain, of San Francisco, for appellants.

William M. Thornton, in pro. per., and for Lightner.

Carr & Kennedy, of Redding, for respondent.

SEAWELL, J. This appeal is from an order denying motions made by certain defendants in the above-entitled action for an order transferring said cause for trial from the county of Shasta to the county of Alameda, the place of residence of said moving parties. The appellant Happy Valley Fruit Growers, Inc., is a corporation with its principal place of business in the county of Alameda. On and prior to December 31, 1925, said corporation was the owner and holder of certain described parcels or tracts of land situate in the county of Shasta.

On December 31, 1925, Howell Lightner commenced an action in the superior court of the county of Alameda to recover a stated indebtedness against said corporation in the sum of $22,363.29. Said corporation offered no defense to said action and judgment accordingly went against it for the gross sum of $24,699.38. Pursuant to an execution issued upon said judgment, the sheriff of the county of Shasta sold at judicial sale on June 19, 1926, said parcels of land owned by said corporation, situate in Shasta county, to Howell Lightner for the sum of $10,000, which sum was applied as a credit upon said judgment. A sheriff's deed of said real property was, on June 21, 1927, executed and delivered to said Lightner.

The complaint alleges that on and prior to December 31, 1925, said corporation was indebted to plaintiff and respondent J. Harry Brown upon an assigned promissory note, dated October 3, 1923, in the principal sum of $5,802.08, together with interest thereon at the rate of 7 per cent. per annum; that at a time not stated in the complaint said respondent Brown commenced a suit in the superior court of the county of Butte against said corporation upon said note and obtained judgment on October 19, 1926, for the gross sum of $7,088.90; that upon the filing of said action plaintiff Brown procured a writ of attachment to be issued out of the superior court of the county of Butte, directed to the sheriff of the county of Shasta, and said officer by virtue thereof, on April 10, 1926, levied upon and attached all of the interest which said corporation owned in said real property situate in the county of Shasta.

The foregoing facts, taken from the complaint, are sufficient to illustrate the order in which the adversary parties proceeded in their respective efforts to reduce the property of said corporation to satisfaction of their asserted claims.

We now come to the gravamen of the complaint, which is essential in order to determine the nature of the action with reference to the place of trial. The complaint in the present action, filed in the superior court of the county of Shasta, is an attack upon a judgment obtained in the county of Alameda, valid upon its face, charging fraud and collusion were practiced by said plaintiff in said action, Howell Lightner, and defendant corporation, with the purpose and design of enabling said Lightner, upon a fraudulent and fictitious cause of action, to obtain said judgment against said corporation to the prejudice and damage of plaintiff herein and other creditors. The prayer of the complaint is for a decree of annulment of said attachment issued out of said superior court of the county of Alameda and the judgment entered thereon on May 20, 1926, in favor of defendant Howell Lightner and against said corporation, and the voidance of all the subsequent proceedings had and acts done pursuant thereto, on the ground that said judgment was procured by the fraud and collusion of the parties to said action, acting in concert, with the intent and design of defrauding said plaintiff and other creditors of said corporation; further, that defendants Lightner, Thornton, and all persons claiming through or under them be restrained from asserting any right, title, interest, or claim in or to said Shasta county property by reason of the judgment, or the execution or sale arising out of said judgment; further, that the writ of attachment issued out of the superior court of the county of Butte on April 10, 1926, and levied upon said corporation's Shasta county real property be declared a lien upon said real property prior in time and superior in right to any claim of said defendants herein.

The motion made by appellants at the time this cause was before us for hearing for diminution of the record by including certain matters which were omitted therefrom and which are before us in supplemental form, properly authenticated, is granted.

Defendant Thornton appeared in propria persona and as attorney for defendant Lightner, and demurred to the complaint on behalf of both of said defendants. At the same time he gave notice of motion for change of the place of trial, assigning as the grounds therefor that he was at the time of the commencement of the action, and had since continued to be, a resident of the county of Alameda. In said notice he subscribed himself as attorney in propria persona and also attorney for Lightner, but did not move in the latter's behalf. The demand for change of venue was signed, "Wm. Thornton, defendant," and the affidavit of merits was signed merely in his personal capacity, but the affidavit sets forth his appearance as defendant in propria persona. Said corporation likewise appeared by demurring to the complaint and complied with all the provisions of the statute requisite to the right of obtaining a change of venue. In its affidavit of merits said corporation, through its vice president, Goss, averred its place of residence at the time of the commencement of said action and since to be the county of Alameda, and further averred, upon information and belief, that none of defendants named in said complaint were, at the time of the filing of said complaint, or have since been, residents of the county of Shasta. No counter affidavits were filed by respondent. The minute order appearing in the record is: "Motion for change of venue denied."

Defendant Lightner, who joined in the demurrer with his attorney and codefendant Thornton, was not joined with him in said notice of motion for change of venue or in the demand or affidavit of merits, nor did he appear separately in said matters. Attorney Thornton, who was a codefendant in the action, was unquestionably the attorney and representative of Lightner, as shown by the joint demurrer filed. The corporation was represented by Attorney Chamberlain. There is no doubt, however, that all of the defendants acted in concert on the motion to change the place of trial. The trial court apparently considered the motions as jointly made, as the entry in the record is: "Motion for change of venue is denied."

[1-3] It is respondent's claim that, inasmuch as Lightner did not in the venue proceeding file an affidavit showing his place of residence to be in a county other than Shasta, it must be presumed that he was a resident of said county. But it does appear by uncontradicted averment that none of the defendants were residents of said county of Shasta and that at least two of them were residents of the county of Alameda. It is further objected that the affidavit made by the vice president of the defendant corporation as to the fact that none of said defendants were residents of the county of Shasta was made upon information and belief. It may be said in passing that, as the question of residence is largely dependent upon the intent of the person whose residence is the subject of inquiry (section 52, subd. 7, and section 1239, subd. 10, Pol. Code), an averment based upon information and belief as to the place of residence of a third party should be accepted as a sufficient averment of fact, although such an averment may not be regarded as sufficient in that class of cases where the ultimate fact is susceptible of direct and positive averment. Such an averment is prima facie proof of the fact in the absence of any denial or contrary proof whatsoever. "Whenever the statute, either in express terms or by implication, requires a person to make a statement which from the very nature of things can only be made on information and belief, an affidavit in that form meets the demands of the statute. It is impossible for anyone to swear positively that a particular person is a nonresident of this state, or to say that a nonresident resides at a particular place. In requiring these facts to be stated, the statute does not demand the impossible. * * * It does intend that the person making the affidavit * * * shall state these facts upon information and belief —the only possible ground upon which they can be made." Smith v. Collis, 42 Mont. 350, 363, 112 P. 1070, 1073 (Ann. Cas. 1912A, 1158), Leigh v. Green, 64 Neb. 533, 90 N. W. 255, 101 Am. St. Rep. 592. If none of the defendants were residents of Shasta county, the motions for the change of place of trial to Alameda county should have been granted, even though Lightner, who more than likely believed, and whose attorney, Thornton, no doubt likewise believed, Lightner was represented in all the proceedings for the change of venue by his said attorney, Thornton, did not join in or consent to the change, provided he was not a resident of Shasta county.

In Wood, Curtis & Co. v. Herman Min. Co., 139 Cal. 713, 73 P. 588, the rule is thus stated: "In the present case the defendants who had been served made the demand, but other defendants appeared voluntarily, and answered and opposed the demand, and requested that the trial proceed in Sacramento county. It appeared, however, from the affidavit of the moving defendants, and is uncontradicted, 'that none of the defendants named in the complaint on file herein did at the commencement of the action, or since, or now, reside in said county of Sacramento.' This was a compliance with section 395 in that regard (Greenleaf v. Jacks, 133 Cal. 506 [65 P. 1039]). The language of section 395 requires the action to be tried in the county in which the defendants, or some of them, reside, not where they do not reside. The consent of certain defendants not residing in the county where the action is brought could not take away from the defendants who did not reside there the right to have the cause transferred to the county of their residence. To hold otherwise would be a violation of the provisions of section 395."

The right of a defendant to have an action brought against him tried in the county in which he has his residence is an ancient and valuable right, which has always been safeguarded by statute and is supported by a long line of judicial decisions. "The right of a plaintiff to have an action tried in another county than that in which the defendant has his residence is exceptional, and, if the plaintiff would claim such right, he must bring himself within the terms of the exception." Brady v. Times-Mirror, 106 Cal. 56, 39 P. 209.

[4, 5] Appellants insist that the action is personal and transitory and no phase of it can properly be included within section 392, Code of Civil Procedure, which provides that causes must be tried in the county in which the subject of the action or some part thereof is situated, subject to the power of the court to change the place of trial, to wit: "For the recovery of real property, or of an estate or interest therein, or for the determination in any form, of such right or interest, and for injuries to real property; for partition of real property; for the foreclosures of all liens and mortgages on real property. * * *"

Unquestionably neither the Alameda county action nor Butte county action involved or in any way affected an injury to, interest in, or right to real property or the foreclosure of a mortgage or lien thereon. The present action is a direct attack upon a judgment entered in the superior court of Alameda county, valid upon its face, upon the grounds of fraud and collusion. Fraud and collusion constitute the crux of the action. It is true that relief incidental to the main question and which follows it as a matter of course is unnecessarily included in the prayer of the complaint. Plaintiff's lien as an incident of the Butte county judgment would remain in full force and effect in the event that the Alameda county judgment should be annulled upon the ground of fraud. There would be absolutely nothing left, so far as the condemned judgment is concerned, to hinder or impede the plaintiff in the full enjoyment of the fruits of the Butte county judgment. That portion of the prayer of the complaint which prays that defendants be enjoined and restrained from asserting any right, title, interest, or claim in said real property by reason of the Alameda county judgment, execution, and sale arising thereon, and that plaintiff's lien be declared to be prior in right to the claim of said defendants, is merely surplusage matter. No claim is made that the action is one to foreclose a lien, nor is the enforcement of execution or any other immediate threatened action on the part of defendants sought to be stayed. The validity of an existing judgment, valid on its face, is recognized by plaintiff as the pivot point which controls all other questions; but, if it could be said that an action to quiet title is joined with matter which forms the subject of a personal action, the answer to that question is that a plaintiff cannot, by uniting in his complaint matters which form the subject of a personal action, such as fraud and collusion, with matters which form the subject of a local action, compel the defendants to have both matters tried in a county other than that in which said defendants reside. Sheeley v. Jones, 192 Cal. 256, 219 P. 744; Warner v. Warner, 100 Cal. 11, 34 P. 523; Smith v. Smith, 88 Cal. 572, 26 P. 356; Nason v. Feldhusen, 34 Cal. App. 789, 168 P. 1162.

[6, 7] Under a system where courts are given co-ordinate jurisdiction, one court will not interfere with the judgment of another court of co-ordinate jurisdiction except where the exigencies of the situation are so exceptionally pressing as to demand the summary intervention of the equity side of said court of co-ordinate jurisdiction. The facts as pleaded present no reason why the instant action should have been commenced in Shasta county. Months before the Butte county judgment was obtained and probably before said Butte county action was filed, a writ of attachment was caused by Lightner to be levied upon said Shasta county real property. Said property was sold at execution sale almost four months before the Butte county judgment was obtained. No injunctive relief was sought. The complaint herein was filed months after the process set in motion by the Alameda county judgment had spent its force. The court that rendered the judgment assailed could, upon application made to it, have granted the same adequate relief that any other court in the state could have granted. This being so, the rule is that one court will not interfere with the judgments of another court of co-ordinate jurisdiction. Crowley v. Davis, 37 Cal. 268.

We are of the view that the proper place of trial of said cause was the county of Alameda upon both of the grounds considered herein; certainly upon the ground that the action was personal and transitory and none of the defendants resided in the county of Shasta.

The order is reversed.

We concur: CURTIS, J.; PRESTON, J.

---

206 Cal. 291

SMITHWICK et al. v. PACIFIC ELECTRIC RY. CO.★ (L. A. 9567.)

Supreme Court of California. Jan. 29, 1929.

Hearing Denied in Bank Feb. 28, 1929.

1. Railroads ⚷401(1)—Instruction that railroad owed duty not to knowingly maintain dangerous instrumentalities on right of way held not objectionable as submitting "attractive nuisance" doctrine.

Instruction that if defendant railroad permitted public to use its tracks and right of way for travel at place of accident, and if 4½ year old boy was injured while so using tracks, he was not a trespasser and defendant owed him duty not to maintain any dangerous contrivance on right of way which was likely to injure him, *held* not objectionable as submitting "attractive nuisance" doctrine, not involved in case.

★Hearing denied in bank.

2. Railroads 🔑357—Within populous districts, measure of ordinary care controls operation of trains in manner likely to injure persons likely to be on right of way.

In populous and metropolitan area, interests of public outweigh claim of railroad to exclusive use of its right of way unobstructed, and the measure of ordinary care will be applied where trains are operated through such district in a way likely to inflict injury on persons whom railroad should expect may be on or near its right of way.

3. Railroads 🔑400(5)—Whether object, improperly projecting from train in manner likely to injure persons on or near tracks, constituted breach of care, is jury question.

Whether operation of a train, with an arm, timber, or other object, not a proper and permanent portion of the train, which employés knew or should have known was projecting in a manner likely to injure persons whom company should expect to be on or near its tracks, amounts to a breach of care, is a question for the jury.

4. Railroads 🔑359(1)—Railroad's duty to trespasser on right of way is not to recklessly injure him.

Trespasser on railroad tracks is contributorily negligent in being on the tracks or right of way where he has no right to be, and must expect only that railroad will not recklessly injure him.

5. Railroads 🔑358(1)—Railroad owes to implied licensee on tracks higher degree of care than merely not to recklessly injure him.

One on railroad tracks under implied license or invitation from railroad is not necessarily negligent in being there, and railroad owes him a higher degree of care than merely not to recklessly injure him.

6. Railroads 🔑400(2)—On conflicting evidence, it is for jury to decide whether plaintiff injured on railroad tracks is licensee or trespasser and degree of care owed him.

Where evidence is conflicting, it is for jury to determine whether plaintiff injured by train on or near right of way is licensee or trespasser, and whether under particular circumstances railroad owed him duty of care which it failed to exercise, by reason whereof plaintiff was injured without fault on his part.

7. Railroads 🔑364—Infancy of person struck by projection on moving train would be material only on question of contributory negligence.

In action for injuries to 4½ year old boy struck by projection extending from freight car, whether injured plaintiff was infant or adult was immaterial, if jury could find from evidence that railroad should have expected his presence at place of injury and could also find that railroad employés were negligent in operation of trains, and was material only on question of contributory negligence.

8. Railroads 🔑398(1)—Evidence that 4½ year old boy was struck by object projecting from train held to make case of negligence proximately causing injury.

In action for injury to 4½ year old boy, evidence that he was struck by object projecting from moving train *held* to make out a case of negligence proximately causing injury.

9. Railroads 🔑398(1)—Testimony that witnesses found no projection alleged to have injured pedestrian held not to overcome inferential finding of negligence in inspection.

In action for injuries to boy struck by object projecting from moving freight train, testimony of railroad's witnesses that they inspected train and found no projection *held* not to overcome inferential finding of negligence in matter of inspection.

10. Railroads 🔑401(7)—Instruction that railroad owed no duty to discover boy near tracks, and, if discovered, only not knowingly to permit object to extend beyond car, held properly refused.

In action for injuries to boy struck by projection from side of car while walking near railroad tracks, defendant's requested instruction that it owed no duty to discover plaintiff, and no duty if he was discovered except not knowingly to permit beam or other object to extend outside of car, *held* properly refused.

Department 2.

Appeal from Superior Court, Los Angeles County; Walton J. Wood, Judge.

Action by Marion R. Smithwick, a minor, by his guardian ad litem, Marion A. Smithwick, and another, against the Pacific Electric Railway Company. From an adverse judgment, defendant appeals. Affirmed.

Frank Karr, E. E. Morris, and C. W. Cornell, all of Los Angeles, for appellant.

Geo. W. Rochester and Frank P. Doherty, both of Los Angeles, for respondents.

SHENK, J. This action was brought by Marion R. Smithwick, a minor, by Marion A. Smithwick, his father, as his guardian ad litem, and by Marion A. Smithwick in his personal capacity, for damages resulting from an accident wherein the minor plaintiff was injured by a freight train of the defendant company. The jury returned two verdicts, one for the minor in the sum of $6,000 on account of the personal injuries suffered by him, and one for $735 in favor of the father on account of medical and surgical attention and hospital care. From the judgments entered pursuant to said verdicts, the defendant has appealed.

The minor plaintiff was about 4½ years of age at the time of the accident. He suffered an injury by which his leg was cut off by the wheels of the defendant's moving train. The injury occurred about noontime on March 19, 1925, on the defendant's private right of way running in a straight line east and west between Grand avenue and Hope street in the city of Los Angeles. A vacant lot, contiguous to the northern boundary of the right of way and bounded on the west by Hope street, on the north by Thirty-Fifth street, and on the east by a spur track running from the right of way to the May Company's warehouse, had been used by children as a playground for five or six years continuously next preceding the time of the accident. Employés of the Birch-Smith Company, whose warehouse joined the southerly boundary of the defendant's right of way at Grand avenue, also used the playground during the noon hour for the game of baseball. To get to the playground the employés crossed over the private right of way at a point about equidistant between Grand avenue and Hope street. It was in evidence that children often crossed and came upon the private right of way for the purpose of recovering balls; that each year there was at least one well-defined footpath crossing the right of way, but that its location might not be the same in every year; that a well-defined footpath extending from the playground and crossing the right of way existed at the time of the accident; that several other but less defined paths were made through the weeds and across the tracks; that there were well-worn footpaths parallel to the tracks along the right of way on the north and on the south sides of the tracks; and that children and adults had crossed the right of way over these paths daily for about six years.

On the day of the accident, a freight train of 23 cars, comprising flat cars, "gondolas," and box cars, attached to a motor which was at the head end, was operated by defendant's employés from Culver Junction east-bound for the Butte street yards of the defendant. As the train was crossing Hope street from the west and approaching Grand avenue, and going at a rate of 10 miles an hour, the minor plaintiff and another boy about the same age were seen coming from the playground and running toward the train. After the motor had passed the minor plaintiff, he changed his course and ran along and parallel with the train and in the same direction in which it was moving. He was picked up with one of his legs cut off and with other minor injuries. The foregoing was established by practically undisputed evidence. There was additional evidence that the minor plaintiff was struck from the back by a rod, truss, beam, or other object which protruded several feet from one of the cars, which, as it passed near the boy, hit him on the back of the head and knocked him under the wheels. One witness testified that he was in his automobile on Grand avenue on the north side of the passing train waiting to cross the right of way when he saw the two children near the tracks; that they were far enough from it for safe clearance; that he saw something "hit the smaller boy on the head and turned him around and knocked him under the train"; that he looked at the train as it continued to pass to see what had struck the boy and saw that "something was hanging," protruding about 4 feet from the car and downward; that he could not make out exactly what the object was; but that he thereupon immediately ran to the child's assistance. The minor plaintiff himself testified that something struck him on the back of the head. It was in evidence that the boy was about 15 feet east of the cross-path and 4 or 5 feet north of the track when he was picked up. The defendant's train crew testified that the train was examined at Culver Junction and no truss or beam or other object was sticking out from the side of the car; that when they arrived at the Butte street yards, which was about 15 or 20 minutes after they passed Grand avenue, they received a telephone message concerning the accident; that they examined every car carefully to find any protruding object, but found none; that at the time of the accident the conductor and all the crew except the rear brakeman were forward; and that the rear brakeman was in a "gondola"—a box car without a roof—which was next to the rear car. The trainmen testified that they did not see the boy at any time and did not know of the accident until they received the telephone message on arriving at the Butte street yards.

The defendant assigns as error the refusal of the trial court to grant its motions for a nonsuit and for a directed verdict; also, the giving of certain instructions and the refusal to give certain requested instructions. The defendant contends that as a matter of law the defendant was not negligent, because at the most the minor plaintiff was a mere licensee and the duty of care owed to a licensee by the owner of private premises is no greater than that owed to a trespasser, viz., a duty not wantonly or willfully to injure him. It is insisted that this court has refused to recognize any distinction between a mere licensee and a trespasser, citing, Means v. Southern California Railway Co., 144 Cal. 473, 77 P. 1001, 1 Ann. Cas. 206; that the duty owed a licensee on defendant's right of way is the same as that owed a trespasser; and that there is no duty therefore to discover the plaintiff, but the duty arises only after discovery to use due care to avoid injuring him (see Green v. South S. F. R., etc., Co., 181 Cal. 392, 184 P. 669; Toomey v. S. P. R. R. Co., 86 Cal. 374, 24 P. 1074, 10 L. R. A. 139; Tennenbrock v. S. P. C. R. Co., 59 Cal. 269, 271, citing Maumus v. Champion, 40 Cal. 121); and that the defendant owes no greater duty to discover infant trespassers than it does to discover adult trespassers, citing mainly Felton v. Aubrey (C. C. A.) 74 F. 350, and Palmer v. Oregon Short Line, 34 Utah, 466, 98 P. 689, 16 Ann. Cas. 229. It is also contended by the defendant that there was no negligence shown in the operation or maintenance of the train, because it did not appear that there was anything out of the ordinary in its operation nor did defendant know that any beam projected from one of its cars.

On the other hand, the plaintiffs rely on Hansen v. Southern Pacific Co., 105 Cal. 379, 38 P. 957, as determinative of the issues presented on this appeal and as an authority for instructions Nos. I and IV given by the trial court in the present case and objected to as erroneous by the defendant.

In the Hansen Case a boy of seven years had his foot caught in a defective cattle guard while he was crossing the tracks on a footpath when the defendant's train ran over his foot, necessitating amputation. The engineer testified that he saw the boy on the track in sufficient time to have stopped the train, but did not realize his inability to remove himself from the tracks until too late to avoid the injury. The trial court left two issues to the jury: (1) That if the "defendants permitted and consented to the use of their tracks and right of way by the public for the purpose of travel along and across the same at the place where the cattleguard was maintained and that the plaintiff was so using the track * * * at the time the injury occurred, then * * * the plaintiff was not a trespasser and the defendant owed him a duty not to obstruct the track and right of way with a dangerous contrivance; and if you further find that the cattleguard was a dangerous trap, and the defendant knew or ought to have known that it was dangerous," the plaintiff was entitled to recover on the first cause of action if he was without fault on his part; and (2) on the second cause of action, if "plaintiff was upon the track by the consent and permission of defendants, then they were bound to exercise reasonable care in keeping a proper lookout and otherwise, and if they failed therein, and by reason of their negligence and without the fault of plaintiff he was injured, the jury should find for plaintiff, and that if plaintiff was not on the track or road by permission of the defendants, he was a trespasser, and the defendants owed him no duty except to use ordinary care to avoid injuring him when they discovered him on the track, and if, under such circumstances they exercised such care the verdict should be for the defendants." On appeal from a judgment in favor of the plaintiff in that case, the court held that the issues by reason of the conflicting evidence were properly for the jury and approved the law stated in the instructions.

In the present case the defendant charges error in the refusal of the trial court to instruct the jury in effect that the defendant owed no duty to discover the minor plaintiff and no duty if he was not discovered except not *knowingly* to permit a beam or other object to extend beyond the side of the car; and in giving instead the following two instructions:

"I. If you find from a preponderance of the evidence that the defendant permitted and consented to the use of its tracks and right of way by the public for the purpose of travel along and across the same at the place where the alleged accident occurred and that the minor plaintiff was so using the tracks and right of way at the time the alleged accident and injury occurred, then I charge you that the minor plaintiff was not a trespasser and the defendant owed him a duty not to have or maintain any dangerous contrivance upon said right of way which would be likely to injure the minor plaintiff. I further instruct you that if you find from a preponderance of the evidence that the defendant's right of way and tracks had for a long period been used by the public as a footpath for travel with the knowledge of the defendant and without protest or objection from it, then you have a right to infer that such use of the tracks and right of way was with the acquiescence and permission of the defendant."

"IV. The railroad company has the right to the exclusive use of its railroad tracks and right of way, free and clear of any use by others. It may relinquish such right of exclusive use, however, to the public, or to any class of persons, either by giving its express permission to such use by the public or other persons or by its tacit or implied permission which may be established by circumstances such as knowledge of and acquiescence in its long continued use as a public passageway. If from a preponderance of the evidence you believe that the railroad company gave its permissive consent, directly or impliedly, or acquiesced in the use of its premises by the public or children, then the persons who entered upon said premises, if any, were not trespassers, but were licensees. The defendant did not owe to plaintiff the duty to be free from negligence but did owe plaintiff the duty not to knowingly maintain hidden traps or dangerous instrumentalities."

The defendant urges that the principles stated in the instructions quoted have been rejected by the case of Means v. Southern California Railway Co., supra, and that the present rule in this state is that the defendant owes no greater duty to licensees than it does toward trespassers.

In the Means Case it appeared that while the plaintiff was on the defendant's warehouse premises as a licensee for his own purposes and without invitation, he was injured by the bursting of a tank of sulphuric acid. The appeal was from an order granting a nonsuit. The court held applicable the general rule that a mere licensee takes the premises as he finds them, and that there exists no duty on the part of the owner of private premises toward him except, as variously quoted from the cases cited in its opinion, to refrain from willful or affirmative acts which are injurious, or which wantonly or recklessly expose him to danger, or not to maintain a trap which would include any very dangerous construction or condition designedly arranged to do injury (see, also, Giannini v. Campodonico, 176 Cal. 548, 169 P. 80; Powers v. Raymond, 197 Cal. 126, 239 P. 1069; Lindholm v. Northwestern Pac. R. Co., 79 Cal. App. 34, 248 P. 1033; Herzog v. Hemphill, 7 Cal. App. 116, 93 P. 899); and held as a matter of law that the record did not show a breach of the duty toward the plaintiff in keeping on the warehouse premises a tank of sulphuric acid in the condition in which it was shown to be at the time of the injury, and which did not appear to be in its nature essentially and inherently a dangerous agency.

[1] There would seem to be no essential difference between the definition of the duty toward licensees by permission stated in the instruction covering the first cause of action in the Hansen Case and the definition respecting the same duty stated by the court in the Means Case. It will be noted that the instructions I and IV in the present case are predicated on the first instruction quoted from the Hansen Case. We cannot agree with the defendant's contention that the instructions here complained of incorporated the "attractive nuisance" doctrine of the turntable cases. The plaintiffs concede that the doctrine of attractive nuisances is not involved in this case, and the defendant's contention that the case was tried on that theory because of the form of the instructions is without merit on the record herein.

Research discloses that the rule of the Means Case is uniformly accepted as the general rule defining the duty of the owner of private premises to mere licensees, who are sometimes called "licensees by permission" as distinguished from licensees by invitation (see Holstine v. Director General of Railroads, 77 Ind. App. 582, 134 N. E. 303), and that the rule with reference to mere licensees is substantially the same as the rule respecting the duty which the proprietor owes to trespassers (see 45 C. J. p. 796 et seq.). But whether the duty is any greater toward persons who use, for their own convenience or purposes, the private right of way of a railroad company by its express or implied permission is a question on which the authorities are divided. We find that the rule suggested by the second instruction quoted from the Hansen Case, sometimes called the "intermediate rule" (see Palmer v. Oregon Short Line R. Co., 34 Utah, 466, at page 480, 98 P. 689 [16 Ann. Cas. 229] citing Hansen v. Southern Pac. Co., supra, and cases from other jurisdictions), and within which the members of the class are sometimes called "licensees by invitation," has been adopted in a number of jurisdictions. It is, in fact, an exception to the general rule of the Means Case and is the application of the measure of ordinary care to persons entering private rights of way by permission, express or implied—a special class of licensees. The doctrine as to this class of licensees is stated generally by Mr. Thompson in his Commentaries on the Law of Negligence as follows: "Where the public for years have been accustomed to cross the track of a railway company upon a well-defined path, with the acquiescence of the company, although without its express license, a license to do so will be presumed, and persons so crossing to and fro are not, in a strict sense, trespassers, but are licensees, and the company is bound to take reasonable precautions to avoid injuring them. * * * We have seen that toward ordinary trespassers on railway tracks, the general doctrine is that the railway company owes *no duty to keep a lookout*, though judicial opinion is not uniform on this question; but where persons are upon a railway track with the license or invitation of the company, express or implied, it is under a duty to keep a lookout for them and to exercise ordinary care to discover them on the track, no less than to avoid injuring them after so discovering them. The doctrine applies to *bridges*, as well as to paths across or upon the railway tracks at other places." Thompson, Neg. vol. 2, § 1725.

A clear statement of the doctrine appears in St. Louis & S. F. R. Co. v. Hodge, 53 Okl. 427, 157 P. 60, wherein many cases adopting the rule are cited and reviewed. It is there said: "Admittedly a railroad company has, as against trespassers, an exclusive right to the occupation and use of its tracks within its yards, as well as of its tracks at other points, and to persons trespassing it owes no duty except to avoid injuring them unnecessarily after they are discovered upon the premises. This right is essential to the operations of the company in carrying on its business, and no other or higher duty arises unless the facts show that the person injured is upon the tracks with the express or implied consent of the railroad company. If the person is a licensee, the company is obliged to use reasonable care to avoid injury to one sustaining that relation; the reason of the doctrine being that, where the company has the exclusive right to the use of its tracks, and has neither impliedly nor expressly licensed persons to be there, it has no reason to anticipate their presence, and consequently is under no obligation to be on the lookout, or to avoid injury to such persons. But, where they may be expected to be, and where an implied license has arisen from the conduct of the company, it is bound to use care commensurate with the circumstances to avoid injury to such persons. In such cases the company has imposed upon itself a precautionary duty which it is bound to discharge, or suffer the consequences. Whether the circumstances are such in a particular case as to give rise to this implied license is a question to be decided upon the facts as they may arise in each instance. Where it is claimed that no such license has been extended, and but one inference can be reasonably drawn from the circumstances, and that showing the person to be a trespasser, the question becomes one of law. Where, however, there is testimony showing that a license, either expressed or implied, arises from the circumstances, the question becomes one of fact, to be submitted under proper instructions to the jury; and the question therefore is: Was there such a situation shown as made it clear, as a matter of law, that the boy at the time of his injury was a trespasser, or had the circumstances given rise to such an implied license as made the question one to be submitted to the jury?"

A case often cited as the leading case in support of the doctrine is Barry v. New York Central, 92 N. Y. 289, 44 Am. Rep. 377. Many other cases are to the same effect. See, also, Chicago, R. I. & P. R. Co. v. Austin, 63 Okl. 169, 163 P. 517, L. R. A. 1917D, 666; Byrne v. New York Central, 104 N. Y. 362, 10 N. E. 539, 58 Am. Rep. 512; Pomponio v. N. Y., New Haven & Hartford R. R. Co., 66 Conn. 528, 34 A. 491, 32 L. R. A. 530, 50 Am. St. Rep. 124; Grauer v. Alabama Great Southern R. Co., 209 Ala. 568, 96 So. 915; Hooker v. Chicago, M. & St. P. R. Co., 76 Wis. 542, 44 N. W. 1085; Troy v. Cape Fear & Y. V. R. Co., 99 N. C. 298, 6 S. E. 77, 6 Am. St. Rep. 521; Lewis v. Rio Grande Western Ry. Co., 40 Utah, 483, 123 P. 97; Midland Valley R. Co. v. Kellogg, 106 Okl. 237, 233 P. 716; Taylor v. President, etc., of Delaware & H. Canal Co., 113 Pa. 162, 8 A. 43, 57 Am. Rep. 446; Keim v. Gilmore & P. R. Co., 23 Idaho, 511, 131 P. 656; 33 Cyc. p. 767, as in accord with the general doctrine stated; and Palmer v. Oregon Short Line R. Co., 34 Utah, 466, 98 P. 689, 16 Ann. Cas. 229, for a discussion of the various doctrines governing the measure of care owed to trespassers and licensees.

The case of Felton v. Aubrey (C. C. A.) 74 F. 350, relied upon by the defendant, cites and reviews some of the cases adhering to the doctrine that there is no distinction between trespassers and implied licensees upon the railroad's right of way, and points out that these cases rest on the doctrine of the English cases touching the liability of the owner to those whom he suffers or permits to go upon or across his premises. Nevertheless, the rule which is approved in the case of Felton v. Aubrey is the rule to be deduced from Barry v. N. Y. Central Railroad Co., supra, and which is stated to be the following: "Nonliability to trespassers is predicated upon the right of the company to a clear track, upon which it is not bound to anticipate the presence of trespassers. It therefore comes under no duty to a trespasser until his presence and danger are observed. But if it has permitted the public for a long period of time to habitually and openly cross its track at a particular place, or use the track as a pathway between particular localities, it cannot say that it was not bound to anticipate the presence of such persons on its track, and was therefore not under obligation to operate its trains with any regard to the safety of those there by its license. * * * The rule we deduce from the cases best reasoned and most consistent with sound public policy is this: If the evidence shows that the public had for a long period of time, customarily and constantly, openly and notoriously, crossed a railway track at a place not a public highway, with the knowledge and acquiescence of the company, a license or permission by the company to all persons to cross the track at that point may be presumed." Felton v. Aubrey, supra, pages 359, 360 of 74 F., citing Barry v. New York Cent. & H. R. R. Co., 92 N. Y. 289, 44 Am. Rep. 377, and other cases.

Cases which go to the extreme of holding that a lookout is required at all times and places are cited in Palmer v. Oregon Short Line R. Co., supra, at pages 482, 483 of 34 Utah (98 P. 689).

[2] Whatever doubt may be indulged with reference to the propriety of imposing liability on a railroad company for a breach of ordinary care toward persons using without objection its private right of way for their own purposes in thinly populated districts at points which are not established public crossings, unless the user is so open, notorious, and continuous as required by the rule announced in Felton v. Aubrey and Barry v. N. Y. Central Railroad Co., supra, we are convinced that in a populous and metropolitan area, as in the case before us, the interests of the public have uniformly outweighed the claim of railroad companies to the exclusive use of their rights of way unobstructed. Within city limits and other populous districts the courts have applied the measure of ordinary care in situations where trains are operated through such districts in a way calculated or likely to inflict injury on persons whom the company should expect may be on or near its right of way. The case of Imler v. Northern Pac. R. Co., 89 Wash. 527, 154 P. 1086, L. R. A. 1916D, 702, Ann. Cas. 1917A, 933, is an instance where the court refused to apply the rule of ordinary care to a licensee walking on a footpath along the railroad's right of way in the country, and wherein cases which imposed the higher duty of ordinary care toward licensees were distinguished in the following language: "These cases, like many that might be cited, are either crossing cases or cases from cities and towns where population is congested and the public have been accustomed to cross the tracks or to use them as a thoroughfare. Recoveries are allowed in such cases because a higher duty rests upon a railroad company under such circum-

stances." In Palmer v. Oregon Short Line R. Co., supra, at pages 480, 481 of 34 Utah (98 P. 695), is this language: "It is not necessary, however, that the track must be used so extensively and for such a length of time as to establish a license by implication before a railroad company may be required to keep a reasonable lookout for persons on the track. In this regard much depends upon the place and surrounding conditions and circumstances. It may be that in a populous city, or in smaller towns and villages where persons habitually have recourse to and pass over or along the railroad tracks in considerable numbers and at a particular place or places for a much shorter time than is required to establish a license, the railroad company may still be required to exercise reasonable care for their safety and warn them of the approach of trains, although they are trespassers. But in such cases the use must be such as to apprise the railroad company through its employees that the track is being used for such purposes and by a considerable number of persons continuously (not occasionally merely), and with some degree of regularity and habitually. In this latter class of cases it is a question of fact for the jury to say whether, under all the circumstances, the company has exercised ordinary care in view of the facts and conditions prevailing. It does not follow, however, that because a few persons once or twice a week walk on the railroad track in a sparsely settled country district it is for the jury to say whether or not the railroad company discharged its legal duty in keeping a lookout for trespassers. It does not follow that because there is an occasional trespass it will be repeated." For other cases following this rule generally, see Alabama Great So. R. Co. v. Guest, 136 Ala. 348, 34 So. 968; Savannah & W. R. Co. v. Meadors, 95 Ala. 137, 10 So. 141; Doyle v. Portland Ry., Light & Power Co., 71 Or. 576, 143 P. 623; Louisville & N. R. Co. v. Marlow, 169 Ky. 140, 183 S. W. 470; also Thompson, Negligence, vol. 2. § 1726.

[3] Unquestionably, whether the operation of a train, with an arm, timber, or other object not a proper and permanent portion of the train which the employés knew or should have known was projecting in a manner likely to injure persons whom the company should expect to be on or near its tracks, amounts to a breach of care, is properly a question for the jury. In the following cases it was so held, and the evidence was deemed sufficient to sustain the jury's finding of negligence: St. Louis Southwestern R. Co. of Texas v. Balthrop (Tex. Civ. App.) 167 S. W. 246; Missouri, K. & T. R. Co. of Texas v. Scarborough, 29 Tex. Civ. App. 194, 68 S. W. 196, and Chesapeake & O. Co. v. Davis (Ky.) 58 S. W. 698; Id., 119 Ky. 641, 60 S. W. 14, wherein the court stated: "To run a train through a populous city, with an iron swinging in and out, as this was shown to be, was necessarily to endanger those on the highway along which it passed, and was evidence from which the jury might properly infer negligence." Atchison, T. & S. F. R. Co. v Shadden (Tex. Civ App.) 185 S. W. 629; Pruitt v. Southern R. Co., 167 N. C. 246, 83 S. E. 350; Brown-Scott v. Davis, 216 Mo. App. 530, 270 S. W. 433; Chapman v. Davis (Mo. App.) 287 S. W. 832.

[4-6] As a conclusion from the various rules and doctrines discussed by the cases, it is important to discover whether the plaintiff is a trespasser or a licensee as bearing on the question of his contributory negligence. See Illinois Cent. R. Co. v Eicher, 100 Ill. App. at page 601. If he is a trespasser, he is contributorily negligent in being on the tracks or right of way where he has no right to be, and must expect only that the defendant will not recklessly injure him. If he is on or near the tracks by what the courts have termed an implied license or invitation, he is not necessarily negligent in being there, and the railroad company owes him a higher degree of care. In cases where the evidence is conflicting, it is for the jury to decide whether the plaintiff is a licensee or a trespasser, and whether under the particular circumstances the defendant owed him a duty of care which it failed to exercise by reason whereof plaintiff was injured without fault on his part.

[7-9] It was therefore immaterial here whether the injured plaintiff was an infant or an adult, if the jury could find from the evidence that the defendant should have expected his presence at the place where he was at the time of the injury and could also find that the defendant's employés were negligent in the operation of its train over the portion of the right of way in question. Infancy would be material only on the question of contributory negligence. See Felton v. Aubrey, supra; Palmer v. Oregon Short Line R. Co., supra. The evidence on behalf of the plaintiffs, if taken as true, makes out a case of negligence on the part of the defendant which was the proximate cause of the injury. The fact that defendant's witnesses testified that they inspected the train before leaving Culver Junction and found no projection cannot overcome the inferential finding of negligence in the matter of inspection. See Pruitt v. Southern Ry. Co., 167 N. C. 246, 83 S. E. 350; Brown-Scott v. Davis, 216 Mo. App. 530, 270 S. W. 433; St. Louis & S. F. R. Co. v. Carr, 94 Ark. 246, 126 S. W. 850.

[10] The instructions, the rejection of which is complained of by the defendant, were not in accord with the principles herein concluded to be applicable and were properly refused by the trial court.

The cases cited by the defendant are not controlling. In Louisville & N. R. Co. v. Wade (Ky.) 36 S. W. 1125, on which the defendant specially relies, it was held that there was no evidence of a license or permission to the 14-year old plaintiff to be between the rails of a switch when he was struck by a projecting timber which was not shown to have been there through any gross negligence of the defendant. In Carr v. Missouri Pac. R. Co., 195 Mo. 214, 92 S. W. 874, the questions whether the plaintiff was a licensee or a trespasser and whether he was injured by a flying brakeshoe from a passing train through defendant's negligence were left to the jury, which found for the defendant, although the Supreme Court of Missouri indicated that it would apply to mere licensees on a commonly used footpath the same rule as applied to trespassers. In Thomas v. Cincinnati, N. O. & T. P. R. Co., 127 Ky. 159, 105 S. W. 379, the plaintiff, who was standing near the defendant's tracks in the country, was struck by a coalgate which fell off the train as it passed her. The Court of Appeals of Kentucky pointed out that the defendant was not under the duty to anticipate plaintiff's presence at the place where she was at the time of the injury and the defendant was not recklessly or wantonly negligent. In Toomey v. Southern Pacific R. Co., 86 Cal. 374, 24 P. 1074, 10 L. R. A. 139, the deceased was a trespasser without any right to be where he was when struck.

The instructions given and objected to by the defendant involved only one theory of the case. The record shows that the instructions as a whole were not unfavorable to the defendant on the proper theory of the case, and, as no error appears, the judgment is affirmed.

We concur: LANGDON, J.; RICHARDS, J.

---

97 Cal. App. 39

SYMONS et al. v. WOODEN et al. (Civ. 3590.)

District Court of Appeal, Third District, California. Feb. 19, 1929.

1. Evidence 🔑222(2)—Defendant's statement to plaintiffs, after automobile collision, regarding insurance, and that surety company would pay repair bill, was material as admission against interest.

Defendant's statement to plaintiffs, after automobile collision, "Don't pay any of the damages, we are carrying insurance, we are fully protected, don't pay the repair bill, present your bill to the surety company, it will be paid," was material as an admission against interest.

2. Appeal and error 🔑201(2)—In automobile collision case, court's remarks, regarding plenty of room for automobiles to pass, not objected to, held not prejudicial.

In automobile collision case, court's remark, while defendants were endeavoring to prove width of wagon tires on side of highway, and distance which hub caps protruded into highway as follows, "Of course, I don't know—on the testimony, you never have shown but what there was plenty of room for automobiles to pass there. I don't know what it is all about, plenty of room for automobiles to pass, you all agree," to which no objection was made at time, *held* not prejudicial.

Appeal from Superior Court, Merced County; E. N. Rector, Judge.

Action for damages resulting from an automobile collision by Fred Symons and another against J. H. Wooden and another. From a judgment for plaintiffs, defendants appeal. Affirmed.

Everts, Ewing, Wild & Everts, A. W. Carlson, Frederick W. Docker, all of Fresno, and H. K. Landram, of Merced, for appellants.

F. W. Henderson, of Merced, for respondents.

FINCH, P. J. The complaint alleges damages sustained in an automobile collision caused by the negligence of the defendants as follows: Damage to plaintiffs' automobile $573.15; loss of use of the automobile for 16 days, $80, and damage to a tire and tube, $20.85. Verdict and judgment went for the plaintiffs for the total amount demanded, and the defendants have appealed.

[1] In his opening statement to the jury counsel for the plaintiffs stated that at a time subsequent to the collision the plaintiffs informed defendant Hanby of the amount of the damage to their automobile, and that Hanby replied: "Don't pay any of the damages, we are carrying insurance, we are fully protected, don't pay the repair bill, present your bill to the surety company, it will be paid." Evidence to the same effect was introduced. Defendants made no objection to the opening statement or to the evidence referred to when it was offered. Objection was first made when counsel for the plaintiffs commented on such evidence in his argument to the jury. The court instructed the jury: "That you are not concerned with the matter or fact of whether the defendants did or did not carry liability insurance, * * * and it is your duty to determine the liability of the defendants in this case independently of and without consideration of, their being insured, or not being insured." In his argument to the jury, counsel for plaintiffs stated that Hanby's statement was material as an admission against interest. The decisions support this contention. Lahti v. McMenamin (Cal. Sup.) 268 P. 644; Dullanty v. Smith (Cal. Sup.) 265 P. 814; McPhee v. Lavin, 183 Cal. 264, 191 P. 23.

[2] At the place where the collision occurred there was a water wagon on one side of the highway, the wheels of which on one side thereof extended a few inches inside the edge of the pavement, and another obstruction

covered a few inches of the other side of the pavement, the space through which the two automobiles had to pass being narrowed accordingly, although such space was somewhat greater than the combined widths of the two automobiles. While defendants were endeavoring to prove the width of the wagon tires and the distance which the hub caps protruded into the highway, the court said: "Of course, I don't know—on the testimony, you never have shown but what there was plenty of room for automobiles to pass there. I don't know what it is all about, plenty of room for automobiles to pass, you all agree?"

Appellants contend that such statement of the court constituted prejudicial misconduct. No objection was made at the time, however. No exception was taken by the defendants, and no request was made for an instruction to the jury to disregard the statement. Under the circumstances stated, it cannot be held that the statement of the court was of such a prejudicial character as to require a reversal of the judgment.

Appellants contend that error was committed in the manner of proving that the plaintiffs suffered damage in the sum of $80 on account of the loss of the use of their automobile during the 16 days required to repair it. It is further urged that the evidence does not show liability on the part of defendant Wooden, who was driving the automobile in which both of the defendants were riding at the time of the collision. Both of these contentions are so obviously without merit that no discussion thereof is considered necessary. The implied findings of the jury on these issues are amply supported by competent evidence, and, if there was any technical error in the introduction of evidence, the defendants suffered no possible prejudice on account thereof.

The judgment is affirmed.

I concur: PLUMMER, J.

PEOPLE v. POST. (Cr. 1745.)★

District Court of Appeal, Second District, Division 1, California. Feb. 14, 1929.

Hearing Granted by Supreme Court March 14, 1929.

1. Homicide 🔑342—Defendant cannot complain of manslaughter verdict on evidence warranting conviction of murder.

Where the evidence is sufficient to sustain a conviction of murder, defendant has no grounds for complaining that jury returned a verdict of manslaughter.

2. Criminal law 🔑823(15)—Instruction to decide whether circumstances are sufficiently consistent with innocence to raise reasonable doubt held harmless, in view of other instructions.

In murder trial, instruction that jury must decide whether circumstances are reasonably consistent with any other conclusion than defendant's guilt and sufficiently so to raise reasonable doubt *held* harmless, if erroneous as requiring that circumstances be of sufficient weight to raise reasonable doubt of guilt before he could be acquitted because of facts or circumstances apparently consistent with innocence, where other instructions emphasized law that accused should be acquitted unless his guilt were proven beyond every reasonable doubt, exclusive of every reasonable hypothesis of innocence.

3. Criminal law 🔑814(8, 9)—Instruction that when killing is proved, defendant must show circumstances in mitigation, excuse, or justification held erroneous as inapplicable (Pen. Code, § 1105).

In murder trial, instruction, based on Pen. Code, § 1105, that when killing is proved, it devolves on defendant to show any circumstances in mitigation, excuse, or justification by preponderance of evidence *held* erroneous as inapplicable to situation presented by evidence supporting defendant's contention that he was not responsible for decedent's death, but that she caused her own death by grabbing steering wheel of automobile being driven by defendant.

4. Criminal law 🔑1172(6)—Instruction that when killing is proved, defendant must show circumstances in mitigation, excuse, or justification held harmless, though inapplicable.

Instruction in murder trial that, when killing is proved, it devolves on defendant to show circumstances in mitigation, excuse, or justification by preponderance of evidence, *held* not prejudicial to defendant, though inapplicable to situation presented by evidence in support of his contention that he was not responsible for killing.

Appeal from Superior Court, San Diego County; Shelley J. Higgins, Judge.

Ralph N. Post was convicted of manslaughter, and he appeals. Affirmed.

Edgar B. Hervey, of San Diego, for appellant.

U. S. Webb, Atty. Gen., John L. Flynn, Deputy Atty. Gen., and John D. Richer, of Los Angeles, for the People.

HOUSER, J. On a charge of the commission by him of the crime of murder, defendant was convicted of the crime of manslaughter. He appeals from the judgment and the order denying his motion for a new trial.

From the evidence the jury would have been justified in concluding that, among other things, the following facts were established: Some time prior to the date on which the tragedy occurred which resulted in her death, the deceased and defendant (who was a married man) were illicitly living together as

---

★Superseded by opinion of Supreme Court 281 P. 618.

husband and wife. Although up to the time of her death defendant was frequently in the company of the deceased, the inference is strong that the deceased was endeavoring to discontinue her relationship with defendant, and that by reason thereof defendant was jealous of her and made various statements concerning her, such as, "She is trying to get away from me, but I will kill her. If I can't have her, nobody else will." The evidence shows that on the day on which the homicide occurred, beginning as early as 10 o'clock a. m. thereof, and almost continuously thereafter until about 8 o'clock p. m. of that day, at which latter time the deceased met her death, the deceased and defendant were in each other's company, during a considerable portion of which time they were riding together in an automobile operated by defendant; that while so engaged with defendant, and on at least two different occasions, the deceased indicated to third persons that she was being mistreated by defendant, and shouted, "Help! help! he is killing me." At that time blood was seen by such persons on the left side of the face and on the bare legs of the deceased. Within a few minutes thereafter defendant drove the automobile onto a pier in San Diego bay, the lights of the automobile were "switched off," and the automobile went over the side of the pier into about 35 or 40 feet of water. Defendant was rescued, but the body of his woman companion was not recovered until some 45 minutes later, at which time life was extinct. Physical examination of the deceased showed "a severe bruise around the left eye * * * about four inches in diameter; * * * laceration on the back of the scalp and more marked bruises on the body; * * * slight blood clot under dura mater; and fine pinpoint hemorrhages throughout brain." The lungs were completely filled with water. In the opinion of three doctors the woman was unconscious at the time the automobile went into the bay.

The defense consisted of a specific denial of each of the foregoing incriminating facts. Defendant testified that immediately preceding the accident, as the auto approached the edge of the pier, "it struck something or dropped; and that apparently scared Mrs. Simpson; she frantically grabbed the steering wheel with both hands very forcibly, and before I had time to do anything at all we were going over the edge of the pier."

[1] The first point presented by appellant is that, since "the prosecution's evidence proved murder or nothing," the evidence was insufficient to support a verdict of manslaughter. The authorities of this state are to the contrary, and generally to the effect that where the evidence is sufficient to sustain a conviction of the crime of murder, the defendant has no grounds for complaining that the jury returned a verdict for a lesser offense. People v. Muhlner, 115 Cal. 303, 47 P. 128; People v. Huntington, 8 Cal. App. 612, 97 P. 760; People v. Cyty, 11 Cal. App. 702, 106 P. 257; People v. Herges, 14 Cal. App. 273, 111 P. 624; People v. Cramley, 23 Cal. App. 340, 138 P. 123; People v. Kelley, 24 Cal. App. 54, 140 P. 302; People v. Tugwell, 32 Cal. App. 520, 163 P. 508; People v. Hamilton, 49 Cal. App. 30, 192 P. 467.

[2] Appellant complains of an instruction given by the court to the jury at the request of the prosecution which contained the following statement of the law: "* * * The true rule is that the jury must decide whether or not the circumstances are in fact reasonably consistent with any other conclusion than defendant's guilt and sufficiently so to raise a reasonable doubt of his guilt. * * *"

It is urged that the meaning to be attributed to such language is that before defendant could be acquitted by reason of facts or circumstances which apparently were consistent with his innocence, such facts and circumstances must be of sufficient weight "to raise a reasonable doubt of his guilt."

In other instructions to the jury the law was emphasized that the accused should be found not guilty unless the fact of his guilt were proven beyond every reasonable doubt, exclusive of every reasonable hypothesis of his innocence. In still further instructions the point was repeated that under no circumstances could defendant be convicted unless his guilt were established beyond a reasonable doubt. It is therefore clear that the ambiguity (if any reasonably could be said to exist) in the language of the criticised instruction was corrected so that no possible harm resulted to defendant by reason of the language to which attention has been directed.

[3] Appellant also attacks the following instruction given by the court to the jury: "You are instructed that up to the moment when the killing is proved the prosecution must make out its case beyond any reasonable doubt. When the killing is proved, it devolves upon the defendant to show any circumstances in mitigation to excuse or justify by a preponderance of evidence on his part. That is, the killing being proved, the defendant must make out his case in mitigation to excuse or justify by some proof stronger in some appreciable degree than the proof of the prosecution. The burden of proof changes. It must be in some degree, no matter how small, stronger than the proof of the prosecution on the other side."

On the ground that such an instruction requires the defendant to establish his defense by a *preponderance* of the evidence and is in opposition to and inconsistent with the general rule of law to the effect that the defendant is entitled to an acquittal if by the evidence a reasonable doubt is raised as to his guilt, it has been condemned and held prejudicially erroneous in each of the following cases: People v. Bushton, 80 Cal. 160, 22 P. 127, 549; People v. Elliott, 80 Cal. 296, 22 P. 207; People v. Roe, 189 Cal. 548, 209 P. 560.

Section 1105 of the Penal Code is the basis for the instruction in question. With the exception that the statute is lacking in any requirement as to the quantum of proof, the principle of law announced in the questioned instruction appears to be similar to that provided by the statute. But on consideration of the instruction it will be noticed that its provision is that "when the killing is proved, it devolves upon the defendant to show any circumstances in mitigation," or which will either "excuse" or "justify" the act. Necessarily, such defenses presuppose either the actual or the inferential admission by the defendant of the fact that he did the killing. If he deny the homicide, nothing is presented upon which the words of the statute may operate so far as the defendant is concerned. As to any act committed by him, there is nothing to "mitigate" or "excuse" or "justify."

In the instant case it will be remembered that the position assumed by defendant was that he was in nowise responsible for the tragedy; that he was neither negligent nor culpable with relation to the death of the woman who was riding with him in the automobile; and that she caused her own death by "frantically" grabbing the steering wheel of the automobile and causing it to run off the pier into the deep water of the bay. It is thus made manifest that the defensive theory advanced by defendant was wholly inconsistent with either "mitigation," by the operation of which a lesser verdict than murder in either the first or the second degree might be anticipated, or with either the statutory "excuse" or "justification" for the homicide—from which it inevitably results that neither the provision of the statute nor the instruction in question had any application to the situation presented by the evidence.

In the case of People v. Miller, 177 Cal. 404, 170 P. 817, where the defendant was accused of the crime of murder, and where he offered no evidence in his defense, an instruction was given to the jury to the effect that: "When the killing is proved it devolves upon the defendant to show any circumstances in mitigation to excuse or justify the homicide by evidence on his part." It was held that: "* * * While inapplicable to the case for the reason that no circumstances of mitigation or excuse are shown or even suggested, the defense being a denial of the killing by the accused, no possible injury therefrom could result to defendant." Likewise, in People v. Tapia, 131 Cal. 647, 63 P. 1001, an instruction similar in many respects to the instruction here under consideration (but also containing additional objectionable matter) was held inapplicable—the court saying that the part thereof taken from section 1105 of the Penal Code, to which reference has been had herein, "is applicable only when a defendant sets up circumstances of mitigation, excuse, or justification of an admitted or proved homicide." To the same effect is People v. Roe, 189 Cal. 548, 209 P. 560.

[4] The inapplicability of the attacked instruction to the situation here presented being thus established, its effect, if any, upon the rights of defendant, remains for consideration. As hereinbefore noted, on the authority of People v. Tapia, 131 Cal. 647, 63 P. 1001, the case of People v. Miller, 177 Cal. 404, 409, 170 P. 817, is direct authority that in such circumstances "no possible injury" could result to defendant from the giving of such instruction.

The judgment and the order denying the motion for a new trial are affirmed.

We concur: CONREY, P. J.; YORK, J.

---

96 Cal. App. 765

WHITE v. WHITE. (Civ. 3733.)

District Court of Appeal, Third District, California. Feb. 14, 1929.

Divorce ⚷221—Court had no jurisdiction to grant attorney's fees to wife in divorce action after services had been rendered.

Where no counsel fees were asked for by wife during pendency of trial of divorce action, court had no jurisdiction to grant attorney's fees after services had been rendered.

Appeal from Superior Court, Los Angeles County; J. Walter Hanby, Judge.

Action by Homer H. White against Henrietta White. From that portion of an interlocutory decree awarding counsel fees and alimony in divorce action, plaintiff appeals. Modified and affirmed.

E. C. Jennings, of Los Angeles, for appellant.

Eugene A. Tucker, of Los Angeles, for respondent.

PLUMMER, J. This is an appeal by the plaintiff from that portion of an interlocutory decree of divorce awarding the respondent counsel fees and alimony upon her cross-complaint. The interlocutory decree granted the respondent a divorce, alimony and counsel fees in the sum of $100. The record shows that no counsel fees were asked for during the pendency of the trial, and not until after the termination thereof, when the court in its findings found that $100 was a reasonable amount to be paid by the plaintiff to the defendant as and for her counsel fees, and the same was written into the interlocutory decree of divorce. So far as the award of alimony or maintenance is concerned, we will pass that by with the simple statement that the court had jurisdiction to award the same. As to the allowance of counsel fees, the respondent relies upon the case of Newlands v. Superior Court of Los Angeles, 171 Cal. 741, 154 P. 829. The facts set out in the opinion in that case show, however, that it is wholly inapplicable to the case at bar. In the Newlands Case a stipulation was entered into to the effect that the court might, upon final determination of the cause, fix the amount of attorney's fees. In the case at bar, as we have said, no application was made during the pendency of the action, and the allowance appears to have been made after the services were rendered. In such cases it has been uniformly held that the court has no jurisdiction to grant attorney's fees; in other words, that the court has no jurisdiction to make an allowance for attorney's fees after the services have been rendered. Lacey v. Lacey, 108 Cal. 45, 40 P. 1056; Stampfli v. Stampfli, 53 Cal. App. 126, 199 P. 829; Loveren v. Loveren, 100 Cal. 494, 35 P. 87; Wickland v. Wickland, 19 Cal. App. 562, 126 P. 507; Sheppard v. Sheppard, 15 Cal. App. 619, 115 P. 751; Smith v. Superior Court in and for Yuba County (Cal. App.) 264 P. 573. The question presented in the case at bar relative to attorney's fees is precisely similar to the question passed upon by this court in Stampfli v. Stampfli, supra.

The judgment of the trial court is modified by striking therefrom the allowance of $100 as and for attorney's fees. In other respects the judgment is affirmed. Costs awarded the respondent.

We concur: FINCH, P. J.; THOMPSON, J.

---

96 Cal. App. 767

In re GREGSON'S ESTATE. (Civ. 3713.)★

District Court of Appeal, Third District, California. Feb. 14, 1929.

Hearing Denied by Supreme Court April 15, 1929.

1. Descent and distribution ⇐82—Contract between widow and children of intestate for division of his property held void for want of consideration, where entire estate consisted of community property (Civ. Code, §§ 1401, 1550).

Where entire estate of husband dying intestate consisted of community property, to which title was vested in widow, under Civ. Code, § 1401, contract between widow and surviving children, entered into after husband's death, whereby widow was to have certain real estate and residue of property was to be equally divided between widow and children, *held* void for want of consideration, under section 1550.

2. Executors and administrators ⇐303(2)—Distribution to assignees of heirs or legatees is authorized only where assignment is admitted and validity thereof not disputed (Code Civ. Proc. § 1678).

Distribution of share of estate to assignee is authorized under Code Civ. Proc. § 1678, only where assignments or conveyances of interests of heirs or legatees are admitted and there is no dispute as to their validity, but, where validity of conveyance or assignment is contested, resort must be had to the courts.

Appeal from Superior Court, San Joaquin County; D. M. Young, Judge.

Proceeding for the distribution of the estate of William F. Gregson, deceased. From a decree of distribution awarding all the property to the surviving wife, Mary A. Gregson, the surviving children of deceased appeal. Affirmed.

A. H. Carpenter, of Stockton, for appellant.

George E. Frioux, of Stockton, for respondent.

PLUMMER, J. This is an appeal from a decree of distribution awarding all the property of the deceased to Mary A. Gregson, the surviving wife.

The record shows that William F. Gregson died intestate in the county of San Joaquin, on or about December 3, 1926, leaving as his widow Mary A. Gregson, and the following children by a former marriage: Mary Alice Gann, J. Henry Gregson, William A. Gregson, and Carrie Katberg. The record likewise shows that the estate left by the deceased was all community property of himself and his surviving wife, and was of a value less than $10,000. The widow, declining to act as administratrix, nominated D. F. Mackey, who was thereupon appointed by the court to act as administrator.

[1, 2] The record shows that some time after the death of William F. Gregson, deceased, a writing relative to the distribution of the property of the estate of said deceased was signed by the widow and the children of the deceased herein named. After certain preliminary recitals, which are not necessary to set forth herein, the agreement provides that there shall be distributed "to Mary A. Gregson, surviving wife of said deceased, that certain lot, piece or parcel of land situate in the City of Stockton, County of San Joaquin, State of California, bounded and particularly described as follows, to-wit:" (Here follows description of the real estate.) The writing then provides the further distribution as follows: "All the residue of said estate, of whatever kind and nature, shall be distributed, one-half to Mary A. Gregson, and the other half, in equal shares, to Mary Alice Gann, J. Henry Gregson, William A. Gregson and Carrie Katberg, surviving children of said deceased." Upon petition of the administrator of the estate, the whole thereof was distributed to Mary A. Gregson, the surviving wife. From this decree of distribution, the children appeal.

The record shows, without controversy, that the whole of the estate consisted of com-

---

⇐For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

★Hearing denied by Supreme Court.

munity property of the said William F. Gregson, deceased, and his surviving wife, Mary A. Gregson, and that, under the provisions of section 1401 of the Civil Code, vested in the surviving wife.

The controversy in the trial court arose over the validity of the writing to which we have referred. The respondent admits that the authorities cited by the appellants relative to contracts, agreements, and conveyances between heirs correctly state the law, but contends that none of them are pertinent to this case. With this contention we must agree. The contract shows upon its face that no consideration passed from the children to Mary A. Gregson; the record likewise shows that no consideration was paid by the children or given by the children to Mary A. Gregson, as a basis for the transfer of any part of her interest in said estate to the appellants. Section 1550 of the Civil Code requires that every contract must be supported by a consideration. In the case at bar, the writing has for its support neither a good nor a valuable consideration. It may be further added that, while section 1678 of the Code of Civil Procedure authorized distribution to assignees, this section applies only when the assignments or conveyances are admitted, and there is no dispute as to their validity. The record shows that the validity of the writing in this case was disputed in the court below. In such case resort must be had to the proper tribunal. 12 Cal. Juris. 191; Est. of Howe, 161 Cal. 152, 118 P. 515; 24 Cal. Juris. 524; 12 Cal. Juris. 206. That a want of consideration renders a contract unenforceable, see 6 Cal. Juris. 166, § 115.

The judgment of the trial court is affirmed.

We concur: FINCH, P. J.; THOMPSON, J.

---

96 Cal. App. 769

HOWE et al. v. SUPERIOR COURT OF CALIFORNIA IN AND FOR SACRAMENTO COUNTY et al. (Civ. 3745.)

District Court of Appeal, Third District, California. Feb. 15, 1929.

1. Certiorari ⚷33(2)—Witnesses, who are not parties to action, were not entitled to review order requiring answers to interrogatories (Code Civ. Proc. §§ 1069, 1991).

Witnesses, who were not parties to action in which testimony was to be used, were not entitled, under Code Civ. Proc. § 1069, in subsequent proceeding in certiorari, to review order of trial court directing them to answer interrogatories, pursuant to section 1991.

2. Certiorari ⚷16—Certiorari will not lie, except from final determination.

Petition for certiorari will not lie, except from final determination of proceeding involved.

3. Certiorari ⚷16—Order requiring parties to answer questions propounded in taking of depositions was not final disposition warranting writ of review (Code Civ. Proc. §§ 2031, 2032).

Order requiring parties to action to answer questions propounded to them, in taking of depositions incident to litigation in accordance with provisions of Code Civ. Proc. §§ 2031, 2032, is not such final disposition of competency or relevancy of the evidence as to warrant the issuing of a writ of review, in that, where objections to evidence are preserved during taking of deposition, it will not be assumed that trial judge will improperly rule thereon when evidence is offered at trial.

4. Certiorari ⚷9—Certiorari is extraordinary remedy, issuing of which rests in sound discretion of court.

Writ of certiorari is an extraordinary remedy equitable in its nature, the issuing of which rests in sound discretion of the court.

Original application for certiorari by S. Luke Howe and others against the Superior Court in and for the County of Sacramento, and Hon. Malcolm C. Glenn, Judge of such court. Writ denied.

Howe, Hibbitt & Johnston and O. F. Meldon, all of Sacramento, for petitioners.

Reisner & Deming, of San Francisco, McLaughlin & McLaughlin, of Sacramento, and J. J. Posner and Louis Ferrari, both of San Francisco, for respondents.

THOMPSON, J. This is an application for a writ of certiorari to review the order of the trial judge directing certain witnesses to answer interrogatories which were propounded upon the taking of depositions before a notary public.

The petition alleges that an action for money had and received was pending in the superior court of the county of Sacramento. The complaint in that action was couched in the simple form of assumpsit. No specific fund was described in the complaint, or sought to be recovered. All of the defendants in that action appear as petitioners in this proceeding. Certain other witnesses, who are not parties to that action, also join as petitioners herein. Prior to the trial of that case a notice to take the depositions of these petitioners before a notary public was given. In the taking of these depositions, on the advice of counsel, each of these witnesses refused to answer questions which sought to elicit information regarding the existence and disposition of a joint bank account, assumed to be owned and held by Mr. and Mrs. J. W. Parker, and which the questions infer was transferred or disposed of by them to the defendants. These questions were objected to on the ground that they were incompetent. The relevancy of this bank account to the issues of the suit in assumpsit does not appear. Subsequently, upon notice of such refusal to answer the interrogatories, pursuant to section 1991 of the Code of Civil Procedure, the trial judge directed the witnesses to answer the questions. Thereupon this petition for a writ of review was presented to this court.

[1] It appears that the petitioners Mary Helen Parker and Jack W. Parker, her husband, were not parties to the action for money had and received, incident to which the depositions were being taken; they were strangers to that record, and are therefore not entitled to review the order of the trial court in this proceeding of certiorari. Section 1069, Code Civ. Proc.; Elliott v. Superior Court, 144 Cal. 501, 508, 77 P. 1109 (103 Am. St. Rep. 102); Tingley v. Superior Court, 8 Cal. App. 47, 96 P. 20.

[2, 3] A petition for certiorari will not lie, except from the final determination of the proceeding involved. 4 Cal. Jur. 1041, § 16. An order requiring parties to an action to answer questions propounded to them in the taking of a deposition incident to the litigation pending is not such final disposition of the competency or relevancy of the evidence as to warrant the issuing of a writ of review. The taking of depositions as provided by sections 2031 and 2032 of the Code of Civil Procedure is for the purpose of preserving and using the evidence at the trial "subject to all legal exceptions." The preliminary rulings respecting the competency of the evidence, rendered upon the taking of the deposition, are in no sense final or conclusive. Where the objections to the evidence are preserved at the taking of the deposition, it will not be assumed the trial judge will improperly rule upon the objections when the evidence is offered at the trial. Moreover, there is no assurance that the depositions will ever be presented or used at the trial. In the event that the depositions are offered at the trial, and that the court should erroneously and adversely rule against the plaintiffs with respect to the admission of the evidence, they have their remedy by appeal. No contempt proceedings have been threatened. Assuming, however, that the petitioners might be cited to appear before the trial court for persistent refusal to answer the challenged interrogatories, they would then have their remedy. Commercial Bank v. Superior Court, 192 Cal. 395, 220 P. 422; Drew v. Superior Court, 43 Cal. App. 651, 185 P. 680. At the present stage of these proceedings, a writ of certiorari is premature. The case of Commercial Bank v. Superior Court, supra, relied upon by the petitioners, was a writ of prohibition. One of the reasons that writ was granted was because an order to produce correspondence was "too general in its terms to be capable of enforcement." That case is not authority for the issuing of a writ of certiorari under circumstances similar to the present proceeding.

[4] The writ of certiorari is an extraordinary remedy, equitable in its nature, the issuing of which rests in the sound discretion of the court. 2 Spelling on Extraordinary Remedies, 1646, § 1906; 5 R. C. L. 254, § 6; 11 C. J. 128, § 78; Keys v. Marin County, 42 Cal. 252; Birch v. Board of Supervisors, 191 Cal. 235, 215 P. 903. To authorize one to resort to this extraordinary remedy to correct mere errors in the admission of evidence in the taking of a deposition would lead to untold mischief, and would obstruct the usual course of procedure.

It is apparent that the order complained of is not final or conclusive, and that the writ should therefore be denied.

It is so ordered.

We concur: FINCH, P. J.; PLUMMER, J.

97 Cal. App. 22

GROFF et al. v. RECLAMATION DISTRICT NO. 108. MYERS v. SAME. BROWNING v. SAME. (Civ. 3594–3596.)★

District Court of Appeal, Third District, California. Feb. 16, 1929.

Rehearing Denied in Civ. 3595 March 16, 1929.

1. Eminent domain 🔑280—Landowner, granting right of way for irrigation canal cannot recover damages for natural injury from seepage.

Landowner, granting right of way, as for irrigation canal, estops himself to sue for past, present, or future damages, occurring or reasonably to be expected, by reason of necessary, natural, and ordinary use of utility or public service for which granted, including natural, reasonably to be anticipated, and ordinary injury to adjacent land from seepage.

2. Waters and water courses 🔑263—Instruction to find for defendant held proper, in absence of evidence that toe ditch was contemplated before conveyance of right of way or would have prevented damage to crops by seepage.

In absence of evidence that any plans for toe drainage ditch were adopted or contemplated at time of or before conveyance of right of way for irrigation canal, or that such ditch would have prevented damages to crops from seepage, court properly instructed jury to find for defendant in actions for such damages as alleged result of failure to construct such ditch before suits were commenced.

3. Waters and water courses 🔑263—Plaintiff, testifying that toe ditch increased seepage complained of, could not recover damages for delay in constructing it.

Plaintiff, testifying, in action for damages to land by seepage from irrigation canal, that toe drainage ditch, built after commencement of action, did not stop seepage, but made it greater, could not recover damages because of defend-

---

★Rehearing denied in Civ. 3595.

ant's failure to construct such ditch before action was brought.

4. Eminent domain ⚿271—Landowner, granting right of way for irrigation canal, cannot recover damages for harmless departures from contemplated plan.

Landowner, granting right of way for irrigation canal, on understanding that particular type of ditch shall be installed, can sue for any damage caused by subsequent change of construction, but cannot recover for any departure from contemplated plan which caused no damage.

Appeal from Superior Court, Colusa County; Ernest Weyand, Judge.

Actions by W. R. Groff and another, Earl Myers, and J. W. Browning, respectively, against Reclamation District No. 108. Judgments for defendant, and plaintiffs appeal. Affirmed.

Seth Millington, of Gridley, for appellants.
Huston, Huston & Huston, of Sacramento, and Thomas Rutledge, of Colusa, for respondent.

FINCH, P. J. The first two of the above-entitled actions were tried together, and, at the close of the evidence, the court instructed the jury to return verdicts in both cases in favor of the defendant. On the return of such verdicts, judgments were entered thereon in favor of the defendant. The last of the three actions was tried before the court without a jury, but upon the evidence introduced in the other cases and additional evidence taken after the rendition of such verdicts. Findings and judgment went in favor of the defendant, and the plaintiffs in all three actions have appealed on a single record, and the appeals have been argued together.

Plaintiff Browning is the owner of agricultural lands within the defendant district, and the other plaintiffs are his tenants. In the year 1918 an irrigation canal was constructed by the defendant through Browning's land, and water has been conducted through the canal for irrigation during every season since 1919. Browning, who was a trustee of the defendant at the time the plans for the canal were adopted, and had theretofore had extensive experience in reclamation work, executed deeds, after the construction of the canal, conveying to the defendant "an easement and right of way for the construction, repair, improvement and maintenance of a canal and banks, for conducting and flowing water therein, with the right to flow and have flow water therein from whatever source and whether naturally flowing therein or artificially conducted or brought thereto, and whether drainage, seepage, rain, flood water, or water for or from irrigation, over, along and across the following tract, strip or parcel of land." This is followed by a particular description of the right of way. The lands involved in these actions lie adjacent to the canal.

Plaintiffs Groff sue for alleged damages to their crops during the seasons of 1923, 1924, and 1925, caused by seepage water from the canal. Plaintiff Myers sues for damages similarly caused to his crops of 1924 and 1925. They held under yearly leases executed during the years mentioned. Plaintiff Browning sues for alleged damages to the land itself caused by the seepage, and for an injunction.

[1] Browning testified that most of the land is "tule land; used to be tule land, and of course that is porous soil and had high tule there, very high. * * * Allows the water to pass along it sometimes for o[illegible] miles." Under such circumstances, [illegible] seepage of water from the canal m[illegible] been foreseen by all experienced pers[illegible] were familiar with the facts.

"Whenever a grant of a right of w[illegible]ecuted by a landowner he thereby e[illegible]self from afterward prosecuting a[illegible] for the past, present, or future da[illegible] may have occurred, or reasonably [illegible] to occur, by reason of the necess[illegible] and ordinary use of the utility or [illegible]ice for which the right of wa[illegible]d. And this includes the natural, [illegible]y to be anticipated, and ordinary in[illegible] resulting to adjacent land from seepage, [illegible] land is of a character that admits of [illegible]y be reasonably expected to admit of [illegible] action of the waters taking place." St[illegible]rnes v. Sutter Butte Canal Co., 61 Cal. App. 737, 743, 216 P. 66. See, also, Yolo Water & Power Co. v. Hudson, 182 Cal. 48, 52, 186 P. 77.

[2] Appellants contend, however, that the foregoing rule is not applicable where the damage results from failure to follow the plans adopted which were [illegible]n the contemplation of the parties to the conveyance at the time of its execution, and that, in this case, the plans provided for a toe drainage ditch below the bank of the canal, which ditch was not constructed until after these suits were commenced.

The evidence in the Groff and Myers cases does not show that any plans for such drainage ditch were adopted or contemplated at or prior to the conveyance of the right of way to the defendant, or that, if such a ditch had been constructed, it w[illegible] prevented the damage of which com[illegible]ade. It was not error, therefore, to [illegible] the jury to find for the defendant in [illegible]ses.

[3] In the Browning [illegible] after the verdicts had been returned in the other cases, oral evidence was introduced to the effect that the construction of a toe drainage ditch was a part of the defendant's plans at the time the right of way was granted. In addition to this testimony, a letter, dated October 7, 1925, from the engineer of the defendant to Browning, was admitted in evidence. This letter states:

"Mr. Poundstone has instructed me to in- ire whether you wish us to proceed at once ith construction of remedial measures in- ded to prevent a repetition of damage from page from the district's main irrigation ls to your lands. * * * The district's s contemplate the construction of seep- litches at the toe of the irrigation canal s as follows: (Here follows a descrip- of the ditches as 4 feet deep, 3 feet wide e bottom and 15 feet wide at the top.) * It is possible that a small amount of additional right of way will be required for their construction. We understand the district stands ready to pay for this additional right of way at the price for which it has heretofore acquired rights of way from you and others."

The president of the board of trustees of the defendant testified that Browning first complained of seepage from the canal two or three years before the toe ditch was constructed; that this complaint was made during a meeting of the trustees; that the witness "asked him if he would give his permission to [illegible] that ditch in to see if it would correct the condition. * * * At that time he refused his permission. * * * It occurs to me [illegible] must have been two years after that, Mr. Millington (attorney for Browning) finally said Mr. Browning would permit this ditch to [illegible]; he didn't believe the ditch would correct the fault and didn't want to release any rights he had to sue the district, but he would permit us to go ahead and do the work. We passed a resolution at that meeting of the board and ordered the work done and the work was done shortly after that resolution was passed." Written permission to construct the toe ditch was given October 13, 1925, [illegible] letter replying to the engineer's letter of October 7. The toe ditch was completed in the spring of 1926. This case was tried in October, 1927, after the toe ditch had been in operation for two seasons. The plaintiff testified:

"Mr. Millington: Now, you say after the institution of this action they built a toe ditch along that levee? A. Yes.

"Q. Has that had [illegible] effect in stopping the seepage? A. No [illegible] made more seepage —yes, sir. Th[illegible] it down the county road on my [illegible] two miles. * * *

"Mr. Hust[illegible] it he hasn't answered the question.

"Mr. Mill[illegible] He answered the question; he said [illegible] hadn't, and explained why it hadn't."

On cross-examination the plaintiff testified:

"Q. What was the first year you noticed this water on your land? A. More or less from the first year they ever ran it out there. * * * It is getting greater all the time. * * * It has got so now it is ruining my land entirely."

It cannot be held that the trial court was not justified in accepting plaintiff's foregoing testimony at its face value. If the drainage ditch which was within the contemplation of the parties when the right of way was granted is ineffective to prevent seepage through the loose, porous tule land, then the plaintiff suffered no damage from the defendant's failure to construct it prior to 1926.

[4] "The condemnor may bind itself to a specified plan of construction * * * and have the damages assessed upon that basis. In that case an action can be maintained for any damage caused by a subsequent change in the works or use. So if the damages were in fact assessed on the basis of a certain mode of construction by the procurement or acquiescence of the parties, it has been held that this fact may be shown and relief obtained in case of a change of construction." Lewis on Eminent Domain (3d Ed.) § 830. Of course, the same rule applies where there has been a voluntary grant of a right of way procured on the understanding that a particular type of construction was to be installed. But it is axiomatic that no damage can be recovered on account of any departure from the contemplated plan which has caused no damage.

It may be stated further that, while the plaintiff testified that the maintenance of the defendant's irrigation system had greatly depreciated the value of his land, the president of the board of trustees testified directly to the contrary.

The judgments in all the three cases are affirmed.

I concur: PLUMMER, J.

HOGBERG v. LANDFIELD et al.★
(Civ. 6581.)

District Court of Appeal, First District, Division 2, California. Feb. 18, 1929.

Rehearing Granted March 19, 1929.

1. Corporations ⟜117—Where notice of rescission of contract for purchase of stock for fraud was served, rescission was complete.

Where court found that buyer gave notice in due form of rescission of contracts for purchase of corporate stock on grounds of fraud and failure of consideration, rescission was complete upon service of such notice, and court should have so found.

2. Brokers ⟜102—Buyer was justified in relying upon representations concerning facts not within his knowledge, but within knowledge of broker making representations.

Buyer of corporate stock was justified in relying upon representations concerning existing facts not within his knowledge or his means of knowledge, but within knowledge of broker making representations.

⟜For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

★Superseded by opinion 278 P. 907.

3. **Brokers ⚷4—Surety on stockbroker's bond held not liable, where broker's false representations induced buyer to purchase worthless stock (Corporate Securities Act, §§ 5, 6).**

Surety on stockbroker's bond, given under terms of Corporate Securities Act (St. 1917, p. 673, as amended) §§ 5, 6, *held* not liable, where broker made false representations knowing them to be false, inducing buyer to enter into contracts for purchase of corporate stock, and buyer believed and relied on such representations to his injury, stock being practically worthless.

4. **Appeal and error ⚷1173(2)—Finding showing liability of broker's surety, which was wholly without issues and unsupported by evidence, was not ground for reversal of decree for surety not appealing or attaching finding (Code Civ. Proc. § 956a, as added by St. 1927, p. 583).**

In action against broker and surety to rescind contracts for sale of corporate stock in which surety was held not liable, finding showing surety's liability to effect that broker exhibited to buyer a letter regarding financial condition of corporation, stating that company was fine going concern, which finding was wholly without issues and admittedly unsupported by evidence, was not ground for reversal of judgment for surety because surety did not appeal or otherwise attack finding, but under Code Civ. Proc. § 956a, as added by St. 1927, p. 583, appellate court had authority to make finding contrary to that of trial court.

Appeal from Superior Court, City and County of San Francisco; John J. Van Nostrand, Judge.

Action to rescind contracts for the sale of shares of corporate stock by Emil Hogberg against P. E. Landfield, doing business as an individual, and also under the fictitious name of Edward Marvin Company, and also under the name and style of P. E. Landfield Company, and another. From the judgment, plaintiff appeals. Affirmed in part, and in part reversed, with directions.

Everette C. McKeage, of San Francisco, for appellant.

John Ralph Wilson, of San Francisco, for respondents.

NOURSE, J. Plaintiff sued to rescind two separate contracts for the sale of shares of corporate stock. A separate judgment was asked against the defendant Maryland Casualty Company as the surety upon Landfield's bond as a stockbroker. Each contract was pleaded in a separate cause of action. Judgment went for plaintiff and against defendant Landfield on his first cause of action only and judgment went for the surety company in both causes. The plaintiff has appealed from the portions of the judgment denying him relief on his second cause of action and denying any relief against the surety company. The appeal is presented on typewritten transcripts.

On August 15, 1924, plaintiff paid Landfield $2,650 under the first contract for shares of stock of the New Dominion Copper Company, and on October 24, 1924, paid him $960 f[illegible] additional shares in the same compan[illegible] Both sales were made by Landfield while ac[illegible]ing as a duly licensed stockbroker, and bo[illegible] sales were accomplished through the false and fraudulent representations of Landfield. The bond of the surety company was given under the terms of sections 5 and 6 of the Corporate Securities Act (St. 1917, p. 673, as amended), and was in full force during the time when the acts complained of were done.

[1] The trial court found that all the representations pleaded in the complaint were made by Landfield, that they were false, that said defendant knew them to be false, that he made the representations for the purpose of inducing plaintiff to enter into the contracts, that he knew plaintiff believed and relied on said representations, and that plaintiff did so rely to his injury. It was also found that the stock was practically worthless, and that, within due time, plaintiff gave notice of rescission of both contracts on the grounds of fraud and failure of consideration. Upon these findings the trial court made the conclusion of law that plaintiff was not justified in relying upon these representations when the second contract was made, and recited in the judgment that this second contract had not been rescinded. This recital is directly contrary to the finding that notice of election to rescind in due form was given. When such notice is served the rescission is complete and the court should so find. American Type Founders' Co. v. Packer, 130 Cal. 459, 62 P. 744; Prewitt v. Sunnymead Orchard Co., 189 Cal. 723, 732, 209 P. 995.

[2] The conclusion that appellant was not justified in relying upon the representations is contrary to the findings of fact and to the settled rule of law that a party is justified in relying upon representations concerning existing facts not within his knowledge or his means of knowledge, but within the knowledge of the party making the representations. For these reasons this part of the judgment must be reversed.

[3] The appeal from the judgment in favor of the surety is controlled by Blumenthal v. Larson, 79 Cal. App. 726, 248 P. 681, and Mitchell v. Smith (Cal. Sup.) 267 P. 540. In the Blumenthal Case it was held that a similar bond given by a broker under the Corporate Securities Act, conditioned upon the faithful compliance "with the provisions of law," bound the surety upon the broker's noncompliance with the provisions of the Corporate Securities Act only. The case was affirmed in the Mitchell Case. There the brokers were charged with fraudulently inducing

an owner to part with stock which the brokers falsely promised to sell for him. They then absconded with the stock, and the owner sought to hold the surety for his loss, but the Supreme Court held that this was not a violation of the Corporate Securities Act, and denied relief. There is no essential difference between the act of a broker in fraudulently obtaining stock from an owner for purposes of sale to another, and in fraudulently obtaining money from a party in the purchase of worthless stock. Immediately following the Blumenthal decision the Legislature amended the Corporate Securities Act so as to include cases of this nature, but the amendment came too late to afford this appellant any relief. We are impressed with the able argument of appellant in his endeavor to distinguish the two cases cited, but we must treat them as determinative of the liability of the surety in cases arising prior to this amendment.

[4] It is also argued that, notwithstanding the rule of those cases, the surety here is liable because of the trial court's finding that at the time of the sale Landfield "did exhibit to the plaintiff a typewritten letter purporting to be a statement of the financial condition of the New Dominion Copper Company signed by some person in the city of New York," and stating that the company was a fine, going concern. The respondent points out that this finding has no support in the evidence. This is conceded by the appellant, but he argues that, as the respondent has not appealed, he cannot attack the finding. There is no competent evidence in the record to support this finding. The appellant testified that some one purporting to have come from Mr. Landfield's office showed him "a paper, evidently from New York, showing that the stock had been up to four dollars"; and "they showed me a little letter—a typewritten letter * * * it was that the New Dominion Copper Company was a fine going concern, from somebody in New York." The paper or letter was not produced, and no further effort was made to offer competent testimony of its contents. No evidence was offered to prove that the contents of the letter were untrue, and neither the exhibition of the letter nor the falsity of its contents were pleaded in the complaint or made an issue in any manner. As this finding is wholly without the issues and is admittedly unsupported by evidence, it would be a miscarriage of justice to reverse the judgment merely because the surety company did not appeal or otherwise attack the finding. We feel that this is a case such as contemplated by section 956a of the Code of Civil Procedure (added by St. 1927, p. 583), authorizing an appellate court to make findings contrary to those made by the trial court "based on the evidence adduced before the trial court either with or without the taking of evidence by the court of appellate jurisdiction." Therefore, upon the undisputed evidence adduced before the trial court in this record, we find that there is no proof that defendant Landfield issued, circulated, or published any false or misleading advertisement, pamphlet, prospectus, or circular, concerning the securities sold, within the meaning of section 14 of the Corporate Securities Act.

The portion of the judgment in favor of the Maryland Casualty Company is affirmed. The portion of the judgment in favor of Landfield on the second cause of action is reversed, with directions to the trial court to enter judgment on the findings in favor of appellant and against Landfield on that cause.

We concur: KOFORD, P. J.; STURTEVANT, J.

EGGERS et al. v. NATIONAL RADIO CO. et al. (Civ. 6586.)★

District Court of Appeal, First District, Division 2, California. Feb. 13, 1929.

Rehearing Denied March 12, 1929. Hearing Granted by Supreme Court April 11, 1929.

1. Corporations ⟹419—Corporation's attorneys held authorized to enter stipulation for setting aside order for new trial and for entry of judgment, as against contention directors could not authorize action, and end accomplished was practical dissolution of corporation (Code Civ. Proc. § 283).

Attorneys for corporation *held* not without power to enter stipulation with plaintiffs for setting aside order granting new trial, and for entry of new judgment under Code Civ. Proc. § 283, as against contention that directors could not authorize such action, and that end accomplished was practical dissolution of corporation.

2. Corporations ⟹202—In action against corporation, refusal to permit stockholders to intervene held proper.

In action against corporation, trial court *held* to have properly denied motions of persons claiming to be stockholders to intervene and participate in proceedings, under rule that stockholders cannot interfere with corporation's right to sue and be sued concerning corporate rights or liabilities, except when directors or trustees refuse to act or are guilty of fraud.

3. Corporations ⟹206(1)—Stockholder, to inject himself into proceeding in which corporation is party, must show failure and refusal of managing body to take proper steps.

Before stockholder can inject himself into proceeding in which corporation is party, he must on proper application show that managing body failed to take necessary and proper steps, and would not press litigation in good faith, and he must also show that he has endeavored to induce directors to take proper steps, and that they refused.

★Superseded by opinion of Supreme Court 281 P. 58.

4. Corporations 🔑522—Corporation, like individual defendant, may stipulate to waive trial of issues and entry of judgment against it.

Corporation, like any individual party defendant, may stipulate to waive trial of issues of any cause pending against it, and may also stipulate to entry of judgment against it.

5. Appeal and error 🔑154(4)—Consent judgment is not appealable.

When judgment is entered with consent of parties, there is no appeal.

6. Attorney and client 🔑70—Attorney consenting to judgment is presumed to have authority to do so.

When consent to judgment is given by duly acting attorney for party, it will be presumed that he had authority to do so.

7. Corporations 🔑202—On stockholders' petition to intervene in action in which corporation was party, questions as to directors' fraud or bad faith held fact questions for trial court.

On application of stockholders of corporation to intervene in action in which corporation was defendant, questions as to fraud or bad faith of directors, and effect of their acts on interests of corporation, *held* to be questions of fact, which trial court was required to determine.

8. Appeal and error 🔑901—Corporation stockholders, whose petition to intervene in action in which corporation was party was denied, have burden to show error on appeal.

Where stockholders of corporation petitioned to intervene in action in which corporation was party, but court's determination was adverse to them, burden is on them on appeal to show that trial court committed error.

Appeal from Superior Court, City and County of San Francisco; Frank J. Murasky, Judge.

Action by Herman C. Eggers and others against the National Radio Company, in which Alma Anfinger and others, claiming to be stockholders of defendant company, sought to intervene. From the judgment, and certain orders, Alma Anfinger and others appeal. Affirmed.

Geo. M. Naus, Eugene F. Conlin, and Grant & Zimdars, all of San Francisco, for appellants.

James H. Boyer, of Oakland, and Milton Shepardson, of San Francisco, for respondents.

R. M. F. Soto and J. Clark Benson, both of San Francisco, for respondent National Radio Co.

NOURSE, J. Five separate appeals are herein presented by stipulation upon one transcript, an appeal from the final judgment, an appeal from an order denying the appellants' motion to reinstate the cause for a new trial, an appeal from an order denying the application of appellants to file a complaint in intervention, and an appeal from an order that a former judgment heretofore rendered in the cause, and annulled by order of the court, be again entered as the judgment in the case.

The action was commenced by five stockholders of the National Radio Company, an Arizona corporation, which was named as the sole defendant. The complaint alleged that this corporation was operating in violation of law and without a permit to do business from the corporate commission of Arizona; that it was dominated by one Golden, who caused the organization of the corporation in May, 1916; that no stockholders' meeting had ever been held, but that directors had been chosen subservient to him; that he had continuously speculated in the stock of said corporation on the market; that he had caused nine separate assessments to be levied upon the outstanding stock of the corporation through false representations as to the business which the corporation was doing and the assets which it had acquired; that the plaintiffs herein had paid their proportionate shares of each of said assessments; that the money derived therefrom had been dissipated by Golden and those subservient to him; that they had caused to be erected from said moneys a building in the city and county of San Francisco at a cost to the corporation of $84,000, save and except the sum of $8,000 paid therefor with the stock of said corporation; that said building was erected and acquired on the pretense that it was needed as a laboratory for the business of the corporation, whereas, in fact it was merely a garage and used as such; that it was acquired through the fraud and deceit of said Golden and at a large financial gain to him against the interests of the corporation; that the construction of said pretended laboratory was widely advertised as a valuable asset of the corporation wherein valuable wireless telephone instruments would be manufactured, to the great profit of the corporation; that because of these false claims on the part of the corporation said Golden was enabled to and did speculate in the stock of the said corporation upon the market, and, through the directors subservient to him, was enabled to and did levy and collect nine separate assessments upon the stock of said corporation amounting to $20,000 each; that on June 13, 1921, said Golden and said directors levied assessment No. 10, which assessment said plaintiffs have refused to pay; that on May 10, 1919, said directors sold to one Barker 279,742 shares of said corporation at 2.6 cents a share, though there was then a market for said shares at 14 cents, and in September, 1919, said Golden sold to said corporation 20,000 shares of said stock at 30 cents a share; that neither of said sales was made with permission of the commissioner of corporations of the state of California; that on January 31, 1921, said corporation was $80,000 in debt, having as its only available asset the lot and building hereinbefore mentioned, which was valued at about $70,000; that said corporation is and always has been insolvent.

Upon these allegations the plaintiffs prayed for a perpetual injunction restraining the corporation and its agents from selling or attempting to sell any of the stock of the plaintiffs and enjoining the said corporation from doing any business until it shall have first secured from the corporation commission of the state of Arizona a permit to do so, and enjoining said corporation from receiving or collecting any moneys under assessment No. 10 or from levying any further assessments upon the stock of said corporation, that a decree be entered against the corporation and in favor of plaintiffs for and in behalf of themselves and the other stockholders of said company for the sum of $180,000, the proceeds of such illegal assessments, and that all shares of capital stock of said corporation theretofore sold by the company because of nonpayment of any of such illegal assessments be restored to the owners.

After a protracted trial, judgment was entered in favor of the plaintiffs on May 2, 1924, upon findings which substantially followed the allegations of the complaint. In this judgment it was decreed that every certificate of stock issued by the corporation was void; that each and every assessment levied upon said stock by the corporation was void; that the real property located in San Francisco and described in the complaint was owned by the plaintiffs herein and the other holders of certificates of stock issued by the corporation similarly situated and whose moneys were used in the purchase thereof, and that said corporation merely holds the naked record title thereto in trust for such persons, and that a referee be appointed to take an account and ascertain and report the names of the persons who held certificates of stock in said corporation, and who paid one or more of said assessments, the amounts of such payments, and the amounts of moneys expended by the corporation in the purchase of said property. On May 31, 1924, the trial court, on motion of the corporation, granted a new trial.

Thereafter a change in the personnel of the board of directors of the corporation was made and on July 7, 1924, the board passed a resolution discharging the attorneys then representing the corporation and employing as attorneys for the corporation Mr. Benson and Mr. Soto, who were soon thereafter substituted as attorneys for the corporation in these proceedings. On September 26, 1924, these attorneys, acting under the authorization of the board of directors of the corporation, entered into a stipulation with the attorneys for the plaintiffs in this litigation that the order theretofore made on May 31, 1924, granting a new trial, be vacated and set aside. On September 29, 1924, the trial court, acting upon this stipulation, entered its order setting aside and vacating its previous order granting a new trial. On October 16, 1924, 145 persons, claiming to be stockholders of the corporation, appeared in said proceedings and on October 27, 1924, joined with 147 other persons who also claimed to be stockholders in a motion for an order to vacate and set aside the order of September 29 last referred to and for an order setting said cause at large and at issue upon the pleadings and reinstating the same for a new trial, for an order allowing these parties to intervene in said cause, and for an order permitting said parties to assume charge of the defense of said action on the part of the corporation and to vacate the stipulation of the attorneys for said corporation filed September 30, 1924, waiving the corporation's right of appeal from the judgment entered therein. These motions were supported by an affidavit alleging that the vacation order of September 29, 1924, was illegal, improvident, collusive, would result in a dissolution of the corporation without consent of the stockholders or of a majority, would strip the corporation of its assets and was taken through inadvertence, mistake, surprise, and excusable neglect. The motion to set aside the order of September 29, 1924, was heard upon affidavits and oral testimony and as a result of the hearing the trial court on April 13, 1925, granted the motion to vacate that order, but at the same time denied the appellants' motion to reinstate the cause for a new trial. The latter part of the order was based upon the stipulation of the attorneys for the corporation that the former judgment might be entered against the corporation as the judgment of the court.

Thereafter and on April 13, 1925, these appellants presented their motion for permission to intervene and tendered a complaint in intervention. On April 27, 1925, the trial court denied their motion for permission to intervene and to file a complaint in intervention. Prior thereto and on April 15, 1925, it was stipulated between the attorneys for the plaintiffs in the litigation and the attorneys for the corporation that judgment should be given in favor of the plaintiffs and against the corporation upon the findings which had theretofore been made and signed. The new judgment in the terms of the former judgment was ordered to be entered by the court on May 7, 1925, and at the same time the trial court ordered that the motion of Golden and others claiming to be stockholders of the corporation that the cause be set at issue for a new trial be denied. On May 22, 1925, a new judgment in the terms of the former judgment was accordingly entered carrying the stipulation and consent of the attorneys for the corporation, and on May 28 the same attorneys filed a stipulation on behalf of the corporation waiving its right to appeal from said judgment.

On this appeal the appellants make five assignments of error, the first four of which may be considered under the single head of the right of the appellants to intervene and take such course as they deem necessary in the defense of the litigation. The fifth assignment is that the judgment is erroneous on the face of the roll.

The respondents insist that the appeal from the judgment should be dismissed upon the grounds that the appellants are not aggrieved parties entitled to appeal under section 938, Code of Civil Procedure. The appellants answer that though they were not parties to the proceedings resulting in the judgment they became parties to the record and as such entitled to appeal from the judgment within the rule announced in Luckenbach v. Laer, 190 Cal. 395, 398, 212 P. 918. The same case, however, points out the weakness of appellants' position, where, as here, those seeking to make themselves "aggrieved parties" are stockholders in a corporation which was a real party to the litigation and which under the well-accepted rule in Baines v. Babcock, 95 Cal. 581, 592, 27 P. 674, 30 P. 776, 29 Am. St. Rep. 158, and similar cases, is deemed to have full power to represent and bind the stockholders in all litigation to which it is a party (except where the directors of the corporation refuse to act or are guilty of fraud in the maintenance of the defense of the action as pointed out in Difani v. Riverside County Oil Co., 201 Cal. 210, 215, 256 P. 210). Because of the views which we have reached upon the merits of the appeal from the judgment it is not necessary to determine the motion to dismiss that appeal.

[1] The attack upon the judgment is based upon the ground that the attorneys for the corporation were without power to enter into the stipulation with the plaintiffs for setting aside the order granting a new trial and for the entry of a new judgment, first, upon the ground that the directors could not authorize the attorneys for the corporation to make such stipulation; and, secondly, because the attorneys could not exercise the authority under the resolution of the board because the end accomplished was the practical dissolution of the corporation. No facts or evidence of any character are cited in support of the contention made, but on the other hand respondents point out that the judgment appealed from merely directs a sale of the garage premises which the court found did not belong to the corporation; that this property cost the corporation something over $76,000 and was incumbered by mortgages and deeds of trust aggregating $55,000, whereas the appellants in printed circulars and by their answer which they sought to file herein alleged and contended that the corporation possessed assets of a value in excess of $2,000,000. Manifestly, if the corporation had assets of that value we cannot assume that the disposal of the realty mentioned in the complaint would work a dissolution of the entire corporation, and in the absence of pleading or proof that such would be the effect of the judgment, we may not depend upon statements of counsel that this was known to the directors or the attorneys employed by the corporation and that their purpose in consenting to the judgment was to effect a dissolution.

The authority of the directors of a corporation to control the litigation in which the corporation is engaged has been determined by an unbroken line of decisions (Baines v. Babcock, 95 Cal. 581, 592, 27 P. 674, 30 P. 776, 29 Am. St. Rep. 158; Luckenbach v. Laer, supra; Difani v. Riverside County Oil Co., supra), while the authority of counsel to stipulate and consent to the entry of judgment is found in section 283, Code of Civil Procedure.

[2] The directors of the corporation having the full control over the conduct of the litigation, and the attorneys, by reason of their employment as such, having the authority to stipulate and consent to the judgment, the only course of a stockholder is to appear and show either that the directors have refused to act in behalf of the interests of the corporation or that they were guilty of fraud in the defense of the action. See cases just cited. But a stockholder cannot assume to act on behalf of the corporation until he has exhausted the means within his reach to obtain redress from the directors. Difani v. Riverside County Oil Co., supra. When this has not been done, and when fraud on the part of the directors has not been alleged or shown, it is manifest that a stockholder will not be permitted, by appeal or by motion, to attack or delay the enforcement of a judgment entered against a corporation in any legal proceeding unless it be by a direct attack upon the judgment on the equity side of the court after demand upon the directors and refusal by them in bad faith to follow the necessary proceedings.

This question, however, does not arise here. The sole question on this branch of the case is whether a member or stockholder may by motion inject himself into a case against the corporation which is defended by the duly elected directors thereof, without a showing that he first sought to obtain redress from them or that they are acting fraudulently or in bad faith. Here the appellants have not attempted to show that the directors acted fraudulently or in bad faith in permitting the recovery of the judgment against the corporation. They have made no attempt to show that the recovery of the judgment was not for the best interests of the corporation or for the best interests of its stockholders. They do allege that the stipulations made by the attorneys of the corporation were collusive, inadvertent, and made through mistake or excusable neglect. They did not, however, attempt to prove any of these statements and the trial court impliedly found them to be untrue. In view of the cases just cited the trial court properly denied the various motions of appellants to intervene and to participate in the proceedings of the trial.

The rule is frequently stated as we find it in the Difani Case at page 215 of 201 Cal. (256 P. 212), where it is said: "With the right of the corporation to sue and be sued concerning corporate rights or liabilities the stockholders cannot interfere, except when the governing directors or trustees refuse to act or are guilty of fraud in the maintenance or defense of an action." The appellants take comfort from that part of the statement which gives a stockholder a right to interfere when the directors "refuse to act." They urge that the consent to the judgment in this case was such a refusal to act as would permit a stockholder to intervene. But the language does not refer to every refusal of the directors to act in the manner which each stockholder believes they should act. What is meant is a refusal to act legally and in a manner which is fair and right in the interests of the corporation. This is made clear by a restatement of the rule which follows this language in the Difani Case: "It is the general rule that where a corporation defendant refuses to defend an action, or, having begun a defense, it is made to appear that the corporation will not press it in good faith, a stockholder may, upon a proper application showing the facts, be allowed to become a party and defend on behalf of the corporation, but he must show that he cannot induce those in control to do that which is fair and right."

[3] Thus, before a stockholder can inject himself into a proceeding in which the corporation is a party, either plaintiff or defendant, he must, upon proper application, show that the managing body failed to take the necessary and proper steps or will not press the litigation in good faith, and he must also show that he has endeavored to induce the directors to take the proper steps and that they refuse to do what is fair and right in the premises. Where, therefore, the corporation is a party defendant the stockholder must show that the corporation has a good and valid defense, which the directors wrongfully or fraudulently refuse to make.

[4-8] On the appeal from the judgment the appellants are confronted with these well-settled rules. A corporation, like any individual party defendant, may stipulate to waive trial of the issues of any cause pending against it and may also stipulate to the entry of a judgment against it. When a judgment is thus entered with consent of the parties there is no appeal (Reed v. Murphy, 196 Cal. 395, 399, 238 P. 78), and when the consent is given by the duly acting attorney for the party it will be presumed that he had authority to do so (Strand Improvement Co. v. Long Beach, 173 Cal. 765, 799, 161 P. 975). Irrespective of any question as to the time when the application to intervene was made, the record unmistakably discloses that the appellants wholly failed to make any showing which would entitle them to intervene. There is no showing of fraud or bad faith on the part of the directors that the action taken by them was not taken in good faith and for the best interests of the corporation, or that the interests of the corporation or of the stockholders were injuriously affected thereby. These were all questions of fact which the trial court was required to determine upon the application made by the stockholders. The determination was adverse to them, and the burden is upon them in this appeal to show that the trial court committed error in this respect.

If we may assume, because the point has not been raised by either party, that the four orders appealed from are appealable orders, then for the reasons heretofore given such orders must be affirmed. If, however, they are not appealable orders because not mentioned in section 963, Code of Civil Procedure, but are reviewable upon the appeal from the judgment only as provided in section 956, Code of Civil Procedure, the same result follows because the judgment appealed from must be affirmed. Having determined that the appellants failed to show error in the ruling of the trial court in refusing them permission to inject themselves into the litigation, all the other questions raised on this appeal become unimportant and do not require discussion.

Judgment and orders are affirmed.

We concur: KOFORD, P. J.; STURTEVANT, J.

---

97 Cal. App. 153

JOHNSON v. FLETCHER et al. (Civ. 6582.)

District Court of Appeal, First District, Division 2, California. Feb. 21, 1929.

1. Pleading ⚷201—Demurrer is properly sustained, if any attack stated therein is well founded.

Demurrer to complaint is properly sustained, in case any attack stated in demurrer was well founded.

2. Fraud ⚷45, 46—Pleading to warrant recovery for fraudulent misrepresentations must show representations were made knowingly, were false, and were relied on to plaintiff's injury.

Pleading, in order to warrant recovery for fraudulent misrepresentation, must show the representations, and that they were known by defendants to be false, or were made under circumstances not warranted by knowledge, that they were actually false, and were made with intent to deceive plaintiff, and that plaintiff relied on representations believing them to be true and was injured.

⚷For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

3. Pleading 🔑17—All matters of substance must be alleged positively.

All matters of substance must be alleged positively and cannot be stated in the form of recitals.

4. Fraud 🔑43—Any representation made and relied on must be positively alleged as part of cause of action to recover for fraudulent misrepresentation.

Pleading, in action to recover for fraudulent misrepresentations, must, in case any representation was made, or plaintiff relied thereon, positively allege such fact as part of cause of action.

5. Fraud 🔑47—Complaint, in action to recover for fraudulent misrepresentations, must allege precise amount of damage.

Complaint, in action to recover for fraudulent misrepresentations, must allege the precise amount of damages in order to warrant recovery.

6. Pleading 🔑225(2)—Trial court held not, under circumstances, to have abused discretion in not allowing amended pleading after sustaining demurrer thereto.

Trial court *held* not to have abused discretion in refusing to allow plaintiff to file another amended pleading after sustaining demurrer thereto, in view of record showing that demurrer was sustained on February 4 without any application to amend and judgment entered on February 16.

Appeal from Superior Court, City and County of San Francisco; Franklin A. Griffin, Judge.

Action by Jessica A. Johnson against Carl W. Fletcher and others. Judgment for defendants, and plaintiff appeals. Affirmed.

Joseph A. Brown, of San Francisco, for appellant.

Bert Schlesinger and Jerome H. Bayer, both of San Francisco, for respondents.

STURTEVANT, J. [1] The plaintiff commenced an action to recover a judgment awarding her damages alleged to have been caused by certain fraudulent misrepresentations. The trial court sustained, without leave to amend, a demurrer to the fourth complaint, that is, the third amended complaint filed by the plaintiff; the plaintiff made no application to amend, and 12 days later the trial court caused a judgment to be entered in favor of the defendants, from which the plaintiff has appealed. If any attack stated in the demurrer was well founded, it follows that the trial court did not err in its ruling on the demurrer. Burke v. Maguire, 154 Cal. 456, 461, 98 P. 21.

[2-4] The complaint and the demurrer are very long. It will serve no useful purpose to recite the entire contents of either or both. Among the numerous attacks made by the demurrer, there were included among others: "(I) That said fourth amended complaint does not state facts sufficient to constitute a cause of action against said defendants or either or any of them; (II) that said fourth amended complaint is uncertain in this: (a) that it cannot be ascertained therefrom * * * what if any damages plaintiff is alleged to have sustained; * * * (i) it cannot be ascertained therefrom at what time or times the alleged representations are alleged to have been made." It was apparently the claim of the plaintiff that by reason of the fraudulent acts of the defendants she bought for $30,000 the furniture contained in, and the leasehold interest in, an apartment house known as No. 1007 Sutter street, in San Francisco; that the furniture and the leasehold were valueless; and that her damage was therefore $30,000, the amount which she had paid. To state her case her pleading "must of course show the fraudulent representations; that they were known by the defendant to be false or were made under circumstances not warranted by his knowledge; that they were actually false; that they were made with intent to deceive the plaintiff or with intent to induce him to enter into the transaction; that the plaintiff relied upon the representations believing them to be true; and that he was injured." 12 Cal. Jur. p. 806. Her pleading did not conform to these requirements and was subject to the attacks above quoted. As to some matters she failed to state sufficient facts; as to some other matters her statements are mere recitals and not positive allegations; and as to some other matters her statements are uncertain, ambiguous, and unintelligible. She alleges: "That this plaintiff was induced to purchase the said apartment house and was induced to pay the said moneys hereinbefore specified for the said apartment house, and the maintenance of said house by reason of the defendants, and each of them, having falsely, willfully and untruthfully, and knowingly stated and represented to this plaintiff with the intent, purpose and object of willfully cheating and defrauding plaintiff, and with the full knowledge of defendants that each and all of said statements were false and untrue, the following matters and things concerning the said apartment house and business therein conducted, which statements and representations are and were known to the defendants to be untrue, and, each of them is wholly untrue, and made with the intent to cheat and defraud plaintiff, the same being as follows." The above allegation is a recital of facts and not a positive allegation. All matters of substance should be alleged positively and may not be stated in the form of recitals. Philbrook v. Randall, 195 Cal. 95, 103, 231 P. 739. If any representation was made, the pleader does not state when it was made, whether before or after, or whether at the

time plaintiff made her purchase, July 2, 1924; nor does she allege any facts showing that the representations, if any, were made during and as part of the negotiations leading to the making of the contract. A possible exception to this criticism exists regarding the representation that Mrs. Boyd would buy if the plaintiff did not buy, but as to that representation it is not alleged that it was false. If any representation was made and the plaintiff relied thereon, such fact should have been alleged as a part of the plaintiff's cause of action. 12 Cal. Jur. 812; Hallidie v. First Federal Trust Co., 177 Cal. 600, 603, 171 P. 431. But the plaintiff's pleading contains no positive allegation on that subject. There is a parenthetical recital in paragraph IX, but, as stated above, all matters of substance must be made by positive allegations. This is true because the very object of drawing a complaint is to frame it in such manner that the defendant can admit or deny and thus form an issue. The demurrer was properly sustained. St. Clair Denver v. Burton, 28 Cal. 549.

[5] The last attack made by the demurrer which is quoted hereinabove is based on the contention that the complaint does not properly plead damages. Bearing in mind that this is an action as for deceit, and not an action in rescission, the rule applicable is succinctly stated by Mr. Chitty, in volume 1 of his work on Pleading, commencing on page 396, as follows: "But when the law does *not necessarily imply* that the plaintiff sustained damage by the act complained of, it is essential to the validity of the declaration that the resulting damage should be shown with particularity; * * * and in case of deceit some resulting damage must be alleged and proved." (Italics the authors.) In the case of Harron, Rickard & McCone v. Wilson, Lyon & Co., 4 Cal. App. 488, 88 P. 512, the court was considering a pleading more nearly perfect than the pleading in the instant case. The court quoted and followed the rule as above stated. Moreover, it held that the pleader should have pleaded the elements making up his damage. In Munson v. Fishburn, 183 Cal. 206, at page 216, 190 P. 808, 812, the court said: "It is, of course, well settled that in an action of damages for deceit the plaintiff must allege and prove the precise amount thereof." In drawing her pleading the plaintiff in the instant case inserted an intimation that she paid for the property $30,000, but there is no direct averment to that effect. To show that the lease had no value, the plaintiff attempted to plead that the rental reserved in the lease was as high, or higher, than the market value. 36 C. J. 1282. But she does not attempt to plead what was the market value of the use of the premises. From the pleading as it stands we may not infer nor presume that the plaintiff did not get value received or that the property as purchased was not worth the value which it was represented to have.

[6] If it be claimed that the trial court abused its discretion in not allowing the plaintiff to file another amended pleading, it is sufficient to say that the judgment recites that the demurrer was sustained on the 4th day of February, that no application to amend was presented, and the judgment was entered on the 16th day of February. The appeal is on the judgment roll without a bill of exceptions. Under these cicumstances no abuse of discretion is shown. Philbrook v. Randall, supra.

We find no error in the record. The judgment is affirmed.

We concur: KOFORD, P. J.; NOURSE, J.

97 Cal. App. 56

PEOPLE v. MEILE et al. (Cr. 1744.)

District Court of Appeal, Second District, Division 2, California. Feb. 19, 1929.

1. Robbery 🔑24(1)—Evidence held to sustain conviction for robbery.

In prosecution for robbery, evidence tending to identify defendant as person who committed the crime *held* sufficient to sustain conviction.

2. Criminal law 🔑1159(2)—Where testimony of defendant's guilt is substantial, and passion or prejudice is not indicated, conviction must stand.

Where there is substantial testimony of defendant's commission of offense, and nothing to indicate that verdict of guilty is result of passion or prejudice, conviction will not be disturbed on appeal.

3. Robbery 🔑23(1)—Evidence that defendant, two days after robbery, rented safety deposit box under assumed name, held admissible.

In prosecution for robbery, evidence that defendant, two days thereafter, rented safety deposit box under assumed name, *held* admissible.

Appeal from Superior Court, Los Angeles County; Emmet Wilson, Judge.

Vincent Meile and William Dyer were charged by information with the crime of robbery. Dyer was convicted, and he appeals. Affirmed.

Joseph W. Ryan, of Los Angeles, for appellant.

U. S. Webb, Atty. Gen., and John L. Flynn and Warner I. Praul, Deputy Attys. Gen., for the People.

THOMPSON, J. The defendants were charged by information filed by the district attorney of Los Angeles county with the crime of robbery. The jury returned a verdict of guilty against the defendant William Dyer, who prosecutes this appeal from the judgment and from an order denying his motion for a new trial. The defendant Meile was found not guilty.

[1, 2] That a robbery was committed is not in dispute. On the 2d day of April, 1928, W. L. Rowley and Mr. Donner, employees of the Pan-American Petroleum Company, started to go to the bank for the purpose of depositing the day's receipts. They had just put a suitcase into the rear of a Ford roadster and a smaller bag into the driver's compartment, when they were held up at the point of a revolver by two men who had alighted from an old Cadillac touring car, which had been driven into the yard by a third man. These men made away with somewhere between $10,000 and $12,000 in cash and about $9,000 in checks. Meile was identified by the witness Rowley, the cashier of the oil company, who was a man about 40 years of age. He, however, could not identify the appellant. The other employee, a young man of 20 years, identified the appellant as the one who was on his side of the Ford, and said that the defendant Meile resembled the man who was on the other side, although he only got a fleeting glimpse of the latter robber. On cross-examination this witness testified that, when the appellant approached him, he did so "on a kind of a half run and a half fast walk," crouched, with a tweed cap "flopped down over his face" to about the bridge of his nose, so that he could not see or describe the upper part of his head. Also the witness testified that while he was being held up his back was to Dyer, but that when the latter returned to the Cadillac, which was not over 15 feet away, the latter ran sideways with his head twisted, watching; that he, the witness, observed him during this return. About a month and a half after the robbery, the witness was shown about 20 photographs, among which there were 2 which resembled the appellant, one a front view and the other a profile, and he was not "sure which was the right man." Some time after the witness saw the pictures, the witness picked out the appellant from a group of 9 or 10 men and designated him as one who had participated in the robbery. Evidence was also introduced, that on April 4, 1928, two days after the commission of the crime, the appellant rented a safety deposit box of the Security Trust & Savings Bank under the name of William Harris. The appellant testified that he had had an argument with his wife and "for spite" had rented the box for the purpose of putting into it some papers and insurance policies, using the name of Harris in order to prevent his wife from discovering it. Mrs. Dyer testified that about a week later she found out about the box, at which time she was given the right of entry, and that her husband had told her he rented it on account of their argument.

The defendants presented the testimony of three witnesses, one of whom was a Mrs. De Fillipo, who testified that on April 2, 1928, her husband, who had died before she gave her testimony, her brother-in-law, William O'Brien, and George Costello left her home about 10 o'clock in the morning in a Cadillac automobile, and returned about 3 o'clock in the afternoon with the money taken from the Pan-American Company, which they divided into three parts; her husband getting about $3,300 or $3,400. The other two witnesses, inmates of San Quentin, and sentenced to pay the death penalty for a murder committed in Alameda, testified by depositions. One of them, William O'Brien, stated that he and two other men, the names of whom he would not give, were guilty of the particular crime here charged, and that the defendants on trial were not guilty. The other convict said that he and O'Brien and De Fillipo staged the robbery. The details recited by them agree, in all major circumstances at least, with those recited by the prosecution witnesses. The appellant also sought by his own testimony, that of his wife, and a doctor whom they say was called to attend Mrs. Dyer, to establish that the appellant was at his home at the time of the holdup.

We have recited the testimony at considerable length, for the reason that counsel for appellant argues with all sincerity and earnestness that the testimony is insufficient to support the verdict, and if we were at liberty to weigh the testimony we should be inclined, as we read the record, instead of listening to the witnesses, to agree with him. The very fact, however, that it is not our privilege or our province to view their demeanor, and judge their credibility, is the reason we are not permitted to overturn judgments, where there is substantial evidence to support the verdict. The rule is so well known that all that remains for us to do is to determine whether the testimony concerning the identification is substantial. It is positive and direct. There was nothing unfair or unusual about the manner in which the witness Donner picked the appellant from the group which confronted him at police headquarters, or from the photographs which he was shown. There is nothing inherently improbable in the identification, even under the circumstances, because it is a well-recognized fact that, under the nervous impulse of such an ordeal as the witness underwent during the commission of the offense, impressions are ofttimes made, never to be effaced. The human mind at times is photographic in its accuracy, and at other times, to be sure, it seems almost unimpressionable; but whether in a given instance it is one or the other is for the jury to determine. When we find substantial testimony, and nothing to indicate that the verdict is the result of passion or prejudice, we must rest content with that conclusion.

[3] Appellant also argues that the testimony of the prosecution, which we have already recited, concerning the safety deposit box, was improperly admitted over his objection. But in this we cannot agree. The robbery was committed on the 2d; the rental was two days later, under an assumed name. Both the time and the manner of the rental were circumstances admissible on the same theory as flight or concealment of the person. And as was stated by the court in People v. Cox, 29 Cal. App. 419, 155 P. 1010: "The jury were not compelled to accept the defendant's explanation of why he assumed a false name when traveling with the horse and at the time of the sale and when he was arrested. They were justified in finding, from all of the evidence adduced in the case, that, as the verdict implies, his assumption of a false name was for the purpose of concealing his identity and thereby warding off suspicion. * * *" So here the jury may have believed, although the circumstances may be of no great probative value, that the real reason for renting the box on the second day after the crime was committed was for the purpose of enabling appellant to conceal his ill-gotten gains. That such evidence is admissible, see the additional cases of People v. Cole, 141 Cal. 88, 74 P. 547; People v. Sprague, 52 Cal. App. 363, 198 P. 820, and People v. Frank, 75 Cal. App. 74, 241 P. 924.

Judgment and order affirmed.

We concur: WORKS, P. J.; CRAIG, J.

97 Cal. App. 60

PEOPLE v. GRANT. (Cr. 1762.) ★

District Court of Appeal, Second District, Division 1, California. Feb. 19, 1929.

1. Criminal law 🔑1023(12)—Order denying defendant's application to vacate judgment and withdraw plea of guilty is appealable.

Order denying defendant's application to vacate judgment and for leave to withdraw plea of guilty is an appealable order.

2. Criminal law 🔑274—Defendant, denied hearing after plea of guilty and sentenced to prison, held entitled to withdraw plea on showing that no more than minor technical offense was involved.

Trial court's refusal to grant defendant hearing on plea of guilty, for purpose of determining gravity of offense, was abuse of discretion, entitling defendant to withdraw plea on showing that defendant understood penalty would be light, and that defendant, if guilty, was guilty of only a minor technical offense, whereas sentence was for imprisonment in the state prison.

Appeal from Superior Court, Riverside County.

Proceeding by the People against F. L. Grant, in which defendant pleaded guilty and was sentenced. Defendant applied to the court to vacate the judgment and for leave to withdraw his plea of guilty, and, from an order denying the application, he appeals. Reversed, with directions.

Joseph Seymour, of Riverside, for appellant.

U. S. Webb, Atty. Gen., and James S. Howie, Deputy Atty. Gen., for the People.

YORK, J. [1] The only appeal we can consider in this case is the appeal from the order of the court denying the defendant's application to vacate and set aside its judgment, and his application for leave to withdraw his plea of guilty, which applicaton was made by defendant after judgment on his plea of guilty and after the judgment of the trial court sentencing him to serve in the penitentiary. That such an appeal will lie is directly supported by the decision of our Supreme Court in the case of People v. Schwarz and Wallington, dated June 3, 1927, 201 Cal. 309, 257 P. 71.

[2] In support of this application, it appears that defendant contends that his plea of guilty, which application was made by by his counsel, in the presence of and by ostensible authority of a representative of the district attorney's office, that the sentence would be "from one Dollar up." After the plea of guilty, the defendant was sentenced to imprisonment in the state prison by the trial court. This was done by the trial court without any evidence whatsoever as to the gravity of the offense actually committed in order to determine whether the punishment should be by imprisonment in the penitentiary or county jail or by a mere fine, and nothing to found the sentence upon, except only the plea of guilty, as aforesaid, made under the impression that punishment would not be severe. The defendant made a motion to withdraw the plea of guilty on the ground, among others, that it was made without due deliberation and merely from the hope that the punishment would be "litigated," which we interpret as being that the trial court, when imposing sentence, would make due inquiry into the facts of the case, but the punishment was imposed without any due inquiry by the court, unless we can consider that the court considered in this matter the report of a probation officer, which formed no part of the proceedings to set aside the judgment, and, if it had been so offered and received in the form in which it was offered,

---

★For opinion denying rehearing, see 275 P. 838. Hearing denied by Supreme Court.

the larger portion of it would have been merely hearsay evidence.

The defendant did not have an opportunity to investigate the source of the probation officer's inquiry, but he did deny, under oath, the conclusions reached by the probation officer, at least as to anything that would affect the court in deciding the extent of his punishment.

It sufficiently appears by the showing made by the defendant that he had never been charged with a criminal offense before, and it was stipulated before the hearing of this motion that all of the facts stated in defendant's affidavit in support of his motion were true, which facts establish that defendant was not guilty, as charged in the information, and, if guilty at all, he was guilty of only a minor technical offense therein included, on the conviction of which minor offense he would most certainly not have been imprisoned in the penitentiary.

It appears that justice demands that defendant should not, on the face of these proceedings, be subjected to the imprisonment imposed upon him, and that the trial judge abused his discretion in refusing him a hearing after his plea of guilty, for the purpose, at least, of determining the gravity of the offense.

The order denying the defendant leave to withdraw his plea of guilty is reversed, and it is ordered that the defendant, if he be so advised, be allowed to enter a plea of not guilty to the information to which his plea was made.

We concur: HOUSER, Acting P. J.; CRAIL, Justice pro tem.

---

97 Cal. App. 43

FIRESTONE v. O'BRIEN et al. (Civ. 5904.)★

District Court of Appeal, First District, Division 1, California. Feb. 19, 1929.

Rehearing Denied March 21, 1929. Hearing Denied by Supreme Court April 18, 1929.

1. Brokers 🔑31—Broker cannot sell land to its employee without first disclosing all surrounding facts to principal.

Real estate broker cannot sell to itself or one of its salesmen or employees without first disclosing all surrounding facts to principal.

2. Brokers 🔑31—Principal's knowledge that purchaser was broker's employee did not preclude him from complaining of broker's sale to employee without first disclosing facts.

Where broker sold land to employee without disclosure of all facts to principal, principal's knowledge that purchaser was salesman of broker did not preclude him from complaining.

3. Brokers 🔑31—Broker held liable to owner, where employee bought land and resold at profit, notwithstanding that broker received none of profits from resale.

Broker *held* liable to owner, where land was sold to broker's servant, who immediately resold at profit, notwithstanding that broker was uninformed as to actions of servant and that broker did not receive any of profits from resale.

4. Brokers 🔑38(4)—In action against broker whose servant bought and resold plaintiff's land at profit, judgment ordering accounting held erroneous under evidence.

In action against broker whose servant had bought plaintiff's land and resold it at profit, portion of judgment ordering accounting *held* erroneous, in view of evidence.

5. Appeal and error 🔑1033(9)—On defendant's appeal, any error in judgment allowing less than legal interest held harmless.

On defendant's appeal in action against broker whose servant bought and resold plaintiff's land at profit, any error in judgment for interest on resale profit in that amount allowed was less than legal interest is harmless.

Appeal from Superior Court, City and County of San Francisco; E. P. Shortall, Judge.

Action by C. V. Firestone against Kenneth B. O'Brien and another to establish a trust in profits from the sale of real property and for an accounting. Judgment for plaintiff, and defendants appeal. Modified and affirmed.

Keyes & Erskine, of San Francisco, for appellants.

Sherman & Peters and Donovan O. Peters, all of San Francisco, for respondent.

NEEDHAM, Justice pro tem. The salient points alleged by plaintiff in his complaint are that he listed real estate with the defendant Allen & Co., real estate brokers, on June 25, 1924, for sale for the sum of $8,500; that Allen & Co. represented to plaintiff that this amount could not be obtained for the property listed, and, relying thereon, he authorized Allen & Co. to sell same for not less than $7,500; that on July 8, 1924, Allen & Co., as plaintiff's agent sold the property for $7,500 to the defendant O'Brien, who was an employee of Allen & Co.; that defendant O'Brien deposited $250 with Allen & Co., as a part payment upon the purchase price; that on July 21, 1924, plaintiff delivered his deed conveying the property to O'Brien to Allen & Co.; that the defendants have acted with intent to defraud plaintiff and intentionally misled him, by advising him that the best price they could obtain for the property was $7,500, when they knew that a higher price was obtainable; by selling the property for $7,500 without making a reasonable effort to obtain a higher price, and at the time having knowledge of parties who would give a sum in excess of $7,500; by selling the property to O'Brien, who was an employee of Allen & Co., without disclosing such employment to plaintiff, and without such fact being

---

★Rehearing denied. Hearing denied by Supreme Court.

known to plaintiff; by taking unjust advantage of a confidential and fiduciary relationship of defendant with plaintiff in many particulars among others by wrongfully and secretly reselling the property for $8,500, and at a profit concealed from plaintiff, and wrongfully retaining such profit; by demanding and obtaining the plaintiff's promissory note for $375, covering the commission of Allen & Co., for selling the property. Alleges that plaintiff paid $40 to Allen & Co. on account of the $375 promissory note; that Allen & Co. are not entitled to any commission; that plaintiff has suffered damages in the sum of $1,153.50 by reason of defendants' fraud; that the defendants hold the profits derived from the resale of the property in trust for plaintiff.

The defendants in their answer deny the allegations of the complaint, except it is admitted that on July 21, 1924, the plaintiff conveyed the property to O'Brien, and that O'Brien resold the property at a profit of $1,026.25, but that none of the profit was received by Allen & Co. The answer admits that the plaintiff executed a promissory note for $375 as commission in the transaction.

The court found that Allen & Co. was Firestone's agent for the sale of the property; that it was originally listed for $8,500; that O'Brien was an employee of Allen & Co.; that Allen & Co. by its employee Hill, after persuading Firestone to lower his price, made an agreement with O'Brien for the sale of the property; admits the receipt of the $250 as a deposit on account of the purchase price of $7,500; finds that the property was sold to O'Brien by Allen & Co., as the agent for the owner Firestone; finds that "the relationship of O'Brien as an employee of Allen & Company was not disclosed to the plaintiff until after the sale, nor did plaintiff either directly or indirectly learn of that relationship until after the sale, but at the time the said Firestone signed the clause appearing on the reverse side of said deposit sale agreement * * * said Firestone observed the name of O'Brien on a name-plate on the top of the desk at which he was seated in the office of Allen & Company, indicating that O'Brien was connected with Allen & Company, and at that time said Firestone realized there was some connection between O'Brien and Allen & Company, although he did not realize the significance of said connection as it might concern him. * * *"

Further findings may be summarized as follows: That Firestone had been advised by Allen & Co. that his property was sold, that a deposit had been accepted, and that plaintiff was led by defendants to believe that he was bound by said sale, previous to his signing of the formal sale agreement of July 8, 1924; did not at the time realize the significance of O'Brien's relationship with Allen & Co. as indicated by O'Brien's name plate on the desk in the office of Allen & Co., as it might concern said sale until subsequent to the signing of said formal sale agreement of July 8, 1924; that on the date of the sale there was a resale simultaneously by O'Brien to certain parties by the name of Todts, and "that the defendants, particularly O'Brien, derived a secret profit of $1,000.00 from said transaction, which he, O'Brien, kept from plaintiff and for which he and his employer Allen & Company refused to account to the plaintiff."

There was entered upon these findings a judgment that plaintiff recover from the defendants $1,153.50 as damages; that the defendants account to the plaintiff for the profit realized upon the resale to the Todts; that the note for $375 be canceled; and that the $40 paid by plaintiff to Allen & Co. on account of this note be repaid to plaintiff.

The appellants contend, first, admitting that it is elementary that an agent to sell cannot sell to himself without disclosing the fact that he is buying to his principal, but contends this rule has no application to this case where the agent to sell did not sell to itself but to one of its employees; second, the plaintiff, at the time he entered into the agreement to sell the property to O'Brien, knew that O'Brien was an employee of Allen & Co., hence he cannot rescind the transaction and establish a constructive trust of the profits of the resale; third, even though this court holds that O'Brien is liable, Allen & Co., who did not receive any part of the profit realized upon the resale, is under no liability of any sort to the plaintiff; fourth, even, though this court hold that both Allen & Co. and O'Brien are liable, the judgment entered by the trial court is erroneous.

We have summarized quite fully the pleadings, findings, and judgment in the case, as it seems quite necessary so to do for a full understanding of the case.

[1] The first proposition of appellants is that, conceding that a real estate firm cannot sell to itself, without disclosing the fact that it is buying to its principal, yet this rule has no application to a case where the agent did not sell to itself, but to one of its salesmen. We think that an examination of the authorities show that the agent cannot sell to one of its salesmen or employees without first *disclosing* all the surrounding facts to the principal. One of the leading cases upon this subject is the case of Burke v. Bours, which was before our Supreme Court three times, and this particular phase of the case was quite fully discussed in 92 Cal. 108, 28 P. 57, where the following language is found:

"In Sugden on Vendors, p. 887, it is said: 'Any persons who, by being employed or concerned in the affairs of another, have acquired a knowledge of his property are incapable of purchasing such property themselves.' In Gardner v. Ogden, 22 N. Y. 350, 78 Am. Dec. 192, * * * 'the defendant Smith was the clerk, or assistant, of his principals. * * * Whatever disabilities they labored under equally attached to him. It would work an entire abrogation of the rule to hold the principal subject to the operation of this rule, and exempt his clerks and agents from its effect. It would be opening the door to its evasion, so that it would lose all its vitality and virtue.'" The decision goes on: "I think this is the spirit of all the authorities, and that the honesty and fairness of transactions between principals and their agents demand a firm adherence to these rules, and to bring within their operation, not only the agent himself, but those in his *immediate employ*, and who are engaged in the transaction of his business, which is, necessarily, the business of the agent's principal." (Italics ours.)

These principles are cited with approval in the cases of Newell-Murdoch Realty Co. v. Wickham, 183 Cal. 39, at page 44, 190 P. 359, and Salisbury v. Yawger, 184 Cal. 783, 195 P. 682.

The rule is to place the burden on the agent to make full *disclosure* promptly. See the case of McCallum v. Grier, 86 S. C. 162, 68 S. E. 466, 138 Am. St. Rep. 1037, in which the court said in part: "A broker employed to sell goods for his principal cannot buy them for himself, nor can a broker employed to buy, buy his own goods unless the principal, *with full knowledge of the facts, assents to the transaction.*" The decision states: "'It is immaterial that the broker acts in good faith. * * * The reason of the rule is that, if the broker were permitted to buy from or sell to himself, there would be combined in him the incompatible relation of purchaser and seller, and an interest adverse to that of his principal would be created such as would ordinarily lead to a violation of his duty as agent.' 4 Enc. of Law, 966; 19 Cyc. 207." (Italics ours.)

In Curry v. King, 6 Cal. App. 575, 92 P. 665, it is stated: "Therefore, an agent will not be allowed to deal in his own behalf with his principal with reference to the subject matter of the agency, unless he makes *full, complete and honest disclosure of the truth* of the transaction. He is bound to treat with his principal concerning the property over which he has been vested with authority in the utmost good faith, and so religiously does equity require adherence to this rule that a transaction between them as to the property whereby the agent acquires the ownership thereof, is, upon its face, deemed by the law to be fraudulent." (Italics ours.)

In the case of McCallum v. Grier, supra, it is held that it is the duty of an agent to *disclose* fully to his principal every step taken by him in the transaction of the principal's business. If it be the sale of real estate he should keep nothing concealed in his efforts to bring the owner and prospective purchaser together. The *identity* of the purchaser and the *true consideration* should be instantly *disclosed.* (Italics ours.)

We have examined the authorities cited by the appellants with much care, but we are unable to see wherein they in any way mitigate or in any way narrow the doctrine contended for by the respondent, which we feel is very clearly upheld by the great weight of authority.

[2] The second contention of the appellants to the effect that the plaintiff at the time he entered into the sales agreement knew that O'Brien was a salesman of Allen & Co., therefore he is not in a position to complain, is without merit, for the reason that the evidence clearly shows that there was not a *disclosure* of all the facts as required by the authorities hereinbefore cited. It is true that the plaintiff saw the name of O'Brien on the name plate on a desk in the office of Allen & Co., but that was not a full disclosure of all the facts surrounding the sale. Furthermore, the evidence shows, without conflict, that, on the very day that the deed of the plaintiff to O'Brien was in escrow with the escrow agent, O'Brien himself secretly sold the said property to Todts by a deed to Todts through the same escrow company at a profit of $1,000. This clearly shows that all the facts and circumstances concerning which it is the duty of the agent and the agent's salesman to fully disclose to the principal, the plaintiff, was not done. The evidence sustains the findings of the trial court in this regard.

[3] The contention of the appellants that, even though O'Brien is liable, Allen & Co. cannot be held responsible because the latter did not receive any of the profits realized from the resale is without merit from what has heretofore been said. The authorities quoted clearly hold that Allen & Co. is legally liable, and it is not necessary to further cite authorities sustaining this proposition.

To recapitulate the case briefly: The plaintiff listed property with Allen & Co., for sale for not less than $8,500. A salesman in the employ of Allen & Co., by the name of Hill, persuaded plaintiff to lower his price to $7,500, and the property was sold to O'Brien, also a salesman in the employ of Allen & Co.; on the same day, or practically the same day, the property was resold by O'Brien to the Todts at a profit of $1,000, *the same escrow agency handling both transactions.* The evidence shows that Hill died before the trial, and his testimony was not taken. The appellants earnestly argue that Allen & Co., received nothing from the profits and were ignorant of the transaction; that Allen & Co. are large real estate operators having many branch offices and employing many salesmen; that they have received no profit, and they ought not to be held liable. We think that it is only fair to state that Allen & Co., so far as the evidence shows, were uninformed as to the actions of their salesmen Hill and O'Brien. Allen & Co. received a note covering the commission amounting to $375, upon which the sum of $40 only was paid. Nevertheless, for the reasons which we have herein stated, Allen & Co. must be held legally responsible, however unfortunate it may be.

[4] The judgment entered by the trial court in favor of the respondent and against the appellants O'Brien and Allen & Co. was for the surrender and cancellation of the promissory note of $375; for the return of $40 paid by the plaintiff to Allen & Co.; for damages in the total amount of $1,153.50 against both appellants; and for an accounting as against both Allen & Co. and O'Brien of all the profits in connection with the resale of plaintiff's property.

As the evidence conclusively shows that O'Brien resold the property to the Todts simultaneously with the receipt of the deed from the plaintiff; that O'Brien did not occupy the property or rent the same at all, it is clear that the only profit was that made upon the resale of the property, to wit, the sum of $1,000. Whether the $1,000 be denominated damages or profits would seem to be unimportant, because that sum, together with the cancellation of plaintiff's note of $375, and the return of the $40 paid thereon, is all the relief that the plaintiff is entitled to recover under any theory of the case. Therefore that portion of the judgment ordering an accounting is erroneous, and should be modified by having the same stricken therefrom.

[5] The appellants also complain that the judgment for $1,153.50 is erroneous, and should be reduced to $1,000. But it is apparent, we think, that the $153.50 was intended as interest on the $1,000 resale profit made July 21, 1924, from such date, and, as this is less than the legal interest on such sums from July 21, 1924, to the date of judgment, it is harmless so far as appellants are concerned, and, as plaintiff has not appealed, we are warranted in permitting that part of the judgment to stand.

For the reasons stated, that part of the judgment of the trial court which orders the appellants to account to respondent is stricken from the judgment, the judgment in all other particulars to stand, and the judgment so modified is affirmed; respondent to recover his costs.

We concur: TYLER, P. J.; CASHIN, J.

---

97 Cal. App. 112

LINDBERG v. PANTOLEON et al.

(Civ. 5897.)

District Court of Appeal, First District, Division 1, California. Feb. 21, 1929.

1. Appeal and error 🔑1002—Finding of jury on conflicting evidence is conclusive.

When there is a conflict in the evidence on the issues, finding of jury is conclusive on appeal.

2. Negligence 🔑126(1)—Evidence showing cranking of automobile by boy injured in so doing was so common as to authorize implied direction to do so was properly admitted.

In determining whether or not there existed an implied instruction for boy, injured in cranking automobile, to so crank machine, it was proper for court to admit evidence showing that cranking thereof on numerous startings was so common an occurrence, and done so often at express request and with implied consent of operator, that boy was entitled to consider that he had an implied instruction so to do.

3. Negligence 🔑108(2)—Complaint in action to recover for injury to boy in cranking automobile, stating facts authorizing conclusion of negligence, stated cause of action.

Complaint in action to recover for injury to boy in cranking automobile, stating facts authorizing conclusion of negligence, *held* sufficient to state a cause of action, without expressly using the term "negligence" therein.

4. Appeal and error 🔑882(3)—Litigant, adopting certain position on material issue, and giving evidence in support thereof, cannot seek reversal by contradicting his testimony.

A litigant, having adopted certain position on material issue, and having himself given evidence in support of that position, cannot on appeal seek to reverse judgment by contradicting his own testimony, and obtain a benefit from the evidence which he impugned.

5. Master and servant 🔑366—Boy, assisting in making deliveries, without regular salary or fixed duration of period of work, held not "employee" (Workmen's Compensation Act).

Boy, assisting truck driver in making deliveries, without being paid a regular salary or having fixed duration of work or time of payment, or any agreement that truck driver could direct details of the work, *held* not an "employee," within meaning of Workmen's Compensation Act (St. 1913, p. 279, as amended).

[Ed. Note.—For other definitions, see Words and Phrases, First, Second and Third Series, Employé.]

6. Trial 🔑296(8)—Instruction authorizing recovery in personal injury action in case jury believed plaintiff had established material allegations did not cause miscarriage of justice, in view of other instructions.

Instruction authorizing recovery of damages in personal injury action, in case jury was satisfied that plaintiff had established material allegations of amended complaint, though leaving to jury the duty of determining the material allegations, *held* not to have caused miscarriage of justice, when considered in conjunction with other instructions, fully and clearly stating the law.

Appeal from Superior Court, City and County of San Francisco; H. L. Preston, Judge.

Action by Robert Lindberg, a minor, by John Lindberg, his guardian ad litem, against Antonio Pantoleon and others. Judgment for plaintiff, and defendants appeal. Affirmed.

Goldman, Nye & Spicer, of San Francisco, for appellants.

Anthony Devoto and Devoto & Richardson, all of San Francisco, for respondent.

WARD, Justice pro tem. In this action, instituted by plaintiff, guardian ad litem of Robert Lindberg, a minor, to recover damages for personal injuries, a verdict was returned in his favor against defendants for $500. Judgment followed, and defendants appealed.

The defendants were engaged in the retail grocery business, and in connection therewith operated a delivery truck. On the morning of October 6, 1923, defendant Antonio Pantoleon drove out in the truck to solicit business. In front of the residence of one of his customers he parked the car, with its back facing the sidewalk, and started to walk toward the home of the prospective customer. The evidence is somewhat conflicting and uncertain as to whether Pantoleon had reached the house, or was leaving it, when the cry of "Tony!" attracted his attention, and he hurried to the front of the truck, and there saw Robert Lindberg, seemingly in pain, in front of the truck. The boy had broken his forearm in attempting to crank the automobile.

[1] Appellants' first contention is that the judgment is not supported by the evidence, and claim that Antonio Pantoleon did not request Robert Lindberg to crank the car. The testimony does not show that an express request was made just prior to the accident, but that Antonio Pantoleon did make such a request on the morning of the accident. At the time of the injury Robert Lindberg was 10 years of age, and inexperienced in the operation of an automobile. He had cranked the machine some 40 times prior to this date, either upon the request of or with the assent of defendant. From defendant's own testimony the jury were justified in drawing an inference that defendant Antonio Pantoleon knew that the starting crank of the automobile was likely to kick or strike back, and that a young boy was likely to be injured when turning it.

Appellants' argument goes to the weight of the evidence, and plaintiff's credibility as a witness, rather than to the sufficiency of the evidence to support the verdict. When there is a conflict in the evidence upon the issues, the finding of the jury is conclusive on appeal. See Turano v. Bailey (Cal. App.) 260 P. 841. The jury resolved this conflict in favor of plaintiff, finding in effect by their verdict that the boy had repeatedly cranked the machine at the request of defendant, express or implied; that it had become a custom between them for the boy so to do; that the defendant Antonio Pantoleon knew the danger of cranking the machine, because he himself, a year and a half before, had suffered the same injury in a similar operation. It was not necessary for the jury to consider whether or not this machine had a self-starter, or whether the self-starter was working on that day, if, as a matter of fact, it was being cranked on that day by the crank, and not by the self-starter.

[2] Objection has been made that no express direction was given by Antonio Pantoleon to the boy to crank the machine. A direction need not be expressed, to be a direction. It may be determined from circumstantial evidence, or from the circumstances surrounding the relation of the parties. To determine whether or not there existed an implied instruction so to do, it was proper for the court to admit evidence showing that the cranking of the machine upon its numerous startings was so common an occurrence, and done so often at express request and with the implied consent and approbation of the man, that the boy was entitled to consider that he had an implied instruction so to do.

[3] At the beginning of the trial defendants moved for judgment on the pleadings, on the ground that the complaint did not state a cause of action against defendants or either of them. Paragraph VI of the amended complaint reads as follows:

"That at all the times herein mentioned, the starting crank of the motor of said defendants' automobile was accustomed to kick or strike back when one attempted to crank the motor of same; that at all the times herein mentioned, and particularly at the time said plaintiff received the injuries herein mentioned, said defendants and each of them knew that said starting crank of said motor of said machine was accustomed to kick or strike back when one attempted to crank said motor of said machine; that at all the times herein mentioned, and particularly prior to and at the time of receiving the injuries herein mentioned, said plaintiff, Robert Lindberg, did not know that said starting crank of said motor of said machine was accustomed to kick or strike back when one attempted to crank the same; that prior to the time of receiving said injuries herein mentioned, said plaintiff, Robert Lindberg was requested by said defendants to start said crank of said motor, and neither at the time of said request nor at any other time did said defendants or either of them warn said plaintiff, Robert Lindberg, that said starting crank of said motor was accustomed to kick or strike back when one attempted to crank said motor; that at the time and place herein mentioned, when said plaintiff, Robert Lindberg, attempted to crank said motor of said automobile in accordance with the request of said defendants, as aforesaid, and without any fault or negligence on his part, said starting crank kicked or struck back, causing the injuries herein complained of; that said injuries received by said plaintiff, Robert Lindberg, at the time and place herein mentioned, were proximately caused by and resulted from the kicking or striking back of said starting crank of said motor, as said plaintiff, Robert Lindberg, attempted to crank said motor of said automobile in accordance with the request of said defendants at the time and place aforesaid."

The paragraph last quoted states facts showing the duty of defendants and a neglect of that duty. A conclusion of negligence can be drawn from the facts stated. There is no suggestion from any of the pleadings that any act on the part of plaintiff was willful or mischievous, and nothing to indicate that any conclusion could be reached other than that of negligence. When the complaint, as in this case, alleges a series of facts and circumstances establishing the cause of injury from which an inference must be drawn that a defendant was negligent it is not necessary to use the term negligence in the complaint. Silveira v. Iverson, 125 Cal. 266, 57 P. 996. White v. Covell, 66 Cal. App. 732, 227 P. 196. In answering paragraph VI defendants set forth in part as follows: "* * * deny that there was any fault or negligence on the part of defendants or either of them." In any case wherein a defendant treats the issue as one of negligence, he cannot prevail upon a motion for judgment upon the pleadings. Nittler v. Continental Casualty Co. (Cal. App.) 272 P. 309; National Union Co. v. Nason, 21 Cal. App. 297, 131 P. 755; Carroll v. Briggs, 138 Cal. 452, 71 P. 501; Slaughter v. Goldberg, Bowen & Co., 26 Cal. App. 318, 147 P. 90.

That the court erred in denying defendants' motion for nonsuit is appellants' next contention, and such motion was based upon the following grounds: (1) The matter was within the exclusive jurisdiction of the industrial accident commission. Hence, the court was without jurisdiction to try the case. (2) Plaintiff failed to prove the material allegations of his complaint. (3) Plaintiff failed to prove that the accident was caused by the negligence of the defendants, or any of them.

[4, 5] At the outset we call attention to the reporter's transcript of testimony on page 16, which reads in part as follows: "A. Well, what am I going to answer? I remember one day I got stuck, it was kind of a rainy day, he was outside his place; he said, 'I will help you, Tony,' and I was good nature, and I gave two bits. Q. Was that the only time? A. Another time some lady sent him down to get some meat and I give 15 cents more. I never asked the fellow to work for me. Q. Is that the only time? A. Yes. Q. Are you sure that Mr. Lindberg did not help you in delivering packages to your customers more than twice? A. He never delivered more than twice." There can be no doubt that Antonio Pantoleon definitely stated that the Lindberg boy had worked for him but twice, and that he had given him a small sum of money.

On appeal, counsel for appellants call our attention to testimony of the plaintiff and other witnesses, who testified that the boy had worked upon many other occasions, and upon this testimony he claims that the trial court erred in denying the motion, made upon the ground that the Industrial Accident Commission had exclusive jurisdiction of this case. Our first answer must be that, if a litigant adopts a certain position on any material issue and himself gives evidence in support of that position, he cannot upon appeal seek to reverse the judgment by contradicting his own testimony and obtain a benefit from the evidence which he impugned. However, under the provisions of the Workmen's Compensation Act (St. 1913, p. 279, as amended), Lindberg was not an employee.

Counsel cites McLain v. Llewellyn Iron Works, 56 Cal. App. 60, 204 P. 869. The case is not in point. In that case there was no doubt that the deceased was "actually employed." The suit was instituted by the mother, and the sole question involved was the sufficiency of the complaint in an action instituted in the superior court, and the court on appeal held that "where the condition of compensation prescribed by subdivisions 1, 2, and 3 of section 12 of the act [St. 1915, p. 1079] are, as in the instant case, shown to exist, no cause of action is stated by a complaint, in the absence of allegations showing the employment to have been within the excepted classes of labor mentioned in section 14 of the act [St. 1915, p. 913], and that in the absence of such showing we cannot presume the existence of such facts in support of the judgment."

The question here to determine is: Was there an employment? Irrespective of whether Robert Lindberg worked 2 or 60 days, he was not paid a regular salary; he received small sums of money whenever Pantoleon was in the mood to recompense him for making deliveries. There was no fixed duration of the period of work or the time of payment, and no agreement that Pantoleon could direct the details of the work. The boy worked during vacation, and occasionally after school, and was not required to perform services if he was not so disposed. If one party does not intend to give regular employment and the other to accept regular employment, no contract of employment exists, and whatever work is performed becomes irregular, occasional, or merely incidental, as distinguished from regular and continuous. See Diamond Livery v. Industrial Accident Commission et al., 289 Ill. 591, 124 N. E. 609, and cases cited. That Antonio Pantoleon did not have dominion over the boy's time, as a master over a servant, is best shown when upon an occasion the boy's mother, in the presence of Antonio Pantoleon, ordered the boy home for his lunch; the boy obeyed, and Antonio Pantoleon recognized the dominion of another by concurring therein.

Counsel for appellants, in his zeal in behalf of his clients, has taken us back over 2,000 years to the doings of the early Greeks at Athens. We would be content to go back only as far as the memory of every man now existent in these United States. Ever since wheels have been an integral part of vehicles in this country and elsewhere, every active member of boydom has earnestly desired to be in that vehicle and allowed to ride thereon. If not with permission he has contrived to steal rides, or he has wheedled his way into being invited by running his legs off on side errands to save the driver exertion; he has carried things up hill, when the vehicle could not easily go, in order that he might ride down hill or on the level. He has been alert to open gates to permit a passage through and sometimes to close them afterward. Men have accepted these services coincident with their offering, and have invited them by their tacit consent; in fact, as in the case at bar, have held out inducements of small change as encouragement to receive such services, and as an additional lure to increase the locomotion of the boy. The dimes or quarters are, of course, an incentive; but the principal remuneration is the pleasure of transportation. Such an arrangement cannot be dignified by the term "employment," as that word is used in the Workmen's Compensation Act.

On the motion for nonsuit defendants also pressed the point that the material allegations of the complaint had not been proven, laying stress upon the claim that plaintiff failed to prove that the accident was caused by defendant's negligence. In answering the first point made by appellants, namely, that the judgment is not supported by the evidence, we confined ourselves to a discussion of such evidence presented prior to the time that plaintiff rested. It is therefore unnecessary to consider this point further.

[6] Appellants contend that the court erred in giving plaintiff's proposed instruction No 2. This proposed instruction reads: "If you are satisfied from the evidence that the plaintiff has established the material allegations of his amended complaint by a preponderance of the evidence, I instruct you that the plaintiff is entitled to recover such damages as you believe from all the evidence of the case he is entitled to." As a general rule, this instruction leaves to the jury the duty to determine the material allegations of the complaint. In view of the sixth paragraph of plaintiff's complaint, it was necessary that the jury find for the plaintiff upon such allegations. In conjunction with the other instructions, the jury was fully, clearly, and carefully instructed on the law, and could not possibly have been misled. Elsewhere the court covered paragraphs IV and VI, and a miscarriage of justice has not resulted therefrom. Hoffman v. Pacific Electric Co., 45 Cal. App. 751, 188 P. 597. The instruction complained of did not permit the jury to disregard the real issues, if they considered them immaterial, as each material allegation of paragraph VI was incorporated into a separate instruction.

Those instructions of the defendants which were refused were either covered by the instructions given, or they were instructions upon questions of law, and it is not the province of the jury to determine such, but of the court. The trial judge was eminently fair in his rulings upon evidence, and this court cannot perceive how substantial justice has been denied defendants.

Judgment affirmed.

We concur: TYLER, P. J.; KNIGHT, J.

---

97 Cal. App. 99

CALIFORNIA FILTER CO. v. SUPERIOR COURT IN AND FOR CITY AND COUNTY OF SAN FRANCISCO et al. (Civ. 6489.)★

District Court of Appeal, First District, Division 2, California. Feb. 20, 1929.

As Modified on Denial of Rehearing March 21, 1929. Hearing Denied by Supreme Court April 18, 1929.

1. Husband and wife ⚷299(4)—In action for separate maintenance, order directing corporation employing husband to pay wife certain sum was void, as beyond court's jurisdiction (Civ. Code, § 137).

In action by wife against husband for separate maintenance, order directing corporation which employed husband to pay wife certain sum was void, as being beyond jurisdiction of court since under Civ. Code, § 137, only interlocutory orders that can be made in action for divorce or separate maintenance in favor of wife are orders against the husband.

2. Husband and wife ⚷299(4)—Where wife, suing for separate maintenance, claimed corporation had money belonging to husband, court could not, in summary proceeding, determine corporation's interest in such money.

Where wife, suing for separate maintenance, claimed corporation had money in its hands belonging to husband, and corporation claimed interest in money adverse to both husband and wife, trial court was without power in summary proceeding to determine issue.

3. Judgment ⚷577(1)—One is not bound by judgment in respect to person or property, unless he has had day in court.

One is not bound or concluded by judgment, either in respect to person or property, unless he has had his day in court, by which is meant until he has been duly cited to appear, and has been afforded an opportunity to be heard, and on such hearing to offer evidence in support of his cause.

⚷For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

★Rehearing denied. Hearing denied by Supreme Court.

4. Husband and wife 🔑299(4)—Order beyond court's jurisdiction in separate maintenance action was not valid, merely because no specific objection to jurisdiction was made.

In action for separate maintenance, it was unnecessary to make specific objection to jurisdiction of court to make order directing husband's employer to pay wife certain sum, since such order was beyond court's jurisdiction and could be collaterally attacked.

Application for writ of prohibition by the California Filter Company against the Superior Court in and for the City and County of San Francisco, and Walter Perry Johnson, Judge of Department No. 14 thereof, to prevent further proceedings on an order to show cause for contempt. Writ issued.

Leo R. Friedman and Robert E. Fitzgerald, both of San Francisco, for petitioner.

David Livingston and Livingston & Livingston, all of San Francisco, for respondents.

PRESTON, Justice pro tem. This is a petition for a writ of prohibition. On November 17, 1926, Marion Shibley commenced an action against her husband, Kenneth Shibley, for separate maintenance, and joined as a party defendant the petitioner herein, California Filter Company, a corporation. The original complaint in said action, among other things, alleges:

"Since the marriage of plaintiff and defendant, said defendant Shibley has acquired * * * certain property. * * * Said property is community property. * * * Defendant Shibley is the owner of a large portion of the capital stock of defendant California Filter Company. Plaintiff is unable to state definitely the number of shares of stock in said company owned by defendant Shibley, but is informed and believes, and therefore alleges, that he is the owner of two-thirds of the capital stock of said company. * * * That the remainder of said stock is owned by Paul Bovard, and said Bovard and defendant Shibley are the sole parties interested in said company. * * * Defendant Shibley is in the employ of, and is drawing a large salary from, said company, the amount of which plaintiff is unable definitely to state, and said salary will be paid continuously to defendant Shibley by said company. Plaintiff is informed and believes, and therefore alleges, that defendant California Filter Company is indebted to defendant Shibley, in a large sum of money, the amount of which plaintiff is unable to state. * * *"

Said action is now pending in the superior court of the state of California, in and for the city and county of San Francisco, and no trial upon the merits has ever been had. On March 21, 1927, said respondent superior court made and entered an order requiring said Kenneth Shibley to pay to his wife, Marion Shibley, as temporary maintenance pending the trial of said action, the sum of $600 per month. This order was not complied with by the defendant Kenneth Shibley. On May 13, 1927, said court made an order directing petitioner herein to appear before said court on May 20, 1927, and show cause why an order should not be made in said action of Shibley v. Shibley, directing petitioner to pay to said plaintiff, Marion Shibley, for and on behalf of said defendant, Kenneth Shibley, the sum of $600 per month during the pendency of said action, and charge the same against the account of the said Kenneth Shibley.

On the said 20th of May, 1927, petitioner appeared before said court, through its secretary and attorney, and *offered to prove*, as a defense to said order to show cause, *that it had no money in its possession then due and owing to said Kenneth Shibley*, but did admit that there appeared upon the books of petitioner a credit due said defendant Kenneth Shibley, amounting to approximately $4,500, but that there existed between petitioner and said Kenneth Shibley a written agreement to the effect that said sum was not then due or payable from petitioner to said Kenneth Shibley, but was to be retained by petitioner as a working capital of said petitioner until notice was given to said Kenneth Shibley by the board of directors of petitioner that another arrangement was necessary, and that no such notice was ever given said Kenneth Shibley by said board of directors.

Said writing could not at that time be produced, and the attorneys for Marion Shibley objected to the secretary of petitioner testifying as to the contents of said writing, which objection was sustained by the trial court, and the court directed said petitioner to make a search for said writing and produce the same in court on June 27, 1927, to which date said hearing was continued. On June 27, 1927, petitioner, through its secretary, again appeared in said court, and said secretary testified that he had been unable to find said writing, whereupon the court directed said secretary to make further search for said writing, and again continued the hearing until June 29, 1927. Said court, however, did on said June 27, 1927, after the order of continuance had been made, but before said matter was finally submitted for decision, make an order directing the petitioner, California Filter Company, a corporation, to pay within two days to plaintiff, Marion Shibley, the sum of $350, to be applied on the May award of separate maintenance due from Kenneth Shibley.

Thereafter, and on the said 29th day of June, 1927, petitioner, through its secretary, again appeared before said court, and the said secretary testified that he had been unable to find said written agreement. Said court thereupon permitted said secretary to testify as to the contents of said written agreement. Said secretary stated that said agreement was entered into some time during the year 1924, and it provided that any credit balance remaining due said defendant Kenneth Shibley upon the books of said corporation at the end of any fiscal year should remain with said corporation and be undistributed to the sum of at least $6,000; that the books of said corporation showed that the credit balance of said defendant Kenneth Shibley, at the time said order to show cause above referred to was issued, was less than $6,000, and was approximately $4,000, and at the time said order to show cause was issued there was no other cash capital in the business of said corporation, other than said credit balance. Said order to show cause was then further continued from time to time, and an affidavit was filed by the secretary of the petitioner in opposition to said order to show cause, and opposing any payment by petitioner. Thereafter said written agreement was produced and filed with said court. No further evidence was ever presented to or taken by said court upon said order to show cause, and said order to show cause has never been finally submitted to said court for final determination. Petitioner did not pay Marion Shibley the $350, as ordered by the court on June 27, 1927.

Thereafter, and on August 25, 1927, there was served upon petitioner an order, signed by said court, requiring said petitioner to appear before said court on September 2, 1927, and show cause why petitioner should not be adjudged in contempt of said court and punished for failure to obey the said order of June 27, 1927, directing petitioner to pay said plaintiff, Marion Shibley, the sum of $350. Petitioner appeared before said court on September 2, 1927, in response to said order to show cause, and did set up its claim and defense that it had no money in its possession due, owing, or payable to said Kenneth Shibley, and it was also set up as a defense to said order to show cause that on June 27, 1927, said petitioner had levied upon it a garnishment in an action then pending in said superior court, wherein Frank D. Cohen was plaintiff and Kenneth Shibley was defendant, and wherein and whereby petitioner had been commanded by said court to keep and retain in its possession all funds then due and owing by it to said Kenneth Shibley. Thereafter, and on July 17, 1928, said respondent superior court made and entered its order adjudging petitioner guilty of contempt of court and fining petitioner $500 for its failure to obey said order of June 27, 1927; that is, failing to pay said plaintiff, Marion Shibley, $350, and charge the same to the account of Kenneth Shibley.

[1] Petitioner seeks by this proceeding an order requiring the superior court of the state of California, in and for the city and county of San Francisco, and the judge thereof, to refrain from taking any action or proceeding having for its purpose the enforcing of the order of June 27, 1927, or punishing petitioner for contempt under the order of July 17, 1928. Petitioner contends that the order made on June 27, 1927 directing it to pay Marion Shibley $350, is void as being beyond the jurisdiction of said court to make. We think this contention must be sustained. The only interlocutory orders that can be made in an action for divorce or separate maintenance, in favor of a wife, are *orders against the husband*, as provided in section 137 of the Civil Code of this state. This section measures the power of the court in the matter of allowing suit money and support pendente lite, and was intended to be exclusive and to embrace the entire subject of the allowance of alimony or maintenance pendente lite. Norman v. Superior Court, 75 Cal. App. 705, 243 P. 451; Eisenring v. Superior Court, 34 Cal. App. 749, 168 P. 1062, Sun Insurance Co. v. White, 123 Cal. 196, 55 P. 902; section 4, Civ. Code.

The only proper parties to a divorce or separate maintenance action are generally the husband and wife, but in some instances a third party may also be a proper party; for example, where it is charged that the husband has conveyed the community property, or even his separate property, with intent to defraud the wife of her rights therein, the grantee in such fraudulent conveyance may be made a party so that the property may be kept in statu quo pending the action, and upon a final determination the property rights may be finally adjudicated. Cummings v. Cummings, 75 Cal. 437, 17 P. 442; Weyer v. Weyer, 40 Cal. App. 765, 182 P. 776; Kashaw v. Kashaw et al., 3 Cal. 312, 9 Cal. Jur. 700.

[2, 3] A careful examination of the rather voluminous record convinces us that petitioner claimed, and now claims an interest in the money alleged to be in its hands, adverse to both Kenneth Shibley and Marion Shibley. The trial court was therefore without power in a summary proceeding to determine this issue. Petitioner was entitled to its day in court, with a full opportunity to present its defense and have a full hearing upon the merits. This constitutional right was denied petitioner. "It is a cardinal principle of our jurisprudence that one shall not be bound or concluded by a judgment, either in respect to his person or property, unless he has had his day in court, by which is meant until he has been duly cited to appear and has been afforded an opportunity to be heard, and upon such hearing to offer evidence in support of his cause." 5 Cal. Jur. 875, and cases there cited.

[4] Section 137 of the Civil Code gives the court power to issue an execution upon any order for temporary support and maintenance. Section 717 of the Code of Civil Procedure provides that after a return of an execution against property of the judgment

debtor, and upon proof, that any person has property of such judgment debtor, the judge may by order require such person to appear and answer concerning the same. Section 719 of the same Code provides that the judge upon such hearing may order any property belonging to the judgment debtor, which is in the hands of any other person, to be applied towards the satisfaction of the judgment, but with this express proviso: "But no such order can be made as to * * * property in the hands of any other person, * * * if such person claims an interest in the property adverse to the judgment debtor.

If we treat the proceeding taken against the petitioner in the court below as a proceeding supplementary to execution, still petitioner's rights could not be adjudicated in a summary proceeding. Colyear v. Superior Court, 40 Cal. App. 462, 181 P. 74.

The attorneys for respondent contend that, as petitioner made no specific or direct objection to the jurisdiction of the court below to make the order of June 27, 1927, said order is valid. This contention is wholly without merit. The order complained of, being beyond the jurisdiction of the court to make, is void, and can be collaterally attacked. Tonningsen v. Odd Fellows' Cem. Ass'n, 60 Cal. App. 568, 213 P 710. We think a further discussion is unnecessary

For the reasons above stated, we think that the alternative writ of prohibition heretofore issued should be made permanent; and it is so ordered.

We concur: KOFORD, P. J.; NOURSE, J.

---

96 Cal. App. 705

MARTIN v. BOARD OF TRUSTEES OF MENLO PARK et al. (Civ. 6776.)

District Court of Appeal, First District, Division 1, California. Feb. 13, 1929.

1. Municipal corporations ⚷159(1)—Clerk's certificate that recall petition was signed by requisite number of qualified voters was final (St. Ex. Sess. 1911, p. 128, § 1).

Certificate of clerk of city of the first class that recall petition was signed by requisite number of qualified voters in accordance with provision of St. Ex. Sess. 1911, p. 128, § 1, was final.

2. Municipal corporations ⚷159(1)—Fraud in securing signatures to petition for recall of members of city council is determinable in equity.

In case fraud had been committed in securing signatures to petition for recall of members of city council, a court of equity may be resorted to as the proper forum to determine such question under appropriate proceedings.

3. Mandamus ⚷74(2)—Mandamus will issue to compel city trustees to call special election for purpose of voting on recall petition (St. Ex. Sess. 1911, p. 128, § 1).

Writ of mandate will issue to compel city trustees to call special election for purpose of voting on recall petition containing all requirements of St. Ex. Sess. 1911, p. 128, § 1, and properly certified to by the clerk, since under the statute no discretion is vested in the trustees in question of calling such election.

Original mandamus by K. L. Martin against the Board of Trustees, known as the City Council, of the City of Menlo Park, and others. Writ granted.

Kincaid & Fitzpatrick, of Redwood City, for petitioner.

George K. Whitworth and Pardini & Scampini, all of San Francisco, for respondents.

TYLER, P. J. Mandamus to compel the trustees of the city of Menlo Park to call a recall election. The petition recites that within three months last past petitioner and other qualified electors prepared and circulated a petition for the recall of Alfred E. Blake and Alexander Walker as trustees and members of the city council of the city of Menlo Park and in said petition demanded the election of a successor to each of said persons sought to be recalled. It is alleged that the petition was signed by qualified voters of said city in excess in number of 25 per cent. of the entire vote cast within such city for all candidates for the office of trustee and member of city council of the city of Menlo Park at the last preceding regular municipal election at which two trustees and members of the city council sought to be recalled were voted for. The petition contained a statement of the grounds on which the recall was sought and alleged that each signer to said petition of recall added to his signature, at the time of signing, his place of residence and occupation, giving street and number, or proper designation of his place of residence so that the same could be readily ascertained, and also added to his signature the date of signing said petition. Each separate paper to the petition had attached thereto an affidavit of the circulator that the signatures thereto were those of qualified electors and that they had signed the same.

On the 4th day of December, 1928, the recall petition was filed with the clerk of the city of Menlo Park, who examined the records of registration and ascertained therefrom that the petition was signed by the requisite number of qualified voters, and she thereupon attached to said petition her certificate showing the result of her examination. It appears therefrom that the petition contained the requisite number of bona fide sig-

---

⚷For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

natures and qualified electors and was sufficient. Thereafter, on December 26, 1928, she submitted the petition to the board of trustees of said city, at their regular meeting, but the members thereof failed and refused to call a special election or to take any action thereon, and continued the matter to a regular meeting of the legislative body to be held on January 8, 1929. Petitioner, on said last-named date, demanded that the legislative body forthwith call a special election for the purpose of voting on the recall petition. The board refused the demand of petitioner and declined to act in the matter. Other allegations are to the effect that no regular election is to occur within 60 days or at any other time prior to the regular municipal election in April, 1930. An alternative writ of mandate was heretofore issued by this court.

[1-3] Respondents demurred to the petition upon various grounds, including insufficiency of facts, ambiguity, unintelligibility, and uncertainty. The demurrer was overruled and respondents answering set up, among other defenses, that they had properly performed their duties and the circulators of the recall petition had procured the names of the signers upon false representations, and that a sufficient number of signers so imposed upon had requested that their names be withdrawn; that when the number of signers so induced to sign the petition is deducted from the total number of signers there remains on said recall petition less than the number required by law. It is then alleged that the acts of the circulators constituted a palpable fraud on the signers, the trustees sought to be recalled, and the inhabitants generally of the city. The answer raises no issue of merit.

The city of Menlo Park is organized under the general law as a city of the sixth class. The provision relating to the recall of elective officers of incorporated cities and towns (Stats. Ex. Sess. 1911, p. 128) provides that within ten days from the filing of the recall petition "the clerk shall examine and from the records of registration ascertain whether or not said petition is signed by the requisite number of qualified voters, and he shall attach to said petition his certificate showing the result of said examination." Section 1. The petition here shows that this has been done and the answer does not deny this fact. Having so certified, the determination upon the subject is final. Watts v. Superior Court, 36 Cal. App. 692, 173 P. 183; Ratfo v. Board of Trustees, 75 Cal. App. 724, 243 P. 466. In the case last cited it is held that the duty of the clerk is not judicial; he is not clothed with authority to receive extraneous evidence of the contents of the petition other than to ascertain from the records of registration whether or not the petition is properly signed by the requisite number of voters. If fraud has been committed, a court of equity may be resorted to as the proper forum to determine such questions under appropriate proceedings. Williams v. Gill, 65 Cal. App. 129, 223 P. 559.

The statute further provides that, "if the petition shall be found to be sufficient, the clerk shall submit the same to the legislative body of the city or town without delay, whereupon, that body shall forthwith cause a special election to be held," etc. Under the statute no discretion is vested in the trustees in the question of calling such election (Good v. Common Council, 5 Cal. App. 265, 90 P. 44), provided the petition contains the statement required by the statute. Here the petition contains all the requirements of the statute and is properly certified to by the clerk. This being so, it is the duty of the board to call the election.

It is therefore ordered that a writ of mandate issue from this court commanding respondents to forthwith cause a special election to be held in the city of Menlo Park within not less than 35 nor more than 40 days from the order calling such election, to determine whether the voters shall recall the officers involved.

We concur: CASHIN, J.; KNIGHT, J.

---

97 Cal. App. 51

WELLNITZ v. SACRAMENTO SUBURBAN FRUIT LANDS CO. (Civ. 3610.)★

District Court of Appeal, Third District, California. Feb. 19, 1929.

Rehearing Denied March 21, 1929. Hearing Denied by Supreme Court April 18, 1929.

1. Fraud ⚷55—False representations to others, in selling other parcels in same tract made two years before agreement, held admissible in purchaser's action for fraud.

In purchaser's action to recover damages for fraudulent representations in sale of land, evidence of similar false representations made to others, in effort to sell other parcels of land in colony, was properly admitted, though evidence related to more or less distant parcels of land in tract which defendant was colonizing, and some of the representations were made two years before agreement involved in case, where all representations were made in connection with colonization scheme.

2. Fraud ⚷55—Similar representations to those made in purchaser's action for fraud are admissible, if showing they were parts of single scheme.

In action by purchaser to recover damages for fraudulent representations in sale of lands, similar false representations are admissible, if there is such connection between them as to warrant inference that they were all part of single scheme in which same motive was operative.

Appeal from Superior Court, Sacramento County; Malcolm C. Glenn, Judge.

⚷For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

★For opinion on rehearing, see 276 P. 154.

Action by John E. Wellnitz against the Sacramento Suburban Fruit Lands Company. Judgment for plaintiff, and defendant appeals. Affirmed.

Butler, Van Dyke & Desmond, of Sacramento, for appellant.

Ralph H. Lewis and George E. McCutchen, both of Sacramento, for respondent.

FINCH, P. J. This is an appeal by the defendant from a judgment in favor of the plaintiff for damages on account of defendant's fraudulent representations in the sale to the plaintiff of lands in this state. The agreement out of which the controversy arose was executed by the parties in the state of Minnesota, in which state the defendant was incorporated and has its principal offices and in which the plaintiff resided at the time of the execution of the agreement. The land in question consists of 5 acres, for which the plaintiff agreed to pay $2,000. In part payment thereof he conveyed to the defendant property in Minnesota of the agreed value of $1,200. Thereafter he became entitled to a credit of $400 additional, leaving unpaid on the purchase price of the five acres the sum of $400. The principal false representation upon which the plaintiff relies for a recovery is the defendant's statement that the land "was of the fair and reasonable market value of $2,000," whereas it was not "of any value in excess of $50." Judgment was demanded for the difference, or $1,950. Two grounds only are urged for a reversal: (1) That the court erred in instructing the jury as to the measure of damages, and (2) that evidence was erroneously admitted of similar false representations made by the defendant to other purchasers of its land in the same colony. The court instructed the jury as follows: "The measure of damages which a plaintiff is entitled to recover in an action for deceit in the sale of property, where the facts justify a finding in favor of a plaintiff is the difference between the value of the property purchased by plaintiff, at the time of the purchase, and its value had the property been as represented."

While conceding that the instruction correctly states the California rule as to the measure of damages in such a case, the appellant contends that, since the false representations were made in Minnesota and the agreement was executed in that state, the measure of damages is that provided by the laws of Minnesota. Appellant cites Knight v. Leighton, 110 Minn. 254, 124 N. W. 1090, in which it is held, quoting from the syllabus: "In an action for deceit and fraud in the purchase of lands, the measure of damages is the difference in the value of that with which the plaintiff parted and that which he received in exchange." In the later case of Townsend v. Jahr, 147 Minn. 30, 179 N. W. 486, the court said: "The one general principle of universal application is that the party guilty of the fraud is liable to respond in such damages as naturally and proximately resulted from the fraud. * * * This loss will ordinarily be the 'difference between what he parted with and what he got.' [Citing Knight v. Leighton, supra, and other cases.] * * * Where the transaction is a sale and the price has been paid, the rule adopted by the trial court, namely, the difference between the actual value and the purchase price, will ordinarily prove the correct one and will amount to the same thing as 'the difference between what he parted with and what he got.' * * * We do not wish to be understood as holding that this may not be the rule even though the purchase price has not been paid, if the vendee remains liable for the unpaid balance of the price."

In the instant case the court instructed the jury on the theory that the plaintiff remained "liable for the unpaid balance of the price." The verdict of the jury states the total damages suffered by the plaintiff and the unpaid balance of the purchase price, and then deducts the latter sum from the former, returning a net verdict for the difference.

It is apparent from what has been said that, in this case, the result is the same, whether the California rule or the Minnesota rule as to the measure of damages be followed. In either case one factor is the value of the property purchased. Under the California rule the other factor is what the property would have been worth if it had been what it was represented to be. But the false representation was that the property was worth what the plaintiff agreed to pay for it, the sum which the plaintiff became liable to pay, and the sum with which he was charged by the method followed in arriving at a verdict. Applying the Minnesota rule as stated in Townsend v. Jahr, supra, the result is exactly the same. It is unnecessary, therefore, to determine which rule is applicable to the facts of this case.

[1, 2] Evidence of similar false representations made to others in an effort to sell other parcels of land in the colony was properly admitted. Butler-Veitch, Inc., v. Barnard, 77 Cal. App. 709, 247 P. 597; J. B. Colt Co. v. Freitas, 76 Cal. App. 278, 244 P. 916. Appellants contend that such similar representations were too remote in time and place to be admissible; that they related to more or less distant parcels of land in the 12,000-acre tract which the defendant was colonizing; that the soil of some of such parcels was not the same as that of the parcel in suit, and that some of the representations were made as much as two years prior to the execution of the agreement involved herein. While 40 pages of testimony, selected from the 1,100 pages of the reporter's transcript, are printed in appellant's opening brief, the evidence relied upon to support the foregoing contention

is not pointed out, except that the names of some of the witnesses, who testified that the representations were made, are given. Taking appellant's statement as accurate, however, it appears that the evidence was properly admitted. The various representations were all made in connection with the defendant's colonization scheme and as parts of its selling campaign, which continued through several years. Remoteness in time or place is a relative term. It is sufficient if there is such a connection between the representations as to warrant the inference that they are all parts of a single scheme or plan, in which the same motive is operative. Seimer v. James Dickinson Farm Mortg. Co. (D. C.) 299 F. 651; Hoxie v. Home Insurance Co., 32 Conn. 21, 85 Am. Dec. 240, 242. Appellant made the same contention in Sacramento Suburban Fruit Lands Co. v. Elm (C. C. A.) 29 F.(2d) 233. The similar representations in that case, however, were more remote in time than those in this case. The opinion of the Circuit Court of Appeals overruling the contention is particularly in point here.

The judgment is affirmed.

I concur: PLUMMER, J.

---

97 Cal. App. 71

PEOPLE v. CLENSEY et al. (Cr. 1738.)

District Court of Appeal, Second District, Division 2, California. Feb. 20, 1929.

1. Criminal law 🔑200(6)—Dismissal of count for conspiracy to commit robbery will not bar further prosecution of count for aiding and abetting robbery.

Dismissal of count for conspiracy to commit robbery will not bar further prosecution of count for aiding and abetting robbery, since offenses are not identical; one involving element of conspiracy which is entirely lacking in the other.

2. Conspiracy 🔑47—Robbery 🔑24(1)—Evidence held to support conviction of conspiracy to commit robbery and robbery (Pen. Code, § 971).

In prosecution for conspiracy to commit robbery and robbery evidence showing that part of stolen property was recovered from each of defendants, together with their admissions, *held* sufficient to support conviction, especially under Pen. Code, § 971.

3. Criminal law 🔑1175—Defendants cannot complain of conviction of second degree robbery, though first degree robbery was in fact committed.

Defendants, charged with first degree robbery, cannot complain that they were convicted of second degree robbery under showing that first degree robbery was in fact committed.

4. Criminal law 🔑409—Proof of commission of robbery and possession of stolen property warranted admission and consideration of defendant's admissions.

Proof of actual commission of robbery, together with possession of stolen property by defendants, was sufficient to warrant admission and consideration by jury of admissions made by defendants.

Appeal from Superior Court, Los Angeles County; Douglas L. Edmonds, Judge.

Arthur Clensey and others were convicted of conspiracy to commit robbery and robbery, and they appeal. Affirmed.

Buel R. Wood, of Los Angeles, for appellants.

U. S. Webb, Atty. Gen., and John L. Flynn, Deputy Atty. Gen., for the People.

THOMPSON, J. An indictment was returned by the grand jury of Los Angeles county, charging the defendants Arthur Clensey, William Woods, Horace Miles, Walter Bucan, Carol Morris, Stewart Jones, Malcolm Jones, Julius Becker, H. L. Cokes, and Charles Swafford, in count 1 thereof, with the crime of criminal conspiracy to commit robbery, and in count 2 with the offense of robbery. The defendants Bucan, Morris, and Stewart Jones were not apprehended. During the trial, count 1 of the indictment was dismissed as to the defendants Cokes and Swafford. Count 2 was dismissed as to the defendant Malcolm Jones at the conclusion of the taking of evidence. The jury found the defendant Julius Becker not guilty, but returned a verdict of guilty against the defendants Arthur Clensey, Horace Miles, and William Woods. These last-named defendants prosecute this appeal from the judgments pronounced upon the verdict and from the order denying their motions for a new trial.

[1] The first contention urged by appellants is that by count 1 of the indictment and its dismissal during the trial of the cause the appellants were placed once in jeopardy, and hence they could not be prosecuted or convicted of the crime of robbery. In its essence, the argument amounts to this: That, since the offense of criminal conspiracy to commit robbery involves elements the same, or nearly so, as are involved when two or more persons aid and abet the commission of robbery, the dismissal of the former ought to stand as a bar to the further prosecution of the latter. The position of appellants cannot be upheld. The standpoint from which we shall discuss the problem will probably be less free from doubt if we assume, solely for the purposes hereof, that the situation brought about by the dismissal is the same as though the jury had

returned a verdict of not guilty on the first count. A reason for indulging this presumption is that all the rules relating to a plea of former jeopardy cannot be applied to this case because the appellants were tried but once upon an indictment containing two counts. People v. McDaniels, 137 Cal. 192, 69 P. 1006, 59 L. R. A. 578, 92 Am. St. Rep. 81; People v. Day, 199 Cal. 78, 248 P. 250; People v. Degnen, 70 Cal. App. 567, 234 P. 129. However, it cannot possibly be argued that they were prejudiced to any greater degree than they would have been had an acquittal resulted on the first count. The question can then be stated in this way: Were the offenses stated in the two counts identical? In People v. Day, 199 Cal. 78, 248 P. 250, People v. Vanderbilt, 199 Cal. 461, 249 P. 867, and People v. Kimmerle (Cal. App.) 265 P. 525, it is said that the test by which we may determine whether an acquittal of one count is tantamount to an acquittal on the other is whether there is an essential element involved in the first which is not necessary in the second; i. e., whether the offenses are in fact identical or whether the verdicts would be necessarily inconsistent. It is too apparent for argument that the offenses here charged are not identical. The crime charged in the first count, that of a criminal conspiracy to commit robbery, is by its very name distinguished from the offense of robbery. The one involves the element of conspiracy, entirely lacking in the other. And to say that a person may not aid and abet without entering into a conspiracy with the other participants is to premise the argument upon a self-evident fallacy. This disposition of the argument upon the question also makes it unnecessary for us to comment further upon appellants' last assignment of error to the effect that the jury were not permitted to pass upon their "claim of former jeopardy indicated in the record." Inasmuch as in law no such plea could be interposed, there was no question of fact upon which the jury could possibly pass.

[2] We now approach the claim of appellants that the evidence is insufficient to support the verdicts, and it becomes necessary to jot down the testimony supporting the conclusion of the jury. The evidence establishes beyond any question that a bank messenger and the driver of a Ford roadster employed by the Pacific National Bank were held up and robbed of at least $59,475 by three men in a Packard sedan on March 2, 1928, between 12:30 and 1 p. m. in the 600 block on Chicago street, Los Angeles. About 2 o'clock in the afternoon of the same day, Mrs. Della Nila, who was outside her residence at 1157 South Mott street, saw three men drive up in a Packard sedan, and change from the Packard to a Hupmobile sedan. As they were in the act of changing cars, they dropped some papers, which they immediately picked up and drove away. On March 2, Mrs Margery La Vernon, residing at 1344 North Harvard, one unit of a bungalow court, saw some new tenants (consisting of three men and two girls) occupy a bungalow across the drive from her, another unit in the same court. Two of the men identified by her were the appellant Clensey and the defendant H. L. Cokes. This witness also testified that she saw about the premises occupied by Clensey and the others a Hupmobile, a Cadillac, and a Lincoln sedan, and noted that the Lincoln sedan came on a Friday or Saturday afternoon or evening, remaining there until about 6 p. m., when some bags or sacks were unloaded and taken into the kitchen. (We insert parenthetically that March 2 was a Friday.) Police officers testified to a conversation had with the appellant Miles in which he is said to have stated that he had known about the intended robbery for six months and had taken the matter up with the defendant Stewart Jones, and that he had received $3,000 out of the proceeds, from which he had given Stewart Jones $1,500, paying some bills of his own with a part of the other $1,500, concealing $1,000 thereof in his automobile, and when the officers were about to arrest him, carelessly throwing the remainder into a closet in his apartment. Officer O'Connor testified that he found and recovered from among some old clothes in a closet at the apartment of appellant Miles fifty-five $5 bills and one hundred sixteen $1 bills, and also $1,000 in Pacific National Bank notes of $10 denominations from the automobile of this appellant. Officer Cahill testified to a conversation with the appellant Miles in which the latter is said to have admitted that he talked to the appellant Clensey about the proposed holdup after Miles had talked to him, and that he had received in the neighborhood of $13,000 in currency from the appellant Clensey, of which amount he had given the appellant Miles $3,000, intrusting the remainder contained in a grip with a friend of his named Christie. This officer also testified that Christie accompanied him to the Hotel Carleton and there turned over to him a package containing $3,000, a part of $9,618 left with him by the appellant Woods. Testimony was also introduced covering a conversation with the appellant Clensey in which he is related to have said that the appellant Woods' version of the affair was correct, except that he (Clensey) did not burn a suit of clothes as Woods is quoted to have said. The officers further testified that they went with the appellant Clensey to Santa Barbara, where, directed by him, they located $17,535 in currency and silver contained in a trunk bearing the initials "H. L. C."; that, on the way to Santa Barbara, Clensey said that Walter Bucan and Carol Morris were the men who actually committed the robbery. It was also testified that on March 14, 1928, the officers, accompanied by Clensey, went to 1342 North

Harvard boulevard, and opened the door with a key obtained from Clensey, and that, while there, the last-named appellant stated that the money had been divided at this house, although he was not present at the time; that two packages had been left for him, one of which he had given to the appellant Woods. It should be observed here that Mrs. La Vernon, who identified appellant, lived at 1344 North Harvard. It will also be noted that a part of the stolen money was recovered from each one of the appellants, although that recovered from the appellant Woods had been by him intrusted to a third party. A teller of the Pacific National Bank was put on the stand and identified by number bills recovered from the trunk of the appellant Clensey and from the package of the appellant Woods. It cannot be seriously questioned that the testimony amply supports the determination of the jury, when we bear in mind the oft-stated rule prevailing in California, codified in section 971 of the Penal Code, that there is no distinction between an accessory before the fact and a principal. Here the actual robbery is not in dispute, nor can it be successfully argued that the appellants were not found to be in possession of the stolen property, which, together with their admissions, renders almost impossible any other conclusion than that they were instrumental in plotting and bringing about the commission of the crime, although they may not have actually participated in the physical acts of the robbery.

[3] Appellants also assert that the verdicts rendered are without support either in law or in the facts, for the reason that appellants were charged with first degree robbery and that a first degree robbery was in fact committed, and therefore the appellants, as aiders and abettors, could not be convicted, as they were by the verdicts, of second degree robbery. We may concede, as we have already indicated, that the evidence was sufficient to support verdicts against the appellants of first degree robbery, but the fact that they were found guilty of a lesser offense is now no reason why they should be altogether absolved. We know of no better way to express our opinion than to quote from People v. Edwards, 72 Cal. App. 102, 236 P. 944, as follows: "If the jurors paltered with their oaths and with the law they must make their own peace with conscience. If appellant was wrongfully acquitted on the first and second counts the error was in his favor, and he cannot be heard to complain. The fact that the jurors relieved him on two counts does not oblige this court to relieve him on the third." To the same effect, see People v. Stovall (Cal. App.) 271 P. 576, and People v. Vanderbilt, supra. In this last-cited case, we find a statement that is also very much to the point. It says: "If there be evidence sufficient to support a verdict finding an accused person guilty of a lesser offense which is included within the offense charged against him, he may be found guilty of such lesser and included offense, notwithstanding the evidence shows that (he is guilty of the greater and including offense instead of the lesser offense)."

[4] The only assignment of error we have not formally discussed is that the corpus delicti was not established, and yet what has been said concerning the sufficiency of the evidence fully answers appellants' contention. It cannot be doubted under the rule declared in People v. Selby, 198 Cal. 426, 245 P. 426, and many earlier California authorities there mentioned, that proof of the actual commission of the robbery, together with possession of the stolen property by appellants, was sufficient to warrant the admission and consideration by the jury of the admissions made by the appellants.

Judgments and order affirmed.

We concur: WORKS, P. J.; CRAIG, J.

---

96 Cal. App. 760

MAYS v. WANN et al. (Civ. 3347.)★

District Court of Appeal, Third District, California. Feb. 13, 1929.

Rehearing Denied March 15, 1929.

1. Contracts 🔑354—Finding that defendant lessees contracted for baling of hay held not to preclude finding that codefendant lessor did so, in view of allegation that "defendants" agreed to pay therefor.

Trial court's findings that defendant lessees entered into contract with plaintiff to bale hay *held* not to preclude finding that codefendant lessor entered into such contract; allegation of amended complaint that "defendants" agreed to pay plaintiff for hay baled entitling him to prove that agreement was made with one or all of them.

2. Pleading 🔑237(6)—Amendment of complaint to conform to evidence that defendants' lessor agreed to pay for hay baled held properly permitted.

In action against lessees for amount due for baling hay on leased land, court did not err in permitting amendment of complaint to conform to evidence that codefendant owner of land agreed to pay plaintiff for hay baled.

3. Pleading 🔑229—Amendments are liberally allowed.

Amendments of pleadings are liberally allowed.

4. Pleading 🔑237(3)—Complaint may be amended to conform to evidence during trial or after evidence is all in.

Amendments may be made to complaint to conform to evidence either during trial or after evidence is all in.

★Rehearing denied.

5. Appeal and error 🔑959(1)—Pleading 🔑236(1)—Allowance of amendments to pleadings is in discretion of trial court, whose action will not be disturbed unless discretion was abused (Code Civ. Proc. § 473).

Allowance of amendments to pleadings in interest of justice, under Code Civ. Proc. § 473, is within discretion of trial court, whose action will not be disturbed by appellate court unless abuse of such discretion is shown.

6. Pleading 🔑237(8)—Pleading may be amended to conform to proof, if cause of action is not changed.

An amendment of a pleading to conform to the proof may always be made, if the cause of action is not thereby changed.

7. Pleading 🔑249(4)—Amendment changing count on express contract to one on quantum meruit does not change cause of action.

An amendment of a pleading which changes a count from one on an express contract to one on quantum meruit does not substitute a new cause of action.

Appeal from Superior Court, Sonoma County; Rolfe L. Thompson, Judge.

Action by J. B. Mays against Emerson Wann, the Tubbs Island Land Company, a corporation, and others. From a judgment against defendant Land Company and orders denying its motions to strike out an amendment to plaintiff's amended complaint and vacate the judgment, it appeals. Affirmed.

F. A. Meyer, of Petaluma, Wheeler & Wheeler, for appellant.

A. W. Hollingsworth, W. N. Vallandigham, and W. F. Cowan, all of Santa Rosa, for respondent.

JAMISON, Justice pro tem. Plaintiff brought this action to recover from defendants a balance of $1,332.23, which he claimed they owed him for baling hay, and for fuel furnished to the amount of $45.

In his original complaint he named as defendants only defendants Wann, Towel, and Chase and the copartnership of which they were members. In his amended complaint filed April 9, 1926, some six months before the trial of this case, he joined the Golden Eagle Milling Company, a corporation, the Tubbs Island Land Company, a corporation, and Howard C. Price, as defendants. This amended complaint set forth that during the year 1925, at the instance and request of the defendants, plaintiff performed work, labor, and service upon the land of the Tubbs Island Land Company in baling hay for said defendants, and at their instance and request did bale 1,945 tons of hay, and that as consideration therefor it was agreed by defendants that they would pay to plaintiff $2.50 per ton for baling said hay and to furnish plaintiff with fuel. The case was tried by the court, without a jury, and the judgment was in favor of the Golden Eagle Milling Company and Howard C. Price for their costs, and against Wann, Towel, and Chase, on their default, in the sum of $1,332.23, and against the Tubbs Island Land Company after the trial of the case for $746.09.

The Tubbs Island Land Company, hereinafter referred to as the appellant, owned a tract of land consisting of some 3,000 acres, and in the fore part of January, 1925, leased said land, farm implements, and machinery to defendants Wann, Towel, and Chase from January 6, 1925, to October 1, 1925. The crop raised thereon was hay, and by the terms of the lease appellant was to receive one-half of same as rental. The expense of harvesting and baling said hay was to be borne by the lessees. The said lessees entered into a contract with respondent to bale the said hay, agreeing to pay him therefor $2.50 per ton and to furnish him fuel for cooking. The lessees were without sufficient funds to carry on their operations under the lease and in the beginning were financed by appellant. About the 1st of July, 1925, the lessees arranged with defendant Golden Eagle Milling Company to aid them financially. This the said Milling Company did until about September 21, 1925, when it ceased to do so.

According to the evidence produced by respondent, when the Milling Company ceased to finance the lessees the appellant, through its secretary, Howard C. Price, in order to keep respondent and his employees on the job of baling the hay, promised respondent that if he would continue baling the hay appellant would pay him for his work in so doing, and that, relying upon this promise, respondent continued to bale said hay up to and including October 17, 1925.

The court found that on or about the 21st day of September, 1925, appellant promised and agreed to pay respondent for all hay baled by him after that date at the rate of $2.50 per ton, and that under said agreement respondent baled 549.343 tons of hay, appellant paying to respondent on account thereof $635.27, leaving a balance owing to respondent by appellant of $746.09.

On March 7, 1927, pursuant to an order of the court, and prior to signing and filing the findings of fact, respondent filed an amendment to said amended complaint reciting the facts regarding the agreement with appellant of September 21, 1925, as aforesaid, the said amendment having been directed by the court to be filed to conform to the evidence adduced at the trial.

Appellant filed a motion to strike out the amendment to the amended complaint and also a motion to vacate the judgment, both of which motions were denied by the court. Thereupon appellant appealed from the judgment of the court rendered against it, and from the orders of the court denying its motion to strike and its motion to vacate the judgment. In his opening brief appellant specifies several errors of the trial court, but states that they may be argued under two heads, namely: That the judgment is not supported by the findings, and that the amendment to the amended complaint should have been stricken out.

[1] There is ample evidence to support the findings of the court that appellant, through its secretary and general manager, Howard C. Price, agreed to pay respondent for his services in baling said hay from and after September, 1925, at a compensation of $2.50 per ton for each ton baled. Nor is the fact disputed that after that sale respondent did bale 549.343 tons of hay and that the sum of $746.09 is still owing and unpaid to him for said service.

[2-4] Appellant contends that, because of the fact that the trial court found that on June 25, 1925, defendants Wann, Towel, and Chase entered into a contract with respondent to bale the said hay, that ipso facto the court is precluded from afterwards finding that appellant entered into such contract with respondent. We see no merit in this contention. Reference to the amended complaint will show that therein respondent alleged that during the year 1925 the defendants (including appellant) agreed to pay respondent $2.50 per ton for the hay he baled. Under this allegation he undoubtedly had the right to prove that the agreement was made with one or all of the defendants. The amended complaint appears to have been sufficient to have justified the introduction of evidence as to appellant's agreement with respondent, but whether that be true or not there was no error in permitting the amendment.

[5-7] Amendments under our practice are liberally allowed. Stoops v. Pistachio, 70 Cal. App. 772, 234 P. 423. Such amendments may be made to a complaint either during the trial or after the evidence is all in. Lee v. Murphy, 119 Cal. 365, 51 P. 549, 955; Brown v. Hurst, 1 Cal. App. 752, 82 P. 1056. The power given under section 473 of the Code of Civil Procedure to allow amendments in the interest of justice is uniformly held to be in the discretion of the trial court, and this court will not disturb the action of the trial court except where an abuse of that discretion is shown. Gartlan v. Hooper Co., 177 Cal. 422, 170 P. 1115; Lee v. Murphy, supra; Stoops v. Pistachio, supra. An amendment to conform to the proof may always be made provided the cause of action is not thereby changed. Koch v. Wilcoxon, 30 Cal. App. 520, 158 P. 1048; Hancock v. Board of Education, 140 Cal. 554, 74 P. 44. An amendment which changes the count from one upon an express contract to one upon a quantum meruit does not substitute a new cause of action. Wardrobe v. Miller, 53 Cal. App. 370, 200 P. 77; Turner & Dahnken v. Bauer, 28 Cal. App. 312, 152 P. 308; Cox v. McLaughlin, 76 Cal. 60, 18 P. 100, 9 Am. St. Rep. 164.

We think that the evidence supports the findings and that the findings support the judgment.

The order denying the motion to strike out the amendment to the amended complaint and the motion to vacate the judgment and the judgment of the court is each affirmed.

We concur: FINCH, P. J.; PLUMMER, J.

---

97 Cal. App. 157

In re STOCKTON'S ESTATE. (Civ. 6642.)

District Court of Appeal, First District, Division 2, California. Feb. 21, 1929.

Appeal and error ⚷909(5)—Appellate court must assume in support of decree that contract construed was unambiguous, or, if ambiguous, that ambiguity was properly removed (Civ. Code, § 1635 et seq.).

Where decree of distribution recited that heirs employed attorneys to secure to them their rights as heirs of deceased, and agreed that attorneys should receive 50 per cent. of whatever might be recovered, appellate court must assume, in absence of evidence, that contract between heirs and attorneys was not ambiguous, or, if ambiguous, that ambiguity was removed by ordinary and legal aids admissible for interpreting written instruments, under Civ. Code, § 1635 et seq., and that showing was made and was satisfactory to trial court.

Appeal from Superior Court, Alameda County; E. C. Robinson, Judge.

Proceeding between Alice C. Chase and others, heirs at law, and Milton T. Farmer and others, in the matter of the estate of Lemuel D. Stockton, also known as L. D. Stockton, deceased. From the decree of distribution, Alice C. Chase and other heirs appeal. Affirmed.

Paul A. McCarthy, of San Francisco, for appellants.

Athearn, Chandler & Farmer and Walter Hoffman, all of San Francisco, for respondents.

STURTEVANT, J. From the decree of distribution rendered in the matter of the estate of Lemuel D. Stockton, certain of his heirs have appealed and have brought up the judgment roll. There is no bill of exceptions. The appellants present only one point, and that is that the trial court erroneously construed the contract of employment of the firm of Athearn, Chandler & Farmer as attorneys at law.

The deceased left a document purporting to be his last will and testament. His heirs at law were Emma Stockton, Frank I. Stockton, William J. Stockton, Robert B. Stockton, Alice P. Chase, all of whom were brothers and sisters, and Cornelia Sullivan and Jefferson Stockton, respectively a niece and nephew, being the children of Thomas J. Stockton, a predeceased brother of the testator. By the terms of the purported will, the decedent devised to Emma Stockton $2,000; to William J. Stockton, Robert B. Stockton, Frank I. Stockton, Emma Stockton, Alice P. Chase, and to the children of Thomas J. Stockton, deceased, the purported will contained a devise of an undivided one-half interest in and to a tract of 40 acres located in Mariposa county. After probate, certain of the heirs employed the law firm of Athearn, Chandler & Farmer to contest the will. That firm did so, and the will was held invalid, and thereafter the estate was administered upon under the theory that the decedent had died intestate. The decree recites the names of the persons signing the contract of employment and that they executed "an agreement in writing with Messrs. Athearn, Chandler and Farmer, attorneys at law, wherein and whereby said heirs at law employed said attorneys to take such action as said attorneys might deem advisable and proper for the purpose of securing to them their rights as heirs at law of said deceased, and agreed that said attorneys, as their compensation, should receive 50% of whatever *might be recovered* for said heirs at law, said attorneys, however, to advance all costs and expenses in said matter. * * *" It should be stated in passing that during the controversy over the will, etc., a compromise was entered into whereby certain purported specific bequests were compromised and $2,000 was paid to the legatees thereunder. The appellants call to our attention that, in construing the contract of employment of the attorneys above mentioned, the trial court deducted from the total value of the estate $2,000, and thereafter the trial court distributed one-half of the remainder to the heirs of the deceased and one-half to the attorneys in accordance with its construction of the contract. The appellants claim that the trial court should have deducted the $2,000 above mentioned, and then that it should have deducted the sums which would have passed to said heirs under the will, and then, and not until then, should the residue have been divided fifty-fifty between the heirs and the attorneys. This contention is based on the expression "*might be recovered*" as used in the decree above quoted. Appellants say those words mean "to win back"; that at best the contract is ambiguous; and, being between attorney and client, the ambiguity will be resolved in favor of the client. If this were a presentation in the trial court and a written contract was offered, all of these arguments would have due weight. However, no contract is before us, but a passage contained in the decree. It does not purport to contain the written contract, and does not purport to quote the provisions in hæc verba. In support of the judgment of the trial court, this court is bound to presume that the word "recover" is the language of the trial court and was selected for its ordinary meaning at law as distinguished from its lay meaning. See 34 Cyc. 763; Cent. Dict. "Recover," subd. 7. In other words, we are bound to assume, in the absence of the evidence, that the contract was not ambiguous, or, if ambiguous, that the ambiguity was removed by the ordinary and legal aids admissible for interpreting written instruments (Civ. Code, § 1635 et seq.), and that the showing was made and was satisfactory to the trial court.

We find no error in the record. The judgment is affirmed.

We concur: KOFORD, P. J.; NOURSE, J.

---

97 Cal. App. 42

GILBERT v. UNITED STATES FIDELITY & GUARANTY CO. (Civ. 6151.)

District Court of Appeal, Second District, Division 1, California. Feb. 19, 1929.

Appeal and error 🔑773(2)—Appellant's inexcusable failure to tender opening brief for filing until over six months after transcript was filed requires dismissal of appeal.

Appellant, not tendering its opening brief for filing until over six months after filing of transcript, is in default, so as to require dismissal of appeal on appellee's motion; neglect not being excusable.

Appeal from Superior Court, Los Angeles County; Guy F. Bush, Judge.

Action by Charles L. Gilbert against the United States Fidelity & Guaranty Company, a corporation. Judgment for plaintiff, and defendant appeals. On notice of motion to dismiss the appeal. Appellant's motion for leave to file a brief denied, and motion to dismiss the appeal granted.

James E. Fenton, of Los Angeles, for appellant.

Julius Patrosso and C. C. Mishler, both of Los Angeles, for respondent.

YORK, J. This matter comes up on a notice of motion to dismiss appeal. The record discloses the fact that the transcript herein was filed on July 19, 1928, that the notice to dismiss the appeal and the affidavit supporting the motion were filed on January 16, 1929, and thereafter, on January 24, 1929, the appellant tendered to the court his so-called appellant's opening brief for filing, which was not filed by the clerk, but was held by him and was presented to this court at the time that the notice of motion to dismiss the appeal was heard. It was referred to in the affidavit of James E. Fenton, attorney for appellant, as stating the correct and true basis of his appeal, and is practically used by him in lieu of an affidavit of merits to support the motion for leave to file such brief of appellant, which motion was heard at the same time that the motion to dismiss the appeal came on for hearing.

In accordance with the rules of this court, the appellant is in default in failing to file the brief on time. The neglect shown cannot be considered as excusable.

The motion for leave to file brief is denied, and the motion to dismiss appeal is granted.

We concur: HOUSER, Acting P. J.; CRAIL, Justice pro tem.

---

96 Cal. App. 772

PRAY et al. v. ANTHONY. (Civ. 6522.)★

District Court of Appeal, First District, Division 1, California. Feb. 15, 1929.

Rehearing Denied March 16, 1929. Hearing Denied by Supreme Court April 15, 1929.

1. Brokers 🔑43(3)—Written authorization to broker to sell defendant's house, without describing location, held sufficient, where defendant owned no other house in state (Civ. Code, § 1624, subd. 6).

Written authorization to broker to sell defendant's house, without describing location, *held* properly admitted in evidence in action for broker's commission, where there was evidence that defendant owned no other house in state; authorization being sufficient under statute of frauds (Civ. Code, § 1624, subd. 6), since property could be identified.

2. Brokers 🔑43(3)—Broker's contracts cannot be declared void for uncertainty in description of property, which can be cured by proof of extrinsic facts (Civ. Code, § 1624, subd. 6).

Broker's contracts cannot be declared void under statute of frauds (Civ. Code, § 1624, subd. 6), merely because of defect, uncertainty, or ambiguity in description of property to be sold, when such defect can be cured by allegations and proof of extrinsic facts and circumstances.

3. Evidence 🔑594—Uncontradicted testimony that defendant owned no other house in state than one he authorized broker to sell prima facie established fact.

Where broker's evidence, showing that at time authorization was signed defendant owned no other house in state than one he authorized broker to sell, was uncontradicted and unimpeached, such evidence was legally sufficient to establish prima facie fact sought to be proved thereby, in broker's action for commission.

4. Brokers 🔑53—Where owner and purchaser were brought together through broker's efforts while broker's contract was in force, and owner consummated sale, broker was entitled to commissions.

Where vendor and purchaser were brought together through efforts of broker, who had been duly employed as such while contract of employment was still in force, and sale was consummated by vendor with purchaser the broker had procured on terms and for price acceptable to vendor, broker was entitled to payment of full commissions.

5. Brokers 🔑44—Authorization to sell house was not terminated by lapse of five years, where it contained cancellation clause, but no notice of cancellation was given.

Authorization to broker to sell house was not terminated by lapse of five years between time it was given and date of sale, where authorization contained cancellation clause granting owner right to cancel agency on giving two weeks' notice, but such notice was never given.

6. Estoppel 🔑92(3)—Acceptance of benefit of broker's services, by selling to purchaser procured by broker, estopped owner to claim authorization had lapsed.

Sale by owner to purchaser whom broker procured amounts to acceptance by him of benefit of broker's services in initiating and carrying on negotiations, which estopped him from claiming that authorization to broker to sell property had lapsed.

7. Brokers 🔑86(7)—Evidence held to show broker was not purchaser's agent.

In action for broker's commissions, facts and circumstances *held* to show that broker was not agent of purchaser of house.

8. Brokers 🔑85(6, 7)—Letter from owner's agent and conversations between agent and broker held admissible to show broker's performance, though agent's authority was not in writing.

In action for broker's commission for selling real property, letter from owner's agent and substance of conversations broker had with such agent *held* admissible to show performance on part of broker, and that broker's contract had been neither abandoned nor rescinded, though agent's authority to act was not in writing.

9. Brokers 🔑85(1)—In action for broker's commission, recordation of deed from owner to purchasers was admissible (Code Civ. Proc. § 1951).

In action for broker's commission, recordation of deed from defendant owner to purchasers was admissible, under Code Civ. Proc. § 1951.

Appeal from Superior Court, San Mateo County; George H. Buck, Judge.

Action to recover real estate broker's commission by Anna D. Pray and husband against Earle C. Anthony. From a judgment for plaintiff, and from an order denying defendant's motion for judgment notwithstanding the verdict, defendant appeals. Affirmed.

★Rehearing denied. Hearing denied by Supreme Court.

Samuel M. Samter, of San Francisco, for appellant.

Rufus H. Kimball, of San Francisco, and Ross & Ross, of Redwood City, for respondents.

KNIGHT, J. Action to recover real estate commissions alleged to have been earned by the plaintiff Mrs. Pray in procuring a buyer for defendant's property. Upon trial before a jury, a verdict was rendered in plaintiffs' favor for the amount claimed to be due. Judgment was entered accordingly, and defendant took two appeals—one from the judgment, and the other from an order denying his motion for judgment in his favor notwithstanding the verdict. Summarized, defendant's grounds of appeal are that the evidence is insufficient in fact and in law to sustain the verdict or the judgment, and that the trial court erred in ruling upon the admissibility of evidence, and in refusing to give certain instructions proposed by defendant.

The complaint alleged that defendant entered into a written contract with Mrs. Pray, whereby he agreed that, if she would produce a purchaser for the house belonging to defendant in Hillsborough, San Mateo county, Cal., he would pay her a commission of five per cent. upon completion of the sale; that in pursuance of such contract she produced as purchasers Henry Duffy and wife, to whom defendant subsequently sold and conveyed the property, but that thereafter he refused to pay her the agreed commission. The substance of the evidence supporting the foregoing allegations is as follows:

Mrs. Pray had been engaged in the real estate business in Burlingame for a number of years, and through her agency defendant acquired the property in question, which he occupied as a home until he moved to Los Angeles. Thereafter the house remained vacant for a long time, and eventually, in 1920, he requested Mrs. Pray to find a buyer for it. In furtherance of such request he addressed a communication to her, reading in part as follows: "San Francisco, California, October 28th, 1920. Mrs. Pray, Burlingame, California—My Dear Mrs. Pray: If you will produce a customer for my house, who will purchase the house on terms satisfactory to me and at a price satisfactory to me, upon completion of the transaction, provided I complete the transaction, will pay you a commission of 5 per cent. * * * [Signed] Earle C. Anthony."

Thereafter Mrs. Pray made a number of efforts to interest prospective buyers in the place, but no definite price had been fixed, and in 1924 further correspondence was had between defendant and Mrs. Pray as to the price, and also with reference to the different articles of household furnishings which would or would not be included in the sale. Part of the correspondence consisted of a telegram reading as follows: "Los Angeles, Calif. Price of house $60,000 net to me unfurnished but including all draperies, carpets, linoleum, wall coverings excepting oriental rugs in studio and passage from studio and dining room. [Signed] Earle C. Anthony."

In 1925 defendant was traveling in Europe, but had directed his office manager in San Francisco, named Sahland, to act for him during his absence in the matter of the disposal of his house. During the month of August of that year Mrs. Duffy called at Mrs. Pray's office with a view to purchasing a home in that vicinity. She was accompanied by mutual friends, who had recommended Mrs. Pray's agency. Mrs. Pray immediately proposed the Anthony home, and drove with Mrs. Duffy to visit the premises. She pointed out certain attractive features of the property she thought would appeal to Mrs. Duffy, and also designated the numerous articles of household furnishings to be included in the sale. Mrs. Duffy, after expressing herself as being much pleased with the property, said that she would like to have her husband look it over, but stated that he would likely insist on carrying on the negotiations for its purchase directly with the owner. Mrs. Pray replied that such arrangement would be entirely satisfactory to her, but she explained that Mr. Anthony was then in Europe, and suggested that the matter be taken up with Mr. Sahland, and before leaving the premises that day Mrs. Pray instructed the caretaker, in Mrs. Duffy's presence, to allow the latter and her husband to inspect the same whenever they called. The next morning Mrs. Pray phoned Sahland's office to tell him of the prospective sale to the Duffys, and shortly afterwards Sahland phoned Mrs. Pray's office to the effect that he would do whatever he could to help Mrs. Pray consummate such sale. Thereafter Mrs. Duffy visited the property several times, and occasionally was accompanied by her husband. On one of these visits, when Mr. Duffy was present, they were shown about the property by a Mrs. Hart, an employee in Mrs. Pray's office, and on another occasion Sahland was there, and the Duffys explained to him that they were there through the agency of Mrs. Pray.

About this time the negotiations were suspended for several weeks, due to the fact that the Duffys were traveling. However, on October 8, 1925, Mrs. Pray mailed a letter to defendant at his San Francisco office, confirming her previous reports to Sahland regarding the negotiations carried on by her with the Duffys, and in this regard she stated: "I am waiting for them to return now, and hope to sell your property in Hillsborough to them as soon as I can." On October 14th she received a reply, written by Sahland on defendant's business stationery, acknowledging receipt of Mrs. Pray's letter and stating: "I note what you say about Mr. and Mrs. Duffy, and as I told you before I am sure they can be sold the Anthony Hillsborough property. I also understand that they have returned from the East. I am leaving this matter to you for the time being, and sincerely hope that you will be able to close them." A number of discussions took place thereafter between Mrs. Pray and Sahland about the prospective sale, particularly as to a reduction in the price of the property, and the information Mrs. Pray received was imparted by her to Mrs. Duffy. Finally Sahland told Mrs. Pray that they had gone as far as they could with the proposed sale in the absence of Mr. Anthony, and that immediately upon the latter's return from abroad they would communicate with her. Instead of doing so, however, and in November, 1925, Anthony and Sahland completed the sale with the Duffys, and in consummation thereof Anthony executed a deed conveying the property to them for a consideration of $52,000, and, as stated, thereafter he refused to pay Mrs. Pray the agreed commission.

[1] At the trial defendant objected to the introduction in evidence of the written authorization above mentioned, claiming that it was void under the statute of frauds (subdivision 6, § 1624, Civ. Code), in that it contained no description of the property, particularly as to the city, county, or state wherein it was situate. The trial court ruled adversely, however, holding in effect that the authorization furnished sufficient means for identifying the property referred to therein, and therefore allowed plaintiffs to introduce evidence for such purpose, which consisted in part of testimony to the effect that at the time the authorization was signed defendant owned no other house in California than the one described in the complaint, namely, the one belonging to him in Hillsborough, San Mateo county, Cal. We find no error in the ruling.

[2] As uniformly held by numerous decisions in this state upon the subject, the essential part of a contract to employ a real estate broker, so far as the statute of frauds is concerned, is the matter of the employment and consequently need not describe the land specifically, if the terms of the employment can be made definite without it. The description of the land and its identity are only incidental to the main purposes of the contract, and, since contracts of that nature do not purport to involve the title or right of possession of land, much greater liberality is allowed in construing and curing defective descriptions therein than in cases of executory contracts to convey land or in deeds of grant, for, as stated, so far as the statute of frauds is concerned, the terms of the employment are the essential parts. The well-established rule is, therefore, that broker's contracts are not to be declared void merely because of a defect, uncertainty or ambiguity in the description of the property to be sold, when such defect can be cured by allegations and proof of extrinsic facts or circumstances. Sanchez v. Yorba, 8 Cal. App. 490, 97 P. 205; Maze v. Gordon, 96 Cal. 61, 30 P. 962; Toomy v. Dunphy, 86 Cal. 639, 25 P. 130; Goodrich v. Turney, 44 Cal. App. 516, 186 P. 806; Tolosano v. Will, 62 Cal. App. 622, 217 P. 803; Anderson v. Wilstrup, 34 Cal. App. 771, 168 P. 1150; Cowing v. Wofford, 68 Cal. App. 538, 229 P. 883; Russell v. Ramm, 200 Cal. 348, 254 P. 532; Avis v. Rebhan (Cal. App.) 267 P. 898. Says the court in Anderson v. Wilstrup, supra: "The office of a description is not solely to identify the land but also to furnish a means of identification," and accordingly a contract to employ a broker to sell real estate will not be nullified merely because of a defect in the description of the property, but such defect may be cured though not created by parol evidence.

In Sanchez v. Yorba, supra, the memorandum referred to the property merely as the "Yorba ranch," and it was held that such reference furnished means for readily identifying the property, and that consequently parol evidence was admissible to aid in its identification. Here, as will be observed, the written authorization was signed by the defendant Anthony, in which he chose to designate the property merely as "my house," which was the equivalent of saying the "Anthony house," and such designation evidently furnished sufficient means for readily identifying the property, because all of the witnesses referred to the Hillsborough property as "the Anthony house." Both Mrs. Pray and Sahland had no difficulty in going upon the premises and pointing out to the purchasers the exact property to be sold; there was no dispute about the identity of the property at the time the sale was consummated, or when the deed was prepared and executed; and nowhere in his answer did defendant aver, nor did he claim at the trial, that there was any misunderstanding as to the identity of the property referred to in the memorandum. As aptly said in Russell v. Ramm, supra, in dealing with a like situation: "From all these considerations it is clear that nobody connected with the transaction was at any time misled or under any misapprehension or uncertainty as to the particular properties referred to" in the memorandum.

[3] On this appeal defendant challenges the legal sufficiency of the testimony tending to show that at the time the authorization was signed defendant owned no other house in California than the one mentioned in the complaint; but, as in the case of Russell v. Ramm, supra, at the trial he made no attempt to question the truth of such testimony, nor did he pretend that on the date of the authorization he was the owner of any other property. Consequently, standing uncontradicted and unimpeached, such testimony was

legally sufficient to establish, prima facie, the fact sought to be proved thereby. As will be noted, there is no question here of the authorization having contained an express contract of employment, and we conclude, therefore, in view of the facts above set forth and the authorities herein cited, that the trial court was fully warranted in holding that the authorization sufficiently complied with the statute of frauds to allow parol evidence to be admitted to identify the property, and that the evidence received in that behalf was legally sufficient for the purpose mentioned.

[4] Defendant's second contention is that Mrs. Pray was not the procuring cause of the sale, but this contention is completely negatived by the evidence already set forth, for it appears therefrom that the seller and the buyer were brought together through the efforts of the broker, who had been duly employed as such; that while the contract of employment was still in force, never having been abandoned by the broker nor rescinded by the seller, the sale was consummated by the seller with the buyer the broker had procured, on terms and for a price acceptable to the seller. Under such circumstances the broker is entitled to the payment of the full commissions. Pryor v. McGuire, 59 Cal. App. 234, 210 P. 532; Sessions v. Pacific Improvement Co., 57 Cal. App. 1, 206 P. 653; Bail v. Glantz, 78 Cal. App. 49, 248 P. 258, and cases cited therein.

[5, 6] Nor was the authorization terminated by lapse of time, as defendant claims. True, approximately five years elapsed between the time it was given and the date of the sale; but the authorization contained a cancellation clause granting defendant the right to cancel the agency upon giving two weeks' notice, and admittedly no such notice was ever given. Furthermore, it is apparent that defendant at all times prior to his return from Europe considered the authorization in full force, and led Mrs. Pray to believe so, because in 1924 he was still carrying on negotiations with her regarding the purchase price and the amount of personal property to be included in the sale; and in 1925 his representative, Sahland, acting under Anthony's instructions, actively co-operated with Mrs. Pray in carrying on negotiations with the Duffys, which the defendant subsequently ratified by consummating the sale with them; and, lastly, upon this point, the sale by Anthony doubtless amounted to an acceptance by him of the benefit of Mrs. Pray's services in initiating and carrying on the negotiations, which estops him, in our opinion, from making the claim that the authorization had lapsed.

[7] Defendant further contends that Mrs. Pray acted as agent for both seller and buyer without the knowledge of the other, and consequently forfeited any commissions due from the seller. This contention is utterly without merit. While Mrs. Pray was testifying on direct examination, counsel for defendant made the statement, in interpreting one of her answers, "You mean your client, Mrs. Duffy," to which Mrs. Pray replied, "It was my client after Mrs. Kolster introduced her," and on cross-examination she stated that she "supposed" she was acting for both the Duffys and Anthony. But it is plain that each answer amounted to no more than the legal conclusion of the witness, which, of course, is wholly insufficient to establish an agency, and, moreover, all of the facts and circumstances show beyond question that she was not the agent of the Duffys. As was said in Hicks v. Wilson, 197 Cal. 269, 240 P. 289, to hold otherwise would be to erroneously declare that, whenever a person desiring to buy real estate enters the office of a realty broker to make inquiry concerning the same, and the broker submits property to him, an agency is created, giving rise to an obligation on the part of such persons to compensate the broker for services performed under such employment.

[8, 9] We are also unable to sustain defendant's claim that the court erred in admitting in evidence Sahland's letter of October 28, 1925, and the substance of the conversations Mrs. Pray and Mrs. Hart had with him during the Duffy negotiations, for it appears from Sahland's deposition, which was the only evidence in the case on this point (Anthony having testified neither in person nor by deposition), that Sahland was authorized by Anthony to take care of the matter of the sale during the latter's absence, and in this connection the evidence shows that Sahland's activities were fully ratified by Anthony upon his return. The evidence mentioned was not offered or received for the purpose of establishing any part of the contract of employment, as defendant seems to contend, but to show performance on the part of Mrs. Pray and that said contract had been neither abandoned nor rescinded. For the latter purposes the evidence was admissible, even though Sahland's authority to act was not in writing. The recordation of the deed from Anthony to the Duffys was also admissible. Code Civ. Proc. § 1951. The rule stated in the cases cited and relied upon by defendant on this point became obsolete by virtue of the amendment to said Code section in 1889. St. 1889, p. 45.

The objections made to the court's refusal to give certain instructions proposed by defendant are not of sufficient importance, nor are they presented in such manner, as to require special attention. The record discloses that the jury was fairly and fully instructed on all material issues, and it is evident that the few instructions the court refused to give on behalf of defendant, either did not correctly state the law, or were not pertinent to the issues, or the substance thereof was covered in the court's charge, and therefore were properly refused.

The judgment and order appealed from are affirmed.

We concur: TYLER, P. J.; CASHIN, J.

JOHNSTON v. WOLF et al. (Civ. 6419.) *

District Court of Appeal, Second District, Division 2, California. Feb. 14, 1929.

1. Appeal and error 🔑32—Whether appeal lies to appellate court from superior court's judgment, affirming, modifying, or reversing judgment of municipal court, depends on whether cause of action arose in city where municipal court was located (Const. art. 6, § 4b, as amended in 1928).

Under Const. art. 6, § 4b, as amended in 1928 (see St. 1927, p. 2386), whether an appeal to District Court of Appeal lies from judgment of superior court affirming, modifying, or reversing judgment of municipal court, whose jurisdiction is established by Deering's Gen. Laws Consol. Supp. 1925–1927, p. 1607, depends on the place where cause of action arose, as disclosed by record, whether inside or outside limits of incorporated city wherein municipal court is situated.

2. Constitutional law 🔑22—Amendment to Constitution relating to appellate court jurisdiction became law on date people ratified it (Const. art. 18, § 1; art. 6, § 4b, as amended in 1928).

Amendment in 1928 to Const. art. 6, § 4b (see St. 1927, p. 2386), relating to appellate jurisdiction of District Courts of Appeal on appeal from superior courts, *held* to have become law on date it was ratified by the people, under Const. art. 18, § 1, providing that, if people shall approve and ratify amendment by majority of qualified electors voting thereon, amendment shall become part of Constitution.

3. Appeal and error 🔑32—In determining appellate court's jurisdiction, cause of action for nonpayment of trade acceptance is considered as arising at place designated for payment.

In determining whether District Court of Appeal had appellate jurisdiction on appeal from judgment of superior court, affirming judgment of municipal court in action on a trade acceptance, assumption is that cause of action arose at place designated in instrument for its payment.

4. Evidence 🔑10(2)—Judicial notice taken that Florence, Cal., is outside city of Los Angeles.

District Court of Appeal takes judicial notice of fact that Florence, Cal., is outside the city limits of the city of Los Angeles.

5. Appeal and error 🔑32—Original jurisdiction of action on trade acceptance payable at Florence was in superior court, instead of Los Angeles municipal court, and appellate jurisdiction in District Court of Appeal (Const. art. 6, §§ 4b, 5, as amended in 1928).

Where trade acceptance for less than $1,000 was made payable at Florence, Cal., cause of action arose there, and original jurisdiction in action thereon for nonpayment was in superior court, instead of municipal court of Los Angeles, where action was instituted, and appellate jurisdiction thereof in District Court of Appeal, under Const. art. 6, §§ 4b, 5, as amended in 1928 (see St. 1927, p. 2386).

Appeal from Superior Court, Los Angeles County.

Action by R. G. Johnston against Robert Wolf and Louis Wolf, copartners doing business under the firm name and style of the Wolf Cabinet & Furniture Manufacturing Company. Judgment for plaintiff was affirmed by the superior court, and defendants appeal. On motion to dismiss appeal. Motion denied.

Andreani & Haines, of Los Angeles, for appellants.

Goudge, Robinson & Hughes, of Los Angeles, and David A. Sondel, for respondent.

THOMPSON, J. This is a motion to dismiss an appeal on the ground that this court has no jurisdiction to entertain it. The facts are as follows:

The respondent commenced an action in the municipal court of Los Angeles, in which he sought to recover from the defendants the sum of $680.75. Judgment was rendered in his favor on the 21st day of June, 1928, in the amount prayed for, and on July 19, 1928, the defendants and appellants took an appeal therefrom to the superior court. On November 28, 1928, the last-named court rendered its decision, affirming the judgment of the municipal court. On December 12, 1928, appellants filed a notice of appeal from the judgment of the superior court to this court.

At the last general election, held November 6, 1928, the people ratified a constitutional amendment, proposed by the Legislature (see St. 1927, p. 2386), containing, among other things, an amendment to section 4b of article 6, which, so far as pertinent to the question here involved, reads: "The District Courts of Appeal shall have appellate jurisdiction on appeal from the superior courts except in cases in which appellate jurisdiction is given to the Supreme Court in all cases at law in which the superior courts are given original jurisdiction. * * *" Section 5 of the same article of the Constitution, amended at the same time, now states in part as follows: "The superior courts shall have original jurisdiction in all civil cases and proceedings except as in this article otherwise provided,

---

★For opinion of Supreme Court adopting opinion of Court of Appeal, see 280 P. 980.

and except, also, cases and proceedings in which jurisdiction is or shall be given by law to municipal or to justices' or other inferior courts. * * * The superior courts shall have appellate jurisdiction in such cases arising in municipal and in justices' and other inferior courts in their respective counties or cities and counties as may be prescribed by law." Sections 983, 984, 985 (added by St. 1925, p. 942, and amended by St. 1927, p. 118, §§ 1–3, and sections 986, 987, 988, 988a–988h, of the Code of Civil Procedure (added by St. 1927, p. 118, §§ 4–14), provide for appeals from the municipal to the superior courts, and a comprehensive mode of procedure for the hearing and disposition thereof. Section 29 of the act authorizing the establishment of municipal courts, etc. (Deering's Gen. Laws Consol. Supp. 1925–1927, p. 1607), provides that municipal courts shall have exclusive original jurisdiction of all cases at law in which the demand exclusive of interest amounts to $1,000 or less arising in the city where the court exists, and concurrent jurisdiction with the superior and justices' courts of causes of like amount arising outside the city but within the county in which the court is situated. Finally, section 13 of article 6 of the Constitution, also amended at the last election, gives to the Legislature the right to fix by law the jurisdiction of the municipal courts and concludes with this language: "Any action heretofore taken by the Legislature in fixing exclusive jurisdiction of municipal courts in cases at law is hereby ratified and confirmed."

[1] It would seem that nothing had been overlooked which would make it clear and inevitable that the superior courts, and the superior courts only, should have appellate jurisdiction of causes tried in the municipal courts, where the last-named courts have exclusive original jurisdiction. It must be manifest, however, from the language of section 4b of article 6 that the Constitution vests in the District Courts of Appeal appellate jurisdiction of all appeals from the superior court, where the latter possesses original jurisdiction, and not merely in those cases where the original jurisdiction is exercised. The words employed are "all cases at law in which the superior courts are *given original* jurisdiction." It cannot be gainsaid that they are given original jurisdiction of cases in excess of the jurisdiction of justices' courts and under $1,000 arising outside the limits of an incorporated city which has a municipal court but within the county. Over such causes they have concurrent original jurisdiction with the municipal courts. Whether an appeal to this court lies from a judgment of the superior court affirming, modifying, or reversing a judgment of the municipal court, therefore, depends upon where the cause of action arose as disclosed by the record—whether inside or outside the limits of the incorporated city where the municipal court is situated.

[2] In our discussion of the problem we have assumed that the constitutional amendment embodying the changes we have mentioned went into effect on November 6, 1928, the date when it was ratified by the people. That it may not be thought we have overlooked this feature of the case, we now assert that to be the law. The closing sentence of section 1 of article 18 of the Constitution, in referring to amendments submitted by the Legislature, says: "If the people shall approve and ratify such amendment or amendments, or any of them, by a majority of the qualified electors voting thereon, such amendment or amendments shall become a part of this Constitution." In Livermore v. Waite, 102 Cal. 113, 122, 36 P. 424, 427 (25 L. R. A. 312), it is said that it is beyond the power of the Legislature to submit an amendment "that will not, upon its adoption by the people, become an effective part of the Constitution, nor is it authorized to propose an amendment which, if ratified, will take effect only at the will of other persons, or upon the approval by such persons of some specific act or condition." And in Kingsbury v. Nye, 9 Cal. App. 574, 99 P. 985, the court aptly states: "It is beyond dispute that the amendment went into effect upon its adoption and ratification." A similarly succinct statement is found in San Francisco v. Pac. Tel. & Teleg. Co., 166 Cal. 244–252, 135 P. 971, 975, as follows: "The amendment, which is by its own terms * * * self-executing, was adopted at an election held on November 8, 1910, and became a part of the organic law on that date."

[3-5] But one question remains. Where did the cause of action arise? The affidavit supporting this motion says that the complaint alleges "that defendants accepted a trade acceptance in the sum of $680.75, payable at the Florence National Bank, Florence, Cal., to Brents' Furniture Company." For the purposes hereof we must say that the cause of action arose at the place designated in the instrument for its payment. The breach must be held to have occurred at the place the appellants were bound by their promise to pay. Raphael v. People's Bank of Benicia, 45 Cal. App. 115, 187 P. 53. We take judicial notice of the fact that Florence, Cal., is outside the city limits of Los Angeles, and for that reason conclude that original jurisdiction of the action was given to the superior court, and appellate jurisdiction to this court.

Motion denied.

We concur: WORKS, P. J.; CRAIG, J.

97 Cal. App. 27

OLIVER v. SPERRY et al. (Civ. 3674.)

District Court of Appeal, Third District, California. Feb. 16, 1929.

1. Executors and administrators ⟹315(5)—Under decree distributing property to person for life, with remainder to others, estate vested in remaindermen in existence at time of decree (Civ. Code, § 694).

Under decree of distribution distributing property to S. for life, and, upon her death, the remainder to F. and M., an estate vested in M., under Civ. Code, § 694, where both F. and M. were in existence at time of entry of decree.

2. Appeal and error ⟹1170(12)—Order in action for partition, if error, held harmless, where judgment found ownership of property in parties as law directs (Const. art. 6, § 4½).

In action for partition of real property, that plaintiff sued himself as an administrator of estate of deceased wife and afterwards court entered order of dismissal as to plaintiff as a party defendant, as administrator, if error, *held* harmless, under Const. art. 6, § 4½, where judgment of court found ownership of property in parties just as law directs and just as law gives to them.

Appeal from Superior Court, San Joaquin County; C. W. Miller, Judge.

Action for partition of real property by J. E. Oliver against Carrie Evelyn Sperry, Charles Elmer Miller, and others. From the judgment, second defendant named appeals. Affirmed.

A. H. Carpenter, of Stockton, for appellant.

Louttit & Stewart and Louttit & Marceau, all of Stockton, for respondent.

PLUMMER, J. This action was instituted to secure a decree of partition of certain real property, the plaintiff, J. E. Oliver, claiming an undivided one-quarter interest therein as surviving husband and heir at law of Harriett A. Oliver (née Miller), deceased.

[1, 2] The complaint sets forth that, at the time of her death, Harriett A. Oliver (née Miller) was the owner of an undivided one-half interest in and to the property described in the complaint; that the appellant, Charles Elmer Miller, was the surviving son and only child of the said Harriett A. Oliver; that the plaintiff and respondent, J. E. Oliver, was the surviving husband of the deceased; the property involved in this action was originally owned by Charles Sperry, deceased; that the said Charles Sperry died testate, leaving a will in which he devised his property to his surviving widow, Lydia J. Sperry, for and during the natural term of her life, and, upon her death, to Frank Sperry and Harriett A. Miller (at the time of her death Harriett A. Oliver). The decree of distribution in the estate of Charles Sperry, deceased, reads as follows: "That there be, and hereby is distributed to the said Lydia J. Sperry, for and during the natural term of her life, and upon her death, the remainder to Frank Sperry and Harriett A. Miller (née Sperry) forever, said remainder to be held by said Frank Sperry and Harriett A. Miller from the time of the death of said Lydia J. Sperry, as tenants in common, in equal proportions forever." Harriett A. Oliver (née Harriett A. Miller, née Harriett A. Sperry) died on the 12th day of July, 1917, leaving her surviving as heirs at law her husband, J. E. Oliver, and appellant, Charles Elmer Miller, her only surviving child. Lydia J. Sperry, the holder of the life estate, died on the 19th day of August, 1925.

The claim of the appellant is that no estate vested in Harriett A. Oliver (née Harriett A. Miller, née Harriett A. Sperry) at the time of the death of Charles Sperry, and that no estate was confirmed and vested in her by reason of the decree of distribution entered in the estate of Charles Sperry, deceased, which we have herein set forth. This contention of the appellant, however, was decided adversely in the case of Miller v. Oliver, 54 Cal. App. 495, 202 P. 168. The questions presented upon this appeal were also decided adversely to the appellant in the case of Hall v. Wright, 17 Cal. App. 502, 120 P. 429, and also in the matter of the Estate of De Vries, 17 Cal. App. 184, 119 P. 109. Were these cases not in existence, section 694 of the Civil Code determines the correctness of the judgment of the trial court in this case. That section reads: "A future interest is vested when there is a person in being who would have a right, defeasible or indefeasible, to the immediate possession of the property, upon the ceasing of the intermediate or precedent interest." It requires only a reading of the paragraph of the decree of distribution set out herein to conclusively demonstrate that there were two persons in existence at the time of the entry of the decree, to wit, Frank Sperry and Harriett A. Miller (Harriett A. Oliver at the time of her death), who would immediately succeed to the possession and enjoyment of the estate in which Lydia J. Sperry was given a life tenure. We do not need to elaborate further upon this question, as the Code provision and the two cases cited are conclusive.

It appears that the plaintiff sued himself as an administrator of the estate of Harriett A. Oliver, deceased, and afterwards the court entered an order of dismissal as to the plaintiff as a party defendant, as administrator. Whether this order was regular or irregular, valid or void, cannot affect the merits of this case or in any way prejudice the appellant, for the simple reason that the judgment of the court finds the ownership of the property in the parties just as the law directs, and just as the law gives to them. Therefore section 4½ of article 6 of the Constitution applies, and no reversal can be had for an error, if admitted to be error, where no injury or prejudice has resulted.

The judgment of the trial court is affirmed.

I concur: FINCH, P. J.

DUKE et ux. v. LEVY et al. (two cases).

DUKE v. LEVY et al.★

(Civ. 6550.)

District Court of Appeal, First District, Division 1, California. Feb. 14, 1929.

As Modified on Denial of Rehearing March 16, 1929. Hearing Granted by Supreme Court April 15, 1929.

1. **Contracts 🔑137(1)—Legal transaction may be upheld, when severable from illegal transaction without confusion.**

Whenever legal and illegal transaction are combined, but are severable without confusion, legal transaction may be upheld.

2. **Usury 🔑98—Cash loan held recoverable, though portion of loan recited in notes above amount received, together with interest, was illegal and void as usurious (Usury Law).**

Where loans were made to borrower of $2,000 and $3,500, and borrower gave notes for $2,500 and $5,000, respectively, loans of money actually made were legal, and recoverable as such, though portion of loan above amount of cash received, together with interest at 12 per cent., was illegal and void under Usury Law (St. 1919, p. lxxxiii).

3. **Payment 🔑16(1), 67(4)—Note is not payment of debt, but evidence thereof, which may be rebutted in equity by proof of total failure of consideration.**

Note given is not payment of debt, but merely evidence of debt, and such evidence may be rebutted in equity action by proof of total failure of consideration.

4. **Usury 🔑76, 79—Plaintiffs, executing notes for debt in excess of amount actually received, could not avoid entire transaction for usury, but excess amounts would be voidable (Usury Law).**

Where plaintiffs received cash loans of $2,000 and $3,500, and executed notes therefor for $2,500 and $5,000, each note was merely evidence of debt, susceptible of refutation, and in equitable action excess over actual amounts received would be voidable, independent of Usury Law (St. 1919, p. lxxxiii), and hence plaintiffs could not have entire transaction declared void for usury.

5. **Usury 🔑137—Excess amounts recited in notes over amounts received held not amounts "paid" for interest, and not basis for recovering treble damages (Usury Law).**

Where plaintiffs received cash loans of $2,000 and $3,500, and executed notes for $2,500 and $5,000, excess amounts of $500 and $1,500 over amounts actually received cannot be considered as amounts "paid" for interest, under Usury Law (St. 1919, p. lxxxiii), since they were never in fact paid, but were always under control of plaintiffs, as to repudiation for lack of consideration, and could not be made basis for recovery of treble damages.

[Ed. Note.—For other definitions, see Words and Phrases, First, Second, and Third Series, Paid.]

6. **Usury 🔑140—Borrower, receiving interest from another which he transmitted to lender, could not recover treble amount of illegal interest.**

Where plaintiff, borrowing money of defendants, received interest therefor from another, and transmitted such interest to defendant, plaintiff could not recover treble amount of illegal interest, since merely transmitter of funds.

7. **Usury 🔑140—Action to recover illegal interest or treble interest is maintainable only by actual payee, not transmitter of funds.**

Action to obtain refund as illegal interest, or to treble such interest, would lie only on behalf of actual payee, and not by transmitter of funds.

8. **Usury 🔑142(3)—Complaint held to show that $8,500 note was additional security for $10,000 note, precluding borrower from claiming $8,500 note was bonus, or from recovering treble damages for illegal interest (Usury Law).**

Complaint alleging that plaintiff borrowed $10,000 from defendants, and gave as security for payment thereof $10,000 note and deed of trust, together with trust deed and note for $8,500, showed that $8,500 was given only as additional security, and precluded plaintiff from subsequently claiming such note was bonus for making of loan, in violation of Usury Law (St. 1919, p. lxxxiii), and did not authorize trebling such bonus as damages for exaction of illegal interest.

9. **Usury 🔑137—Borrower, not paying alleged bonus note given for obtaining loan, could not recover treble amount of bonus as damages for illegal interest (Usury Law).**

Where alleged bonus for securing loan, evidenced by note recited to be additional security for loan, was never paid, and would probably never be paid, borrower could not claim treble amount of bonus as damages for illegal interest, under Usury Law (St. 1919, p. lxxxiii).

10. **Usury 🔑142(3)—Borrower could not claim alleged notes were payment, because given by others, under complaint alleging notes were by accommodation makers for borrower (Usury Law).**

Under complaint to recover treble amount of note, alleged to be security for loan, but claimed to be in effect bonus for securing loan, plaintiffs could not claim notes were given by persons other than themselves, and therefore should be considered as payment, so as to entitle them to treble damages under Usury Law (St. 1919, p. lxxxiii), where claim was antagonistic to complaint, and complaint was not amended to change allegations that each of

---

★Rehearing denied. Hearing granted by Supreme Court.

notes was made by accommodation makers for plaintiff.

Appeals from Superior Court, Alameda County; J. D. Murphey, Judge.

Separate actions by George E. Duke and wife against Irving S. Levy and others. From the judgments, plaintiffs separately appeal. Affirmed in each case.

G. E. Duke, of Oakland, in pro. per.

Owen D. Richardson, of San Jose, for respondents Levy, Meyerfeld, Shaw, Federal Finance Co., and San Jose Abstract & Title Co.

WARD, Justice pro tem. The three cases involved herein were brought by G. E. Duke, as plaintiff, his wife, Margaret, joining as plaintiff in two of them, in which promissory notes were actually given by herself and husband, and executed by them jointly, the relief in all three cases being to adjudge certain promissory notes and trust deeds securing them void for usury, and general relief. The numbers of the cases in the lower court in which Duke and his wife were the actual makers of the notes involved were respectively 87,869 and 87,871, that in which third parties made the notes was numbered 87,870. Those numbers will be used for convenience herein. There were also three separate appeals taken from orders made subsequent to judgment, but these have been dismissed by stipulation, and need not be here considered. It is stipulated that the defendant Irving S. Levy is the real party in interest; that defendants Meyerfeld, Shaw, and Federal Finance Company are assignees without consideration and for collection; that the defendant San Jose Abstract & Title Company is merely the trustee in the several deeds of trust; that defendants Pitman and Saleneek were not served with process and did not appear.

Appellants contend that, because they received $2,000 and gave a note and trust deed for $2,500 (case 87,869), and received $3,500 and gave a note and trust deed for $5,000 (case 87,871), that they had "paid" in each case respectively $500 and $1,500, and therefore were entitled to have the sums trebled in the account stated by the court. The contention is also made that, because of the usurious exaction of these sums which they did not receive, the transaction should be declared void.

[1-4] The latter contention will be discussed first. Whenever a legal and illegal transaction are combined, but are severable without confusion, the legal transaction may be upheld. The respective loans made in cash of $2,000 and $3,500 are easily ascertainable; they were legal loans of actual money and are recoverable as such. 2 Kent's Commentaries, 467. That portion of the loan (in these several notes) above the amount of cash actually received by appellants, together with the rate of interest of 12 per cent., is illegal and void, as being in excess of the rate allowed by the Usury Act (St. 1919, p. lxxxiii). A note given is not a payment of a debt; it is merely evidence of a debt, and this evidence may be rebutted in an equity action by proof of total failure of consideration. In that kind of an action, the excess over actual amounts received would be voidable. Considering these excess amounts, therefore, in this light, aside from the Usury Law, it would appear that they were only evidence of debt susceptible of refutation, and concerning only the immediate principals; the makers parting with nothing tangible, nothing with life and vitality, should the makers themselves attack them. It remained merely with the makers to attack the excess over amounts actually received, independent of the Usury Act.

[5] Viewed from the standpoint of the Usury Act, these excess amounts of $500 in the one case, and $1,500 in the other, may not be considered as amounts "paid" for interest, because, in point of fact, they were never paid, and were always under the control of plaintiffs as to repudiation for lack of consideration. The case of Haines et al. v. Commercial Mortgage Co., 200 Cal. 609, 254 P. 956, 255 P. 805, 53 A. L. R. 725, is the last word upon the subject by our courts and is determinative of the issues and contentions noted above in this: "Even a casual reading of the statute itself shows that the legislative intent was not to declare the whole contract void, but only the portion thereof relating to interest. * * * The contention that the principal debt is forfeited is wholly inconsistent with merely deferring the collection of the debt. * * * No authority has been cited and none can be found holding the principal debt forfeited under such provision of a statute." In that case the note involved provided for a stipulated sum to be paid monthly, and segregated as to principal and interest. An item had been included in the principal sum of the note, and was in reality a bonus and usurious. The lower court trebled this in its account stated, but the court on appeal said: "The item of $1,020 simply becomes surplusage, and not only cannot be collected, but cannot be the basis of apportionment for either principal or interest, and the payments on account of principal will serve to reduce the net principal, and will not be construed as a payment of said charge of $1,020, either in whole or in part. To authorize the infliction of the penalty the interest must, of course, be paid." Coulter v. Collins, 71 Cal. App. 381, 235 P. 465, cited.

This disposes of the contentions in actions 87,869 and 87,871.

Case numbered 87,870 in the superior court shows that the plaintiff Duke borrowed $10,000 from certain of the defendants, as the second amended complaint avers; that he gave as security for the payment thereof a $10,000 note and a deed of trust upon Merced county property from the Pitman defendants, but running directly to defendant Meyerfeld, and not to himself, together with a trust deed and note for $8,500 from the defendant Saleneek, running not to himself, but to defendant Meyerfeld. Both of these notes bore 7 per cent. interest and no more.

[6, 7] The defendants Pitman, who were not served or brought into court at all, paid to the plaintiff as interest $358.25, and plaintiff, in turn, transmitted it to the lender. In this action plaintiff asks that this $358.25 be trebled, and the trial court properly refused either to allow or to treble it, upon the ground that plaintiff was a mere transmitter, and had not himself paid the money out of his own funds. This is a correct view. A transmitter is not permitted to obtain a refund as illegal interest, or to treble such interest. An action such as this will only lie on behalf of the actual payee.

[8, 9] It is to be noted from the second amended complaint that each of these two notes of $10,000 and $8,500, respectively, bore 7 per cent. interest, and that "as security for the payment of the said principal sum of $10,000 and interest specified and mentioned in the first promissory note executed" that Duke caused a deed of trust to be made by the Pitmans to the defendant Meyerfeld. Further on plaintiff alleged in his complaint "that, as security for the payment of the said principal sum of $10,000 and interest specified and mentioned in the promissory note" of the Pitmans, Duke caused a deed of trust to be made by defendant Saleneek. It appears from these allegations that the delivery of the two notes and the two deeds of trust was merely as security for the payment of the original $10,000 note and its 7 per cent. interest. After these allegations there is found another of a contradictory nature, to wit: "The difference between the said sum of $10,000 so received by plaintiff as aforesaid and the aggregate sum of $18,500 represented by the two promissory notes and two deeds of trust hereinafter alleged, to wit, the sum of $8,500, represents, was, and is a value and sum taken and charged by said defendants, and each of them, for the said loan of $10,000 made to plaintiff as hereinbefore alleged, in exclusion of the interest mentioned in said promissory notes, contrary to the provisions * * * of * * * the Usury Law." Thereupon plaintiff asked that this $8,500 be trebled.

There is some evidence that plaintiff Duke was to split this $8,500, and receive $4,250 as his part of a bonus. However, the complaint is entirely silent as to any $4,250 portion of said $8,500 note and deed of trust being assigned or given as a bonus, and no further amendment of the complaint appears to have been made to make it conform to the evidence. The trial court confined itself in its findings to the allegations referred to herein of the second amended complaint and found "that, as security for the said principal sum of $10,000.00 and interest specified and mentioned in the first promissory note executed by the said" Pitmans, plaintiff caused a deed of trust to be made to lands in Merced county, and "that as additional security for said principal sum of $10,000 and interest specified and mentioned in said promissory note made" by said Pitmans, plaintiff caused defendant Saleneek to make a deed of trust for certain lands in Alameda county. It also made its decree that, considering both pieces as security for such principal sum and 7 per cent. interest of the first note, the Merced property be sold, and, if sufficient be not realized, that the Alameda piece be next sold. In the state of the pleadings, no other decision could have been given, as plaintiff had pleaded that the $8,500 was only "additional security, and by so alleging has foreclosed himself from afterwards claiming it as a 'bonus.'" However, even viewing the matter from the angle of the $4,250 of the $8,500 being a bonus, we come again to the interdiction of Haines v. Commercial Mortgage Co., supra, ruling. This $4,250 has not been paid in money. The $8,500 was only evidence of additional security. Under the ruling of the trial court that the second piece be sold to make up any deficiency after the first piece has been sold and applied to the $10,000 note, it will, we may safely say, never be paid. Plaintiff cannot, therefore, claim that it should be either allowed or trebled.

[10] Appellants point out that these notes were given by persons other than the plaintiff, and argues that therefore they should be considered as a payment, thereby taking it out of the rule in the Haines Case. Again the complaint is antagonistic to this theory, and it was not amended to change the allegations that each of these notes was made by accommodation makers for the plaintiff; so, in fact, they had no greater significance than if he had made them himself.

It follows that the judgment of the trial court must be affirmed in each of the three cases.

In addition to the three appeals dismissed, there are three appeals pending from an order in each case vacating a stay. Whether or not plaintiff was entitled to a stay becomes immaterial, upon the affirmance of the appeal on the judgment, and hence it is unnecessary to discuss at length these appeals, except to say that, from an examination of the record and the briefs submitted thereon, the orders appealed from should be affirmed.

Judgments and orders appealed from affirmed.

We concur: TYLER, P. J.; KNIGHT, J.

RODGERS v. BOARD OF PUBLIC WORKS OF CITY AND COUNTY OF SAN FRANCISCO et al. (Civ. 6500.)★

District Court of Appeal, First District, Division 1, California. Feb. 13, 1929.
Rehearing Denied March 15, 1929. Hearing Granted by Supreme Court April 11, 1929.

1. Municipal corporations 🔑218(6)—Civil service employee, when position ceased to exist, had right only to be returned to list of eligibles.

Under charter provisions providing that, if civil service appointee has not, at end of probationary period of not more than six months, been discharged, he is entitled to retain position so long as maintained unless he is removed, one who had been appointed to position of granite cutter had right only to be returned to list of eligibles when employment ceased.

2. Municipal corporations 🔑217(1)—Civil service employee, not having served continuously for twelve months, was not entitled to benefit of rule giving preference in re-employment to those so serving.

Civil service employee of city who had not continuously served for twelve months in his position was not entitled to benefit of rule giving preference in re-employment to those who had so served.

Appeal from Superior Court, City and County of San Francisco; J. J. Trabucco, Judge.

Action for writ of mandate requiring reinstatement to civil service position by James F. Rodgers against the Board of Public Works of the City and County of San Francisco and others. From a judgment granting the writ, defendants appeal. Reversed.

John J. O'Toole, City Atty., and Thomas P. Slevin, Asst. City Atty., both of San Francisco, for appellants.

Joseph T. Curley and Marvin C. Hix, both of San Francisco, for respondent.

PER CURIAM. An appeal from a judgment granting a peremptory writ of mandate requiring the board of public works of the city and county of San Francisco to transmit to the civil service commission of the municipality a warrant representing an amount claimed by petitioner as wages, directing the commission to approve the same for payment, to reinstate petitioner's name on the official records of the commission as occupying the permanent position of granite cutter, and directing the board of public works, by virtue of and following such reinstatement, to admit him to the performance of the duties of the position.

The charter of the city and county makes provision for a system of civil service, and creates a civil service commission. The commission is required to classify in accordance with the duties attached thereto all places of employment in or under the offices and departments of the city and county not exempted, and to conduct examinations of applicants for places in the classified services. Petitioner on February 18, 1923, participated in an examination conducted by the commission for the purpose of establishing a list or register of those eligible for the position of granite cutter, as a result of which he was placed twelfth on the register prepared by the commission. The rules of the commission provided that after the lapse of four years the register so prepared should expire, and following another examination a new register of those eligible for the position should be prepared. Petitioner's first appointment was made in response to a requisition from the board of public works dated July 13, 1925, following which he was certified by the commission from the above list for appointment to the position of granite cutter. Thereafter, between July 29, 1925, and May 15, 1926, he worked 216 and a fraction days, being laid off on account of a lack of funds for the employment of granite cutters. Following this action, his name was returned to the register of those eligible for employment in that capacity. A like appointment following a similar requisition and certification was made on March 1, 1927, and petitioner was again employed between that date and September 30, 1927. During that period he worked 19 and a fraction days, his employment again ceasing by reason of a lack of funds. This register, under the rules of the commission, expired on March 14, 1927, and during that year another examination was held in which petitioner participated, and following which a new register was adopted on November 14, 1927. When requisitions for granite cutters were subsequently made, the commission certified the names of persons who, as the result of the last examination, ranked higher on the register of eligibles than petitioner, and for that reason he has not since been employed by the municipality.

The trial court found that from January 25, 1928, to March 6, 1928, the position of granite cutter was filled by a person not entitled thereto, who worked 30½ days; that, had the petitioner been employed, he would have been entitled to receive from the municipality the sum of $289.75.

Petitioner contends that, in view of the facts, his position under the provisions of the charter was permanent, and that his name should be carried on the records of the commission as a permanent civil service employee, having preference in re-employment whenever the services of a granite cutter are required.

The charter provisions and rules of the commission here material are as follows:

Charter, art. XIII, § 2: "The Commissioners shall classify, in accordance with duties

---

★Rehearing denied. Hearing granted by Supreme Court.

attached thereto, all places of employment in or under the offices and departments of the City and County. * * * The Commissioners may grade, and from time to time regrade, the positions covered by any class, in accordance with salaries and duties, to the end that like salaries shall be paid for like duties. The Commissioners may from time to time provide by rule for the manner in which such positions shall be filled. * * * Any classification or grading may be amended or abolished by the Commission, and classes calling for similar qualifications may be consolidated, but persons who have been appointed from any such class shall retain any position lawfully held thereunder so long as such position is maintained unless removed in accordance with the provisions of Section 12. * * *"

Section 3: "The Commissioners shall make rules to carry out the purposes of this Article, and for examinations, appointments, promotions and removals. * * *"

Section 7: "* * * The Commissioners shall prepare a register for each grade or class of positions in the classified service of the City and County of the persons whose general average standing upon examination for such grade or class is not less than the minimum fixed by the rules of the Commissioners, and who are otherwise eligible. Such persons shall take rank upon the register as candidates in the order of their relative excellence, as determined by examination, without reference to priority of time of examination."

Section 9: "Whenever a position classified under this Article is to be filled, the head of the department or office controlling such position shall notify the Commission of that fact, and the Commission shall then certify to the appointing officer the name and address of one or more candidates in the discretion of the Commission, but not exceeding three, standing highest upon the register for the class or grade to which the position belongs. * * *"

Section 10: "* * * Such appointment shall be on probation for a period to be fixed by the rules of the Commissioners; but such rules shall not fix such period at exceeding six months. The Commissioners may strike off names of candidates from the register after they have remained thereon more than two years. At or before the expiration of the period of probation, the head of the department or office in which a candidate is employed may, by and with the consent of the Commissioners, discharge him upon assigning in writing his reason therefor to the Commissioners. If he is not then discharged his appointment shall be deemed complete. To prevent the stoppage of public business, or to meet extraordinary exigencies, the head of any department or office may, with the approval of the Commissioners, make temporary appointments, to remain in force not exceeding sixty days, and only until regular appointments, under the provisions of this Article, can be made."

Section 12: "No person employed in the classified civil service shall be removed or discharged except for cause. * * *"

Rules of the Commission:

Rule 19: "*Probationary Period.* Section 1. *Applies to Permanent Position Only.*—The probationary period provided for by Section 10, Article XIII, of the Charter may be served only in a position defined by Rule 33 as a permanent position. Persons appointed to a permanent position shall serve a period of six months consecutively, after which the appointment shall be deemed complete. An appointee who has served the probationary period as herein defined is entitled to hold the position as long as it exists and no change of title or salary shall be deemed to change his right to such position so long as the duties remain substantially the same as when such appointment was made. * * *"

Rule 33: "*Permanent and Temporary Positions.* All positions which are expected by the appointing power to exist for a period of six months or over shall be considered for the purposes of the rules of this Commission, as permanent positions. All other positions shall be considered as temporary positions, and appointments to temporary positions shall automatically expire at the end of four months. The probable period of employment must be specified by the appointing power in its requisition. This rule shall govern only appointments made after July 15, 1912."

Rule 22: "*Reduction in Force.* Section 1. *Temporary Positions.*—Persons appointed to temporary positions shall be 'laid off' or relieved from duty in the inverse order of their rank on the eligible list. Upon being laid off they shall resume their respective places upon the register of eligibles. Section 2. *Permanent Positions.*—Whenever it becomes necessary to reduce the number of employees in permanent positions in any department, the employee last appointed in such position in that department shall be laid off first; and he shall be returned to his place on the eligible register. Section 4. *Hold-Overs.*—Whenever, because of lack of work or lack of funds, or for purposes of retrenchment, a person who has served for one year, continuously under appointment in an original entrance position that is considered within the meaning of the rules of this Commission as a permanent position, is laid off or separated from such position, he shall, while so separated from such position, be termed a 'hold-over' and shall be preferred for reappointment in the first vacancy thereafter occurring in the class from which he was so separated; provided that if there be more than one such 'hold-over' in a class, the one having the longest service under permanent appointment for the period of two years next preceding the date of receipt of requisition shall be given the preference, and when ties exist in the service during such two-year period the person who was in line first for original appointment shall be preferred. When such 'hold-overs' have not been re-appointed to a permanent position within a period of two years from the date of their last lay-off, their eligibility for reappointment may be cancelled by the Commission. Persons appointed to positions considered as permanent under the rule who are laid off because of lack of work or lack of funds before having served one year continuously under such permanent appointment shall be returned to the existing list of eligibles according to the general average percentage they received in examination and shall be treated as new eligibles."

[1, 2] The question involved relates to the tenure and employment of civil service employees, and the further question of whether, when the employment of an appointee has ceased by reason of the discontinuance of the position or the completion of the work for which he was employed, he is entitled to a preference in re-employment when the need again arises for services of the character rendered by him. This question is primarily controlled by sections 2 and 10 of article XIII of the charter, and, secondly, by rules made by the commission under the power conferred by the civil service provisions of the charter. Under these sections, appointments are required to be on probation; the probationary period may not be longer than six months, and, if the appointee is not at that time or prior thereto discharged, he is entitled to retain such position so long as it is maintained (section 2), unless removed in accordance with section 12. These appointments are termed by the charter (section 10) "regular" appointments, as distinguished from "emergency" appointments of not exceeding sixty days' duration, authorized by the same section. This does not mean, however, that at the expiration of the probationary period the appointment becomes permanent in any sense other than that the appointee cannot be discharged except for cause and after trial, so long as there is work for him in his position, his only right under the provisions of the charter upon being relieved of his position through its abolition or the completion of the work for which he was employed being the right to be returned to the eligible list, and upon such return he is given no preference by reason of his previous employment, except in so far as the rules of the commission may accord it.

Under the power to make rules given to the commission by the charter for the purpose of carrying into effect the civil service provisions thereof, the commission has divided the positions classed by the charter as regular positions into permanent and temporary; the former being those positions which are expected by the appointing power to exist for a period of six months or over, the latter consisting of those which by the appointing power are expected to be of short duration (rule 33). The probationary period prescribed by the charter is applied by the commission (rule 19) only to the first-mentioned of these classes. By rule 22, §§ 1 and 2, it is provided that, whenever it becomes necessary to reduce the number of employees, the employees laid off shall be returned to their places on the eligible list, but by section 4 of said rule 22 it is further provided that, whenever such a person has served continuously for one year in a position that is considered within the meaning of the rules of the commission as a permanent position, he shall be termed a hold-over, and shall be preferred for appointment to the first vacancy occurring in the class from which he was relieved. The persons appointed to such positions who are laid off before having served one year continuously shall be returned to the existing list of eligibles according to the general average percentage they received in examination, and shall be treated as new eligibles.

By this rule 22 it will be perceived that there is a preference in the matter of re-employment accorded to former employees who theretofore have served continuously for one year. The petitioner in the present case had not served continuously for one year in his previous employment, and was therefore not entitled to this preference. His contention is that he had served continuously for more than six months, and, as the longest period of probation provided by the charter is six months, he held a permanent position, and is therefore entitled to the preference accorded by rule 22. The answer to this contention is that, while he held under a "regular" appointment which assured him undisturbed tenure so long as his position was maintained, yet upon his position ceasing to exist or, in the words of the charter, being no longer maintained, his only right was to be returned to the list of eligibles. Not having served continuously for twelve months in his position, he was not entitled to the benefit of rule 22 giving the preference in re-employment to those who had so served. In accordance with rule 22 he was then laid off, returned to his place on the list of eligibles, and, if he thereby found himself in competition with others on the list of higher rating, this is the exact position in which the charter placed him, and indeed the position in which he ought to be placed, if the spirit of the civil service provisions of the charter is to be given effect, which requires that vacant positions be filled by those highest on the eligible list.

For the foregoing reasons, the judgment is reversed.

97 Cal. App. 126

HOLQUIN et al. v. ALLISON, County Clerk et al. (Civ. 6281.)★

District Court of Appeal, Second District, Division 2, California. Feb. 21, 1929.

Rehearing Denied March 22, 1929. Hearing Denied by Supreme Court April 22, 1929.

1. Time 🔑9(6)—New trial cannot be granted after expiration of two months' period even though last day is holiday (Code Civ. Proc. §§ 12, 660).

Court was without jurisdiction to grant motion for new trial after expiration of two months' period prescribed by Code Civ. Proc. § 660, even though the last day of such period fell on a holiday, the statutory period not being extended in such case by virtue of the provisions of section 12 authorizing the excluding of the last day in computing time in case such day is a holiday.

2. Mandamus 🔑4(3)—Mandamus lies from order granting new trial after expiration of statutory period, regardless of whether right of appeal exists (Code Civ. Proc. § 660).

Mandamus lies from order granting a new trial after expiration of statutory period of two months prescribed by Code Civ. Proc. § 660, regardless of whether or not a right of appeal exists, in that such an order constitutes an act without and in excess of jurisdiction of trial court.

Original application for writ of mandamus by Ildefonso Holquin and another against Harry L. Allison, County Clerk of the County of San Bernardino, and others. Writ granted.

Leo B. Ward, of Los Angeles, and A. S. Maloney, of San Bernardino, for petitioners.
Victor T. Watkins, of Los Angeles, for respondents.

CRAIG, J. On January 25, 1928, the petitioners herein were awarded a verdict in the sum of $4,000 damages against the respondents Daley Water Company, a corporation, and Augua Mansa Company, a corporation. On March 19, 1928, a motion for new trial was argued and submitted upon briefs, the plaintiffs being by stipulation allowed two days and the defendants one day thereafter in which to present their respective written arguments and authorities. It is alleged by petitioners, and is not denied, that on January 25, 1928, "judgment upon said verdict so rendered was thereupon entered in said cause in the presence of said parties and their respective counsel," and that "thereafter, and in due time, defendants in said action served upon the petitioners herein" a notice of their intention to move the respondent court for a new trial. On March 26, 1928, the respondent court made its order granting the motion for a new trial. Thereafter petitioners moved to set aside the order last mentioned, upon the ground, it is averred, that the court was without jurisdiction to rule thereon after the expiration of two months from the date of the verdict of the jury, and demanded an execution upon said judgment, which was refused. A writ of mandate is here prayed, directing the respondent superior court and the clerk thereof to issue execution upon the judgment theretofore entered.

Respondents contend that since the period of two months from January 25th expired Sunday, March 25, 1928, the motion for new trial was properly granted on the following day under the provisions of section 12 of the Code of Civil Procedure.

The power of courts to grant new trials is fixed by section 660 of the Code of Civil Procedure, which reads, in part, as follows: "The power of the court to pass on motion for new trial shall expire within two months after the verdict of the jury or service on the moving party of notice of the entry of the judgment. If such motion is not determined within said two months, the effect shall be a denial of the motion without further order of the court."

Section 12 of the same Code provides that: "The time in which any act provided by law is to be done is computed by excluding the first day and including the last, unless the last day is a holiday, and then it is also excluded."

The respective parties have submitted exhaustive briefs embracing quotations from numerous decisions wherein these sections have been construed together prior to the amendment of section 660 reducing the limitation from three months to two months. Petitioners cite Shepherd v. Superior Court, 54 Cal. App. 673, 202 P. 466, which, upon the authority of Bidwell v. Sonoma County Trans. Co., 39 Cal. App. 330, 178 P. 722, held that: "The three months' period of limitation within which the court could determine the motion expired on Sunday, April 3rd, and was not extended by the fact that the last day, and all of the Saturday preceding, from 12 o'clock noon until 12 o'clock midnight, were holidays, and a nonjudicial period." They also rely upon Lancel v. Postlethwaite, 172 Cal. 326, 156 P. 486, wherein it was held that Saturday was not a holiday within the meaning of section 10 of the Code of Civil Procedure so as to require its exclusion in computing the period of time within which to perform judicial acts, under the provisions of section 12 of the Code of Civil Procedure. Respondents contend that in all such cases the precise point here presented was not directly raised, and that their language was in this respect mere dictum. In the case last mentioned this is true, and in Shepherd v. Superior Court, supra, the essential holding was that the superior court had no power to grant a new trial at the

---

★Rehearing denied. Hearing denied by Supreme Court.

residence of the judge on Saturday afternoon, a legal holiday.

In Lancel v. Postlethwaite, supra, it was also held that Saturday cannot fairly be held to be a "holiday" within the meaning of section 10 of the Civil Code, and excluded, assuming for the purposes of that decision the applicability of section 12 to section 660 of the Code of Civil Procedure. It was there further said, however: "The trial court should determine a motion for a new trial regularly made, 'at the earliest possible moment,' and it is expressly made its duty to do so. It has the power to grant a new trial at any time 'within three months after the verdict of the jury or service on the moving party of notice of the decision of the court,' and also power to formally deny such motion within said time. Its failure to determine the motion at all within said time is a denial of the motion. In other words, a trial court is empowered to grant a new trial, upon a motion duly made to that end, at any time within three months after the verdict of the jury or service on the moving party of notice of the decision of the court, but not thereafter; and its failure to determine within such time any such motion regularly made is a denial of such motion and a 'determination in the trial court' within the meaning of section 939 of the proceedings on such motion."

[1] We think it clearly the intention of the Legislature, and the import of decisions construing the sections here in controversy, that a motion for new trial must be granted or denied within the statutory period prescribed by section 660 of the Code of Civil Procedure, and that beyond the final date of such period, even though it be a holiday, the court shall be without jurisdiction to act thereon. If it be assumed that the language employed in each of the foregoing instances was dicta, the rule was stated as definitely applicable to the circumstances indicated, and was so invoked in Ransome-Crummey Co. v. Superior Court, 188 Cal. 393, 205 P. 446, upon application for a writ of mandate requiring the court to take jurisdiction of a motion for new trial after the expiration of the statutory period. It was held that since the petitioner had forfeited its corporate powers, it did not legally exist as a litigant, and could not receive or give notice in pending proceedings. The Supreme Court there again expressly held, however, upon the authority of previous enunciations:

"It was suggested upon the oral argument that the court in any event is now without jurisdiction to hear the motion because of the lapse of more than three months from the date of the purported notice of entry of judgment. It is true that a failure to pass upon such a motion within three months of the notice of entry of judgment is in effect a denial thereof. Code Civ. Proc. § 660, as amended in 1917 [Stats. 1917, p. 240]; Lancel v. Postlethwaite, 172 Cal. 326, 156 P. 486; San Francisco, etc., T. Rys. v. Superior Court, 172 Cal. 541, 157 P. 604."

We are convinced that section 660 of the Code of Civil Procedure is specific and controlling. In Bidwell v. Sonoma County Trans. Co., supra, the defendant appealed from the ruling vacating an order granting a new trial, under circumstances not unlike those here presented. The precise point to be there presented was argued and the Supreme Court denied a hearing after affirmance. The conclusion of the District Court of Appeal is apt: "A careful consideration of the language of these two sections leads us to the conclusion that section 660 is not affected by the provisions of section 12, and that the three-month period during which a court has power to pass upon a motion for a new trial is not extended if the closing day thereof should fall upon a holiday."

[2] It is next insisted by respondents that the petitioners herein had a plain, speedy, and adequate remedy by appeal from the order granting a new trial, and are not properly before this court. Since said order constituted an act without and in excess of the jurisdiction of the trial court certiorari will lie. It appears to have been so held in Diamond v. Superior Court, 189 Cal. 732, 210 P. 36. In that case it was said that certiorari would lie, especially because of the fact that the act of the trial court had been in excess of its jurisdiction. The same is true in the instant case, and this regardless of whether or not a right of appeal exists.

The petition is granted.

We concur: WORKS, P. J.; THOMPSON, J.

---

96 Cal. App. 596

PEOPLE of the State of California, Plaintiff and Respondent, v. J. LEFURGEY, Defendant and Appellant. (Cr. 1049.)

District Court of Appeal, Third District, California. Feb. 4, 1929.

Appeal by defendant from a judgment of the Superior Court of Stanislaus County, J. C. Needham, Judge, of conviction of passing a fictitious check. Affirmed.

N. B. McVay, of Modesto, for appellant.

U. S. Webb, Atty. Gen., and J. Chas. Jones, Deputy Atty. Gen., for the People.

PER CURIAM. The defendant was convicted in the superior court of Stanislaus county of a felony, to wit, the crime of attempt to make, pass, and utter a fictitious check.

The transcript on appeal was filed in this court July 21, 1928. No brief has been filed in behalf of appellant. The cause was regularly placed on the calendar for oral argument on February 4, 1929. No appearance was made for appellant at the time the case was called for hearing. Pursuant to the provisions of section 1253 of the Penal Code, the judgment is affirmed.

---

97 Cal. App. 131

WITT et al. v. KLIMM et al., Board of Health and Milk Inspection Service. (Civ. 6491.)★

District Court of Appeal, First District, Division 2, California. Feb. 21, 1929.

Rehearing Denied March 21, 1929. Hearing Denied by Supreme Court April 22, 1929.

1. Municipal corporations ⚿592(1)—Law regulating production and sale of milk does not prohibit enactment of additional local regulations by cities (Pure Milk Law).

Pure Milk Law (St. 1927, p. 1944), prescribing certain general rules applicable to all cities and elsewhere in state, regulating the production and sale of milk for human consumption, does not prohibit enactment of additional local regulations by cities in keeping with purpose of state law, so long as requirements of municipal ordinances are not unreasonable or discriminatory.

2. Food ⚿1—Municipal corporations ⚿592(1)—Ordinance requiring that milk sold within city be pasteurized within city held valid exercise of police power, and not to conflict with statute (Pure Milk Law, §§ 4a, 5; Const. art. 11, § 11).

Ordinance of city of San Francisco, requiring that milk sold in city be pasteurized within city and county of San Francisco, does not conflict with Pure Milk Law, §§ 4a, 5 (St. 1927, pp. 1949, 1951), and is not unreasonable or discriminatory, but is a valid exercise of police power, under Const. art. 11, § 11.

Applications for writ of mandate by Albert Witt, Sr., and others against Frank J. Klimm and others, members of and constituting the Board of Health and Milk Inspection Service of the City and County of San Francisco, to compel respondents to issue permit to sell milk. Writ denied.

Chauncey Tramutolo, Maurice T. Dooling, Jr., F. A. Devlin, and Geo. M. Naus, all of San Francisco (Ruth Lange, of San Francisco, of counsel), for petitioners.

John J. O'Toole, City Atty., and Henry Heidelberg, Deputy City Atty., both of San Francisco (Arthur H. Barendt, of San Francisco, of counsel), for respondents.

PRESTON, Justice pro tem. This is an original proceeding in mandamus. The petitioners seek an order of this court compelling the board of health and milk inspection service of the city and county of San Francisco to issue to them a permit to distribute and sell in San Francisco milk produced, pasteurized and bottled in Colma, San Mateo county, Cal. The facts are not in dispute and are briefly these:

Petitioners are dealers in milk, which they produce, pasteurize, and bottle at Colma, San Mateo county, Cal. They have applied for a permit to sell "grade A pasteurized market milk" in the city and county of San Francisco, which has been refused by the department of health on the ground that San Francisco Ordinance No. 7025 (N. S.) *requires such milk to be pasteurized within the city and county of San Francisco.* The real and personal property used at Colma by petitioners in the conduct of their dairy business has a value in excess of $100,000, and includes dairy cows, a pasteurizing plant, cow barns, milking barns, etc. They produce and pasteurize not less than 800 gallons of "grade A pasteurized market milk" per day.

The Pure Milk Law of California (Stats. 1927, p. 1944) establishes uniform regulations for the production and sale of milk within the state. Section 4 (a) thereof provides for the establishment and maintenance of a milk inspection service and laboratory by counties, or groups of counties; cities, or groups of cities, or groups of cities and counties. Pursuant to this authorization, the county of San Mateo has established and now maintains in connection with its health department such a milk inspection service, which has been, and now is, approved by the director of agriculture of the state of California, in accordance with the authority granted to him by section 4 (d) of said Pure Milk Law of California.

The city and county of San Francisco maintains a similar approved milk inspection service. The milk produced by petitioners is produced under the supervision of the milk inspection service of San Mateo county. Section 5 of said Pure Milk Law of California provides that it shall be unlawful to sell guaranteed "grade A or grade B milk," except under the supervision of an approved inspection service, and further provides that milk so produced under such supervision may be sold "in territory within the jurisdiction of any other milk inspection service, if the consent of said other milk inspection service has been previously obtained."

The pasteurizing plant operated by petitioners in Colma is situated less than two miles from the south boundary of the city and county of San Francisco. The milk pasteurized and bottled at this plant can be transported across the county line and into San Francisco by automobile trucks in about 15 or 20 minutes. Petitioners now have customers in San Francisco to whom they are selling and delivering their milk in the aggregate quantity of 30 gallons per day, and contend that, in the event they are permitted

---

★Rehearing denied. Hearing denied by Supreme Court.

to sell milk in San Francisco, they will be able to procure many additional customers.

As above stated, petitioners applied on May 6, 1928, for a permit to sell their pasteurized milk within the city and county of San Francisco, and on May 8, 1928, the board of health of said city denied petitioners' application for a permit on the sole ground that the pasteurized milk which petitioners desired to sell in San Francisco "*was not and is not to be pasteurized within San Francisco* as required by subdivision 10 of section 3 of said Ordinance No. 7025, which provides: '* * * All milk intended for human consumption, in San Francisco, that comes from cows that have not passed the tuberculin test, except when sold in bulk to the wholesale trade, *shall be pasteurized in San Francisco in accordance with the method set forth herein.*' * * *"

The milk pasteurized by petitioners in their plant at Colma is pasteurized according to the method outlined in the above ordinance, and the Colma plant is equipped as required in said ordinance, and the "grade A pasteurized market milk" produced by petitioners conforms to the standard established by the said Pure Milk Law.

Petitioners contend that the ordinance in question is unconstitutional for various reasons, among them being that it is unreasonable and unduly oppressive and makes an arbitrary discrimination against outside producers of milk. The ordinance in question is a health ordinance, prescribing, among other things, what is required of dealers in fourth-grade milk, in order to sell the same within the city and county of San Francisco, to wit, it must be pasteurized within the city and county of San Francisco and under the immediate supervision of respondents.

It is not denied by petitioners that the city and county of San Francisco has the power, under section 11 of article 11 of the Constitution, to enact police regulations and ordinances promoting considerations of public welfare, public morals, public health, and public safety, provided that such regulations and ordinances are not in conflict with general laws. It is also admitted that the charter of the city and county of San Francisco vests in the board of supervisors power to enact all those ordinances necessary for the protection of the public health, so long as such ordinances are not in conflict with the state law.

[1] As we have noted above, the Legislature has seen fit to enact the "Pure Milk Law of California," which prescribes certain general rules applicable in all cities and elsewhere in California, regulating the production and sale of milk for human consumption. This law, however, does not prohibit the enactment of additional local regulations by municipalities in keeping with the purpose of said "Pure Milk Law," so long as the requirements of the municipal ordinance are not in themselves pernicious, as being unreasonable or discriminatory. There may be different regulations without a conflict. Ex parte John, 17 Cal. App. 58, 118 P. 722; Ex parte Hong Shen, 98 Cal. 681. 33 P. 799; In re Murphy, 128 Cal. 29, 60 P. 465; In re Hoffman, 155 Cal. 114, 99 P. 517, 132 Am. St. Rep. 75; In re Iverson, 199 Cal. 582, 250 P. 681.

In Re Iverson, supra, the court said: "Where the legislature has assumed to regulate a given course of conduct by prohibitory enactments, a municipality with subordinate power to act in the matter may make such new and additional regulations in aid and furtherance of the purposes of the general law as may seem fit and appropriate to the necessities of the particular locality and which are not in themselves unreasonable."

[2] The provisions of the ordinance requiring that the milk be pasteurized within the city and county of San Francisco is simply a new and additional and more stringent regulation than that contained in the state law on the same subject. These requirements of the ordinance are not in themselves unreasonable or discriminatory and do not conflict with the state law, therefore, both may stand.

The ordinance is not destructive of petitioners' business. There is nothing in the ordinance to prevent petitioners from selling their milk in San Francisco; they only have to pasteurize their milk within the city and county of San Francisco, the same as all other outside dealers in milk are doing. It is an admitted fact that practically all of the pasteurized milk sold in San Francisco is produced from outside the said city, and is sent into the city for pasteurization before being sold for human consumption. Petitioners, like other producers outside of the city and county of San Francisco, must comply with this ordinance. This is not unduly oppressive on petitioners. A great deal of the milk comes from other counties into San Francisco, such as Alameda, Contra Costa, Marin, and even Sonoma, and all these producers conform to the ordinance, and petitioners live within two miles of the city limits, and are, therefore, more fortunately situated than a great many of the other outside dealers in milk. Furthermore, petitioners knew, or should have known, at the time they erected their plant at Colma, of the existence of the ordinance in question.

If petitioners' contention be sound, and the health department of the city and county of San Francisco be required to go to Colma and there inspect petitioners' pasteurization plant, there would be nothing to prevent all outside dealers in milk from requiring the same thing, and the health department would be called upon to make inspections of pasteurization plants in many of the other counties of the state, such as Alameda, Solano, Contra Costa, and possibly others. It goes without saying that such a requirement of the health department would not only be unreasonable and exceedingly expensive, but it would seriously impair, if not wholly destroy, the efficiency of the entire inspection service.

The matter of pasteurization of milk before being sold for human consumption has been the subject of ordinances in many of the large cities of the United States, and many of such ordinances have been reviewed by the courts of last resort in many of our sister states. The Supreme Court of Illinois, in the case of Koy v. Chicago, 263 Ill. 123, 104 N. E. 1104, Ann. Cas. 1915C, 67, in passing upon and holding valid an ordinance of the city of Chicago, requiring the pasteurization of all milk for human consumption, and that pasteurization plants be equipped in a certain way, used the following language which is particularly appropriate in the case at bar, to wit:

"There is no article of food in more general use than milk; none whose impurity or unwholesomeness may more quickly, more widely, and more seriously affect the health of those who use it. The regulation of its sale is an imperative duty which has been universally recognized. This regulation in minute detail is essential, and extends from the health and keeping of the cows which produce the milk, through all the processes of transportation, preservation and delivery to the consumer. Not only may laws and ordinances require that milk offered for sale shall be pure, wholesome and free from the bacilli of any disease, but they may and do, in order to produce this result, prescribe the manner in which such purity, wholesomeness and freedom from disease shall be secured and made to appear. The cows may be required to be registered with a designated public authority; the dairies to be conducted and managed according to prescribed regulations, and, together with the dairy utensils, subjected to inspection; the receptacles in which milk is contained to be of prescribed character and capacity; the labels to be placed according to fixed regulations and to contain certain required information; the milk to be prepared in the manner, at the times and by the means directed and at all times to be subject to inspection. These may be drastic restrictions upon a private business, but experience and the increasing knowledge of the causes of disease and the agencies of its propagation have demonstrated the necessity of such restrictions to the preservation of the public health. The object of all such restrictions is the preservation of the public health, and as a means to that end the protection of the general public against dishonest vendors of milk. They all impose inconveniences and expense upon the dealers in milk, but they are not on that account unreasonable, unjust or oppressive. Legislatures and city councils, in the exercise of the police power, may prohibit all things hurtful to the health and safety of society even though the prohibition invade the right of liberty or property of an individual. * * *"

Although we have not discussed in detail all the attacks made by petitioners upon said ordinance, we have, nevertheless, carefully considered them all and we are of the opinion that none of them is sufficient to invalidate the ordinance, and that a further detailed discussion is unnecessary. We think the ordinance in question is a valid exercise of the police power of the city and county of San Francisco, enacted and enforced in the interest of public health, and should be upheld.

The writ is denied.

We concur: KOFORD, P. J.; NOURSE, J.

---

96 Cal. App. 783

J. B. ERRECA, Plaintiff and Respondent, v. LOS BANOS COTTON GINS, Inc. (a Corporation), Defendant and Appellant. (Civ. 3221.)

District Court of Appeal, Third District, California. Jan. 22, 1929.

Appeal by defendant from orders of the Superior Court of Merced County, E. N. Rector, Judge, denying motion to vacate judgment and refusing to grant motion for new trial. Affirmed and dismissed.

R. R. Sischo, of Merced, for appellant.
Frank C. Hale, of Merced, for respondent.

PER CURIAM. The defendant appeals from the order denying its motion to vacate the judgment rendered against it in favor of the plaintiff on the 17th day of June, 1926, and also appeals from an order refusing to grant its motion for a new trial.

By the provisions of section 963 of the Code of Civil Procedure, no appeal lies from the denial of a motion for new trial. The facts disclosed by the record in this case are identical with the facts which appear in the record in the case of Startzman v. Los Banos Cotton Gins, Inc., a Corporation, 82 Cal. App. 624, 256 P. 220. In that case the order of the trial court refusing to set aside the judgment was affirmed.

Upon the authority of the case just referred to, it follows that the order denying the motion to set aside the judgment in the action must be affirmed; and it is so ordered. The appeal from the order refusing to grant a new trial is dismissed.

NATIONAL UNIVERSITY LIBRARY
3 1786 10046 8419

NATIONAL UNIVERSITY
LIBRARY SAN DIEGO

NON CIRCULATING